

## COMPLAINT INVESTIGATION REPORT

Complaint Number: 21.22.28  
Complaint Investigator: [Redacted]  
Date Complaint Filed: May 16, 2022  
Date of Report: [Redacted]

### Issues Investigated:

1. Whether the School District implemented Student's IEP properly. [92 NAC 51-007.02]
2. Whether the School District monitored Student's progress and provided reports of the same in accordance with Student's IEP. [92 NAC 51-007.07]
3. Whether the School District provided special education and related services to Student using properly licensed and trained staff. [92 NAC 51-010.01]

### Information Reviewed by Investigator

#### *From the Complainant/Parent*

- Letter of Complaint dated May 14, 2022; received by NDE May 16, 2022
- IEP marked "Draft" and dated January 10, 2022
- PWN marked "Draft" and dated January 10, 2022
- Email correspondence dated January 13, 2022
- Email correspondence dated February 17, 2022 with the Daily Checklist attached
- Email correspondence dated March 24, 2022 through April 10, 2022\*
- Email correspondence dated April 25, 2022 through April 26, 2022\*
- Email correspondence dated May 9, 2022 through May 11, 2022\*
- Telephonic interview with Parent on June 16, 2022
- Telephonic interview with Complainant on June 16, 2022

#### *From the School District*

- Letter of Response dated June 9, 2022 received by NDE June 13, 2022
- MDT dated February 10, 2020
- IEP dated January 10, 2022
- PWN dated January 10, 2022 (attached to the IEP)
- Draft PWN dated January 10, 2022
- Progress report dated March 21, 2022
- Progress report dated May 31, 2022

- Narrative regarding staff involvement with Student (no date indicated)
- Narrative regarding the parent signature page attached to IEP dated June 21, 2022
- Student's daily checklists dated February 21, 2022 through May 19, 2022
- Occupational Therapy Notes dated January 20, 2022
- Occupational Therapy Notes dated February 17, 2022
- Occupational Therapy Notes dated March 24, 2022
- Occupational Therapy Notes dated April 14, 2022
- Occupational Therapy Notes dated May 5, 2022
- Email correspondence dated January 17, 2022
- Email correspondence dated February 17, 2022
- Email correspondence dated April 1, 2022
- Email correspondence dated April 14, 2022
- Email correspondence dated April 22, 2022
- Email correspondence dated April 26, 2022
- Email correspondence dated May 4, 2022
- 2021-22 School Calendar
- Detailed 2021-22 School Calendar
- Student's attendance records for the 2021-22 school year
- Telephonic interview with the District's Special Education Teacher on June 21, 2022
- Telephonic interview with the District's Occupational Therapist on June 30, 2022

Note 1: Items marked with an \* were provided by the Parent/Complainant and the District

Note 2: A number of other documents that were not relevant to this investigation were provided by the parties. That documentation is not included in the lists above.

### **Findings of Facts**

- 1) No issues raised in the complaint regarding the Student are currently subject to a due process hearing, nor have these issues been previously decided in a due process hearing.
- 2) The Student is twelve (12) years old and will be entering grade seven (7) at the beginning of the 2022-23 school year.
- 3) Student was last evaluated in early 2020. A report of the findings from the Student's evaluation was completed on February 10, 2020. The evaluation determined, in part:

- a) The Student meets the written verification requirements as a student with a Other Health Impairment (primary disability) and Speech Language Impairment – Articulation (secondary disability).
- 4) On October 21, 2021, Parents filed a complaint with the Nebraska Department of Education (Complaint #21.22.13). The complaint investigation report was issued on December 17, 2021. In that report, there was a finding that the District did not properly develop Student's IEP. The District was required, in part, to reconvene an IEP meeting no later than January 17, 2022 and revise the then-current OT goal.
- 5) Pursuant to the corrective action plan in Complaint #21.22.13, an IEP meeting was held on January 10, 2022. At the IEP meeting, the IEP team discussed what an appropriate OT-related goal would be for the Student. It was determined that the Student's OT goal should be related to their hygiene. The OT goal was not drafted at the IEP meeting. Instead, the District's occupational therapist was to draft the OT-related goal in the following days. Despite the OT goal not being drafted, agreed upon, or finalized, the IEP meeting was concluded.
- 6) Before the OT goal or the IEP were finalized, Parent contends that the District sent home a hard copy of the parent signature page typically attached to the IEP (page 2) on January 11, 2022. The parent signature page asks the following yes/no questions:
  - a) The school district has taken the necessary action to ensure that I understand the proceedings of this IEP conference.
  - b) I have received a copy of the IEP at no cost.
  - c) I have been offered a copy of my parental rights at no cost.

