

COMPLAINT INVESTIGATION REPORT

Complaint Number: 20.21.19 – Systemic Investigation
Complaint Investigator: [Redacted]
Date Complaint Filed: June 21, 2021
Date of Report: [Redacted]

Issue Investigated

Did the District take steps to provide supplementary aids and services to afford students with verified disabilities an equal opportunity to participate in nonacademic and extracurricular services and activities as required by 92 NAC 51-007.07C4?

Information Reviewed

From the School District

- Letter of Response dated July 30, 2021
- Documents relating to each of the 15 identified students, including:
 - IEPs
 - MDT Evaluations
 - IEP meeting agendas and notes taken during IEP meetings relating to the issue being investigated
 - Prior written notices
 - Progress reports
 - District policies
 - Selected pages of District IEP Manual

Introduction

Pursuant to its general supervisory authority under Part B of the Individuals with Disabilities Education Act, the Nebraska Department of Education (NDE), Office of Special Education is required to address a district's failure to provide appropriate services to children with disabilities. 92 NAC 51-009.11 and 34 CFR 300.151. The NDE had reason to believe, based on a review of nine random IEPs that occurred during the investigation of Complaint #19.20.06, that a systemic issue may be present in the District regarding the failure of IEP teams to look beyond the need for adaptive PE and determine whether supplementary aids and services are needed to afford each school-age child with a verified disability an equal opportunity to participate in nonacademic and extracurricular activities.

To conduct this investigation, an outside investigator was used along with a complaint investigator with the NDE Office of Special Education. Documents received from 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 June 21, 2021, the date the NDE notified the District that a systemic issue may be present. Any facts that are discussed that occurred outside the one-year time period for this investigation are provided for context purposes only.

Finding of Facts

1. The District was requested to provide identified records for 15 students in grades 1 through 5 identified by their student identification numbers.
2. The records provided by the District, including the current IEPs for each of the 15 students, were reviewed.
3. The District's IEP form for each of the students includes the following question: *"Will the student participate in non-academic activities with nondisabled peers and have an equal opportunity to participate in extracurricular activities as nondisabled peers?"* In completing this section of the IEP form, the IEP team chooses one of the following from a pull-down menu:
 - a. *Determined that adaptive PE is necessary and it is described above;*
 - b. *Determined that adaptive PE is not necessary to consider for early childhood students*
 - c. *Determined that adaptive PE is not needed*
 - d. *Determined that the needs are described below.*
4. The District's IEP form for each of the students includes a section entitled *"Supplementary Aids and Services / Accommodations."* In completing this section of the IEP form, staff choose one of the following from a pull-down menu:
 - a. *The team considered the need for supplementary aids and services and determined that they are needed.*
 - b. *The team considered the need for supplementary aids and services and determined that they are not needed.*
5. The District has an IEP Manual to provide guidance to District staff for the drafting and completion of IEPs. The definitions of relevant terms provided by the District's IEP Manual include the following:
 - a. *"Supplementary Aids and Services: 'aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to*

be educated with non-disabled children to the maximum extent appropriate...' (Multiple Supplementary Aids and Services may be designated for a student as long as they are needed in order for the child to succeed in regular education.)"

- b. *"Accommodations: Testing accommodations are changes in testing procedures meant to allow students to demonstrate what they know and are able to do. When choosing accommodations, the goal is to obtain scores that accurately reflect a student's knowledge and skills, not to unfairly inflate the student's scores. Accommodations do not change what is being measure or the difficulty of the assessment."*
 - c. *"Modifications: By contrast, modifications do change what is being measured and reduce the expectations for students. Modifications may be needed to change the assessment, change the objective, change the grading, and/or change graduation requirements, e.g. Fine Arts, PE, Science, etc. Modifications are not allowable on some assessments and may have grading implications when they are allowed."*
6. Under the heading of "Supplementary Aids/Services, the District's IEP Manual provides a subsection entitled "Service Description" and sets forth example statements, including the following related to nonacademic and extracurricular events:
- a. *"Additional adult support during nonacademic and extracurricular times such as field trips.*
 - i. Location Examples: District approved field trip sites
 - ii. Minutes Examples: Estimate Length of time
 - iii. Frequency: 1/sem, As needed"
 - b. Under the heading of "Supplementary Aids/Services, the District's IEP Manual provides a subsection entitled "Anticipated Location" and sets forth locations where supplementary aids and services are delivered, with the following examples:
 - i. General education classroom
 - ii. Special education classroom
 - iii. Physical education classroom
 - iv. Cafeteria, playground, hallway, or others
 - v. Various named District programs
7. The IEP teams reviewed whether adaptive PE was necessary for a student when considering whether a student had an equal opportunity to participate in nonacademic and extracurricular activities, as that was the only option available to IEP teams on the District's IEP form.

- a. Certain students were identified as needing supplementary aids or services or modifications and adaptations while attending regular PE class.
 - b. None of the 15 students were identified as needing adaptive PE.
8. The IEP teams considered whether students needed supplementary aids/services and identified certain supplementary aids, services, accommodations and/or modifications for students based on their individual needs in regular education classes, including specials, or other education-related settings.

Issue

Did the District take steps to provide supplementary aids and services to afford students with verified disabilities an equal opportunity to participate in nonacademic and extracurricular services and activities as required by 92 NAC 51-007.07C4?

92 NAC 51-007.07C4 states:

007.07C4	The school district or approved cooperative shall take steps including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP team to provide nonacademic and extracurricular services and activities in the manner necessary to afford each school age child with a verified disability an equal opportunity for participation in those services and activities.
007.07C4a	Nonacademic and extra-curricular services and activities may include counseling services, athletics, transportation health services, recreational activities, special interest groups or clubs sponsored by the school district or approved cooperative, referrals to

agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the school district or approved cooperative and assistance in making outside employment available

District Response

The District asserts that there are not many extracurricular activities sponsored by the District at the elementary school level. Students do participate in “specials” such as art, computer and music class. The accommodations and services provided to students for “specials” is located under the “Supplementary Aids/Services category of each student’s IEP and are the same services each student receives in their general education classroom. If a student requires accommodations and support during transitions or in times that a student is not in a class, those supports are also reflected in the “Supplementary Aids/Services” category of the IEP.

Investigative Findings

While the District’s IEP form includes a question that may be intended to address the requirement that the IEP team provide supplementary aids and services to afford students with verified disabilities an equal opportunity to participate in nonacademic and extracurricular services and activities, the only choices District staff have available to address this requirement pertain to PE, including whether adapted PE is necessary, and if so, what modifications and adaptations are needed in order to participate in the regular PE class with peers (Facts 3, 4, 7).

The IEP teams for each of the 15 students reviewed the individual needs of each student for supplementary aids and services; however, the District’s definition of supplementary aids and services does not include the provision of those aids and services in nonacademic and extracurricular activities (Fact 5, 8).

The District’s IEP Manual does not provide IEP teams guidance or instruction regarding the requirement to review each student’s individual need for supplementary aids and services in order to allow that student an equal

opportunity to participate in those activities or services if a student wishes to do so (Fact 5, 6, 7, 8).

Summary and Conclusions

Nonacademic services and extracurricular activities are important components of the education of students with disabilities. Under the IDEA, districts must provide students with an equal opportunity to participate in extracurricular activities and nonacademic services. 92 NAC 51-007.07C4, and 34 CFR 300.107 (a). Additionally, the IEP must include any supplementary aids and services that the student will need to participate in an activity, should the student choose to do so. 92 NAC 51-007.07C4, 34 CFR 300.107 (a), and Fed. Reg. 46,583 (2006). "Supplementary aids and services" is defined as "aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate..." (Emphasis added) 34CFR 300.42; see also 92 NAC 5192 NAC 51-003.59.

Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available. 92 NAC 51-007.07C4a, and 34 CFR 300.107 (b).

The U.S. Department of Education has advised that "[t]he list of nonacademic and extracurricular services and activities in 34 CFR 300.107(b) is not exhaustive. The list provides public agencies with examples of services and activities that may afford children with disabilities an equal opportunity for participation in the services offered to other children of the public agency." 71 Fed. Reg. 46,583 (2006).

There is no exception to the right of students with disabilities to an equal opportunity to participate that permits excluding students in special classes or programs from field trips or other activities. See, e.g., Bloomington Pub. Sch. Dist. ISD #0271-01, 68 IDELR 293 (SEA MN 2016) (finding that the district violated the IDEA by failing to ensure that the students in a self-contained program participated in field trips to the maximum extent appropriate).

A district must conduct an individualized inquiry to determine whether reasonable modifications or necessary aids and services would provide a student with a disability with an equal opportunity to participate in an

extracurricular activity. See, e.g., Jurupa (CA) Unified Sch. Dist., 66 IDELR 260 (OCR 2015) (finding that a district could resolve compliance concerns by convening IEP meetings for students participating in a functional skills program to consider whether each student should participate in additional academic, nonacademic, and extracurricular activities with nondisabled peers). Further, districts must address students' behavioral problems that impede their ability to participate in nonacademic services and extracurricular activities.