Despite not having a copy of the finalized IEP (as indicated by question b above), the Parent signed and dated the signature page on January 11, 2022.

- 7) The PWN was provided to the Parent via email on January 13, 2022. The PWN was marked "draft." The PWN indicated, in part:
  - a) Description of action proposed or refused:
    - i) [Student] will receive occupational therapy 16 times a year for 30-minute sessions to help with [Student's] sensory needs and personal hygiene needs.
    - ii) Updated accommodations for 6th grade
      - (1) Note: The accommodations mentioned for 6th grade were not related to hygiene or Student's OT goal.
    - iii) Updated accommodations for 7th grade:

(1) The additional accommodations were added to help with [Student's] fine motor and hygiene needs:

(a) Accommodation #10 [Student] will have access to a hygiene kit in the resource room.

b) Explanation of why the district proposes or refuses to take action:

i) [Student's] direct fine motor goal was removed and it was decided to focus on personal hygiene. Fine motor needs are not addressed through accommodations and [Student's] OT goal will now focus on personal hygiene. Personal hygiene was added as a goal due to parent's concerns with [Student] not completing hygiene tasks due to sensory issues.

Nothing else in the PWN related to the Student's OT-related goal or mentioned anything about the Student's personal hygiene.

8) The OT goal was drafted between January 11, 2022 and January 17, 2022 by District's OT. The District OT stated the goal was shared with the special education teacher but the OT was unsure or could not remember who else saw the goal before it was finalized and added to the Student's IEP.

9) The finalized IEP was provided to Nebraska Department of Education (NDE) on January 17, 2022, pursuant to the corrective action required by Complaint #21.22.13. It is unclear when the Parent received a copy of the finalized IEP. The IEP has an effective date of January 10, 2022. Despite the OT goal not being drafted by the January 10, 2022 effective date, there is no indication of a different effective date for the OT goal, or any other component included in the IEP. The IEP includes, in part:

a) PLAAFP:

i) Personal hygiene skills are a concern. [Student] needs lots of reminders and doesn't like to take the time to do it. [Student] doesn't like to brush teeth or hair due to sensory issues.

ii) [Student] will talk with [their] school occupational therapist about [their] personal hygiene skills and help to come up with a plan. This will also be addressed in [their] IEP goals.

b) Goal 3: By the next annual review date, [Student] will maintain cleanliness/hygiene with assistance for 90% of [their] school week as measured by a daily checklist.

i) Short Term Objectives:

(1) [Student] will check [their] appearance in the mirror and make corrections to clothing or grooming as needed.

(2) [Student] will brush [their] teeth.

(3) [Student] will brush [their] hair.

(4) [Student] will use deodorant.

- (5) [Student] will shower/bathe as needed.
- ii) Progress Report:
  - (1) Evaluation Procedures/Instruments: Teacher observation, Written performance, Oral performance, Parent report
  - (2) Person(s) Responsible: Classroom teacher, SPED teacher, Occupational therapist
  - (3) Statement of Progress: Progress reports will be sent home quarterly with report cards.
- c) State of Special Education and Related Services
  - i) [Student] will also receive consultative or direct occupational therapy services as needed 8 times a year for 15 minutes to help with [Student's] sensory needs and personal hygiene needs.
- d) Program Modifications & Accommodations:
  - i) January 10, 2022 through May 26, 2022:
    - (1) No mention of hygiene related modifications/accommodations.
  - ii) May 26, 2022 through January 9, 2023:
    - (1) #10. [Student] will have access to a hygiene kit in the resource room.
- e) PWN:
  - i) The PWN attached to the IEP contains the same contents as discussed under Findings of Facts #7.
- 10) The Student attended occupational therapy on January 20, 2022. The OT notes did not indicate anything was discussed/worked on related to the Student's personal hygiene skills and/or goal.
- 11) The Student attended occupational therapy on February 17, 2022. The OT notes indicated, in part, that some hygiene items were purchased for the Student so that they may have access to the items at school if they forget or do not have time to complete the tasks at home. Additionally, it was noted that a checklist was created for the Student to use every morning.
- 12) On February 17, 2022 the District's occupational therapist emailed Parent and informed them that they personally purchased a hair brush, deodorant, toothpaste, and an electric toothbrush for Student to use at school. Additionally, it was stated that Student will have a checklist to fill out every morning. If Student doesn't complete a hygiene task, Student can complete the task at school. District's OT stated the checklist would be emailed to the Parent.
- 13) In a follow-up email, the District's OT emailed a copy of the daily checklist to the Parent.
- 14) Parent responded on February 17, 2022 and stated, in part, "the check list looks good."

- 15) Between February 21, 2022 and March 18, 2022, the Student completed 17 checklists. All the missing checklists could be attributed to days in which there was no school or the Student was absent. Based on completion, the Student completed 17/17 checklists for a 100% completion rate.
- 16) On March 21, 2022, a progress report was completed. The progress report included the following comments in regards to the OT goal:
- a) [Student] was provided with a toothbrush, toothpaste, brush, and deodorant at school. [Student] is supposed to check in every day in [the special education teacher's] room and mark on a chart whether [Student] completed [their] self-care at home or at school.
  - b) [Student] comes in right away for check-in in the morning. [Student's] first job is to fill out [their] daily hygiene checklist. [Student] does this independently without reminders and does it privately. [Student] says [they] have been completing [their] hygiene at home. There has only been one week where [Student] used the supplied items at school to complete [their] check sheet. I (the District's special education teacher) check in with [Student] about once a week to make sure [they] are being honest on [their] check-in sheet.
- 17) Parent indicated they received the progress report but did not have further communication with the District regarding anything within the progress report.
- 18) The Student attended occupational therapy on March 24, 2022. The OT notes indicated, in part, that the Student had been reporting to the special education teacher that they were completing their hygiene tasks at home. OT stated in the notes that they would email the Parent to make sure the Student was being truthful.
- 19) On March 24, 2022, the OT emailed the Parent and stated that the Student had been indicating they were completing their hygiene tasks at home. The OT wanted to make sure Student was being truthful.
- 20) The Parent responded on March 28, 2022 and indicated they had been thinking about the goal and what was trying to be achieved with the goal. If the purpose was to get the Student to complete daily hygiene, the Student needs more supervision. If the purpose was to get the Student to be accountable, the goal was not going to be successful. The Parent indicated that the Student brushing their teeth was a hit or miss each day and that the Student will say they are brushing their teeth whether they did so or not.
- 21) The OT replied to Parent's email on April 10, 2022 and stated the hygiene-related goal was not a great goal for elementary school and was really meant for the transition to junior high school.

- 22) The Student attended occupational therapy on April 14, 2022. The OT notes indicated, in part, that the OT and the Student discussed their hygiene schedule. The Student indicated there were “following it and still doing it at school.”
- 23) On April 25, 2022, the Parent emailed the District and informed them that the Student went to the dentist and had 12 cavities. The Parent said the hygiene goal was not doing Student any good and that if the goal continued Student would need to be monitored to ensure they were brushing properly.
- 24) On the same day, Student's sister emailed in response and asked: (1) how often and how long Student brushes their teeth in school and (2) why Student was not being monitored and what Student's progress rate was in obtaining the goal.
- 25) District responded and stated Student completes a checklist every morning. If Student did not brush their teeth at home, Student does so in the school secretary's office after check-in. The special education teacher stated they know the Student completed the tasks because “[the school secretary] informs me.”
- 26) The Student's sister replied and, in part, again asked the questions previously indicated in Findings of Facts #24.
- 27) On April 26, 2022, the District answered the questions asked by the Student's sister. The District stated, in part:
- a) The goal monitors if the task was completed or not. The Student is only expected to complete the task.
  - b) The Student has completed the hygiene checklist 100% of the time.
  - c) The school secretary is not evaluating the Student's progress. The school secretary reports whether the Student completed the task or not. No one monitors the Student's technique or duration while brushing their teeth.
  - d) If the Student's sister wants the person who is evaluating the Student to accompany the Student to the bathroom to watch the Student do each step in the checklist, the schedule can be adjusted to ensure that happens. The resource teacher next year will be informed that this is an expectation.
- 28) The Student attended occupational therapy on May 5, 2022. The OT notes indicated, in part, that the OT and the Student talked about the Student brushing their teeth due to their recent cavities. The Student stated they were brushing at home and school.
- 29) On May 9, 2022, Student's sister emailed the District and stated she believed there was an IDEA violation for a number of reasons. District responded on May 11, 2022, and stated it investigated the concerns, discussed the matter with staff, and did not find a violation.