If an IEP team determines that supplementary aids and services are necessary to afford a student an equal opportunity to participate, those aids and services must be included in the student's IEP, not merely offered on an informal basis. See, e.g., Elgin Local Schs., Tillamook Sch. Dist. 9, 65 IDELR 119 (SEA OR 2015) (observing that because an IEP was silent regarding the student's need for an aide during extracurriculars, including a concert and caroling event, the district deprived a first-grade student of FAPE).

The IDEA distinguishes nonacademic services and extracurricular activities from special education. Nonacademic services and extracurricular activities require that a student be provided with an equal opportunity to participate, while special education requires that a student be provided with specially designed instruction that will provide a student with a free and appropriate public education (FAPE). Special education consists of specially designed instruction to meet the unique needs of students with disabilities and includes instruction in physical education (PE). 34 CFR 300.39 (b)(3); 92 NAC 51-003.56. As a result, each child's IEP team will determine what adapted PE to include in the child's IEP, as the IEP team does with all special education and related services. 71 Fed. Reg. 46,662 (2006).

In this case, the District's IEP form and IEP Manual fail to guide students' IEP teams through an individualized inquiry to determine whether supplementary aids and services are necessary to provide a student with a disability with an equal opportunity to participate in an extracurricular or nonacademic activity. In the District's IEP form, the question reviewed by each student's IEP team makes no mention as to whether a student needs supplemental aids and services in order to be provided with an equal opportunity to participate in nonacademic or extracurricular services and activities. While the District asserts there are very few nonacademic or extracurricular activities available to students at its elementary schools, whether there are few or many activities is irrelevant. Each IEP team has an obligation to conduct an individualized inquiry to ensure that each student has an equal opportunity to participate in the activities available to all students.

When reviewing the question on the IEP that states “[w]ill the student participate in non-academic activities with nondisabled peers and have an equal opportunity to participate in extracurricular activities as nondisabled peers?” IEP teams are only directed to consider whether special education services consisting of adaptive PE are required for a student; no other choices in the pull-down menu are provided. The question presented and the pull-down menu options do not guide each IEP team through a discussion of whether supplementary aids or services are necessary to allow for an equal opportunity to participate.

The District's IEP Manual provides a definition of supplementary aids and services, but the definition only discusses providing those aids and services in regular classes or other education-related settings; the definition does not include the language set forth in 92 NAC 51-003.59 and 34 CFR 300.42 providing that supplementary aids and services include aids, services and other supports are also to be provided in extracurricular and nonacademic settings. While the District's IEP Manual does set forth an example statement under Supplementary Aids/Services regarding additional adult support during nonacademic and extracurricular times such as field trips, the statement does not assist each IEP team in understanding that an individualized inquiry is required to determine the opportunity for equal participation in extracurricular and nonacademic activities. Furthermore, when identifying the anticipated location for the provision of supplementary aids or services, the District's Manual does not specifically address extracurricular and nonacademic locations.

Based on the information discussed above, the District failed to fully implement the requirements of 92 NAC 52-007.07C4 and **corrective action is required**.

Corrective Action

1. The District shall review and revise its IEP Manual and IEP form to accurately reflect the IEP team's obligation to provide supplementary aids and services to afford students with verified disabilities an equal opportunity to participate in nonacademic and extracurricular services and activities.
 - a. The review and revision of the IEP Manual and IEP forms must be completed within 90 calendar days of the date of this report.
 - b. The revisions shall be submitted to Jo Gunderson for review and approval.
 - c. After NDE reviews and approves of the IEP Manual and IEP form revisions, the revisions must be provided to the local school board for approval at the first meeting held after NDE approval.

- d. Notice of the acceptance of the form and manual changes by the local school board should be provided to Jo Gunderson no later than 10 days after the meeting.
- 2. The District shall develop and provide training with 60 calendar days of the NDE approval to the forms and manual to all staff in the District who participate in the IEP team process regarding the following:
 - a. The IEP team's obligation to provide supplementary aids and services to afford students with verified disabilities an equal opportunity to participate in nonacademic and extracurricular services and activities.
 - b. The training and trainer(s) must be approved by the NDE Office of Special Education two weeks prior to the scheduled training.
 - c. The District must provide Jo Gunderson with copies of the training materials and handouts used and participant sign-in sheets within 10 days after the training(s) occurred.
 - d. NDE will randomly select 15 student files to review to ensure IEPs have appropriately documented supplementary aids and services afforded to students with verified disabilities to ensure students have an equal opportunity to participate in nonacademic and extracurricular services and activities. The District will be notified of the files that have been selected within 9 months of the date of this report.

Notice to District

Unless otherwise indicated, the corrective action specified must be completed within ninety (90) calendar days of the date of this report. Documentation must be submitted electronically as soon as possible following the completion of the corrective actions. All documentation of correction must be sent to:

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