- 30) The complaint, which consisted of the email written on May 9, 2022, was filed with NDE on May 16, 2022.
- 31) Between March 21, 2022, and May 19, 2022, the Student completed 32 checklists. Six checklists were not filled out and there was no explanation as to why (i.e., the Student was not marked absent that day and school was in session). Based on completion, the Student completed 32/38 checklists for an 84% completion rate.
- 32) On May 31, 2022, a progress report was completed. The progress report included the following comments in regards to the OT goal:
- a) [Student] comes in right away for check-in in the morning. [Student's] first job is to fill out [the] daily hygiene checklist. [Student] does this independently without reminders and does it privately. [Student] has remembered to fill out the list independently 91% of the time, the other times [Student] needs a reminder to do so or was not truthful in [their] response on [the] checklist. This quarter [Student] needed to complete [the] teeth brushing task at school 8 out of 33 times. I (District's special education teacher) continue to check in with [Student] to make sure [they] are being honest on [the] task list.

#### **Issue #1**

Whether the School District implemented Student's IEP properly. [92 NAC 51-007.02]

92 NAC 51-007.02 states:

007 Individualized Education Program (IEP)

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/Parent Position*

Complainant alleges that the Student's IEP was not implemented properly because the Student was independently using a checklist to document whether they were completing certain hygiene tasks or not. District was only monitoring the Student's use of the checklist and not monitoring the Student while they were completing hygiene tasks (per Letter of Complaint).

#### *District Response*

The District asserts that the OT-related IEP goal was clear in its methodology – the goal was tracked through the use of the daily checklist. Every morning, the special education teacher had the Student complete the checklist. The Student would indicate whether the tasks listed on the checklist were completed. If the



tasks were not completed, the Student would have the opportunity to do so in a private bathroom. Thus, the District provided services consistent with the Student's IEP (per Letter of Response dated June 9, 2022).

### *Investigative Findings*

The crux of this complaint surrounds the OT-related IEP goal.

#### **Sub-Issue 1: Meaning of Goal**

Before analyzing the OT goal, it is important to note how it was decided what the new OT goal would be. The corrective action from the previous complaint required that the OT-related goal be revamped. That was the primary purpose of the January 10, 2022 IEP meeting.

Once at the meeting, the Parent and Complainant both assert that the OT was not prepared with any suggestions for the new OT-related goal. The Parent suggested that the OT goal be related to the Student's hygiene as they continuously struggle with completing necessary hygiene tasks each day. Moreover, the Student was working on hygiene-related skills with their outside, private OT. Thus, the IEP team decided the new OT-related goal would be related to the Student's hygiene.

For whatever reason, the goal was not drafted at the IEP meeting. Instead, the District's OT was tasked with drafting a goal afterwards. The District's OT stated that the special education teacher was shown the new OT goal. However, they were unable to remember if anyone else saw the goal or if the special education teacher showed it to anyone else on the IEP Team before it was added to the IEP.

The goal was added to the Student's IEP and reads: "By the next annual review date, [Student] will maintain cleanliness/hygiene with assistance for 90% of [their] school week as measured by a daily checklist."

There are many questions as to what this goal actually intended to capture, due to the poor wording and phrasing of the goal. Specifically, what was intended by the inclusion of "with assistance?" Did "with assistance" mean aid from the District staff, a checklist, or something else?

Each person interviewed, as a result of this investigation, was asked what their recollection was as to what was discussed at the IEP meeting, what they believed the IEP goal was to capture, and how the Student would advance in their hygiene skills. The responses are as follows:

1. The Parent believed the purpose of the goal was to get the Student to complete their hygiene tasks. The Parent believed the Student would be

taken to the restroom each morning by District staff and be told to brush their teeth (per telephonic interview with the Parent on June 16, 2022).

2. The Complainant said the goal was to be related to the Student's hygiene. The Complainant does not recall whether the specifics of what the goal should be were discussed at the meeting or not (per telephonic interview with the Complainant on June 16, 2022).
3. The special education teacher believed the purpose of the goal was to get the Student to be independent and the use of a checklist was supposed to aid them in being such. The special education teacher was asked what "with assistance" meant. The special education teacher stated it meant the assistance of checklist (per telephonic interview with the special education teacher on June 21, 2022).
4. The OT believed the purpose of the goal was to get the Student to understand the importance of hygiene and be held accountable to complete their daily hygiene tasks. A checklist was to be used to aid Student in doing such. The OT, as the drafter of the goal, was asked specifically what "with assistance" meant. The OT stated it meant providing the Student with a verbal reminder to check the checklist. However, the OT seemed very uncertain in their responses, and also stated "I don't know" (per telephonic interview with the OT on June 30, 2022).

Clearly, there was not a consensus regarding what skill the OT goal was to help achieve nor was there a consensus regarding how the goal would be implemented and achieved. Furthermore, there are varying opinions on what "with assistance" means. This confusion and varying accounts of the discussions had at the IEP meeting shows the importance of drafting the IEP and goals at the meeting. At the very least, brainstorming notes of some kind should have been kept to indicate what was agreed upon by the IEP team.

Upon review of the email sent to the Parent on February 17, 2022, it appears that the District intended "with assistance" to mean assistance through the use of a checklist. As the District drafted the goal and the Parent did not object to the goal after the goal was provided to them on or around January 17, 2022, that interpretation is what will be used for this investigation.

#### Sub-Issue 2: Implementation Date of OT-Related Goal

The IEP was implemented on January 10, 2022. However, the OT-related goal was not developed until sometime between January 11, 2022 and January 17, 2022 when the IEP was finalized with the addition of the OT-related goal. The District had two options in regards to the implementation of the OT-related goal: (1) indicate a different implementation date (e.g., a date that was on or after the IEP was finalized with the addition of OT-related goal) or (2) create an

amendment to the January 10, 2022 IEP which contained the addition of the OT-related IEP goal. The District did neither of those. Instead, the District retroactively added the OT-related IEP goal to the January 10, 2022 IEP. As the goal was not in existence until after January 10, 2022, it was impossible to implement the goal for upwards of a seven-day time period.

### **Sub Issue #3: Implementation of IEP**

As discussed under Sub Issue #1, the goal requires the completion of a daily checklist. The District did not create the daily checklist until February 17, 2022 and the Student did not use the daily checklist until February 21, 2022 - 42 days after the goal should have been implemented (see Findings of Facts #12-15). In order to implement this goal, as required by the wording of the goal, a checklist had to have been created and used. The District's OT was asked how the Student was being monitored on the goal before the creation of the checklist, they stated the Student was not being monitored since there was not a checklist (per telephonic interview with the OT on June 30, 2022). As there was no checklist until February 17, 2022 and it was not used until February 21, 2022, the District failed to implement the Student's OT-related goal for 42 days.

Between February 21, 2022 and May 19, 2022, the District required the Student to complete the checklist regularly. Specifically, the Student completed 49 checklists. In that time frame, there were a number of missing checklists. All of the missing checklists could be accounted for except for six. The six dates in which school was in session, the Student was not absent/tardy, and a checklist was not completed were: March 22, March 23, May 12, May 17, May 18, and May 19.

For an implementation failure to violate the IDEA, the deviation from the IEP's requirements must be substantial or significant. Quincy Pub. Schs., 120 LRP 11956 (SEA MA 02/28/20). Here, the failure to require the Student to complete the daily checklist for the six days noted above is not a substantial or significant deviation. However, the 42 days in which a daily checklist was not completed is a substantial and significant deviation from the IEP requirements.

### ***Conclusion of all Sub-Issues***

It is determined that a daily checklist was to be used by the Student in order to gain the skills the goal was attempting to capture. The IEP was implemented on January 10, 2022. The checklist was not created until February 17, 2022 nor used by the Student until February 21, 2022 – 42 days after the IEP was implemented.

In determining whether an implementation failure was material, the duration of the failure may be considered. See *Turner v. District of Columbia*, 61 IDELR 126

(D.D.C. 2013). As the checklist was not used for 42 days, the failure to implement the IEP was “material” and the Student was denied FAPE.

### *Important Notes*

#### *Note 1*

The complaint allegations were centered around the OT-related goal. However, upon review of the January 10, 2022 IEP and the accompanying PWN, it was noted that the IEP and the PWN reported different frequencies of occupational therapy. The IEP stated the Student would receive OT eight days/year for 15 minutes/day; the PWN stated the Student would receive OT 16 days/year for 30 minutes/day. Pursuant to the OT services provided, it appears the correct frequency of OT services was eight days/year for 15 minutes/session. The discrepancy is a procedural error. It is encouraged that moving forward the District provide extra caution when completing a PWN so that there are no discrepancies between it and the IEP.

#### *Note 2*

The Parent expressed their concern that the goal was not an appropriate goal as early as March 28, 2022. Specifically, the Parent stated the Student needed more supervision when completing the hygiene tasks and the Student had the propensity to not be truthful in regards to completing the hygiene tasks (see Findings of Fact #20). The District responded and said it agreed that the goal was not good and that the goal was really meant for junior high school (see Findings of Fact #21). Despite the agreement that the goal was not a good goal for the Student, no change was made to the goal. The Parent again expressed their frustration with the goal on April 25, 2022. The District, again, did nothing in response.

This was an inappropriate response, or lack thereof, from the District. By the District's own admission, the goal was inappropriate for the Student and the District should have reconvened an IEP meeting and determined whether the goal needed to be amended or what could be done to ensure the Student was receiving FAPE. By failing to do so, and continuing to implement a goal that was not reasonably calculated to enable the Student to make progress appropriate in the light of the child's circumstances, the District denied the Student FAPE (see *Andrew F. v. Douglas County Sch. Dist.* RE-1, 69 IDELR 174 (2017)).

#### *Note 3*

Absent an investigation into this matter, any given person not on the IEP Team or present at the IEP meeting would not have known that the OT-related goal was created after the meeting on January 10, 2022. Furthermore, District provided the Parent the parent signature page (see Findings of Facts #6) for the Parent to

sign and the prior written notice (see Findings of Facts #7) prior to the OT-related goals existence and the IEP finalization. The District's practice of (1) adding components to the IEP after the presumed finalization and noted implementation date, (2) asking parents to sign for receipt of an IEP that had not in fact been provided, and (3) issuing a PWN as if the IEP it mentions was finalized appears deceptive and calls into question the District's practices .

As the District failed to implement the Student's IEP for 42 days, 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 an IEP meeting within 30 calendar days of the date of this Letter of Finding and address the OT goal and update it accordingly.
  - a. The District should come prepared to the meeting with suggestions for an appropriate hygiene related goal, keeping in mind that the Student will be entering 7th grade and attending a different school building.
  - b. The goal should be carefully worded so that there is no confusion as to the meaning of the words used within the goal.
  - c. The goal should be drafted at the IEP meeting.
  - d. The IEP implementation date shall be a date in the future, allowing the District to provide the proper PWN.
  - e. Once the IEP is finalized, the District shall pay careful attention that the PWN contains the same provisions, including the special education and related services, as the IEP. The PWN shall be provided before the IEP implementation date, allowing the Parent enough time to object to any of the provisions contained within, unless otherwise waived.
  - f. The District shall not ask the Parent to sign the parent signature page (page 2) of the IEP unless and until the provisions on that page have actually been met.
2. The District must review policies and procedures and provide Mary Lenser with the results of the review regarding the following:
  - a. Drafting of IEP goals to meet a student's needs;
  - b. Finalizing previously drafted goals during the IEP meeting to complete the IEP;
  - c. Providing a PWN after an IEP is finalized as required by 92 NAC 51 – 009.05.

3. District must train all special education staff in the district regarding drafting appropriate IEP goals, per the Endrew F. standard, and the appropriate response when a goal is discovered to not be appropriate within 60 calendar days of the date of this Letter of Finding.
  - a. The training materials must be approved by Mary Lenser at least 14 days prior to the training.
  - b. District must provide Mary Lenser with copies of the participant sign-in sheets including the name and role of the participants at the conclusion of the training(s).

## **Issue #2**

Whether the School District monitored Student's progress and provided reports of the same in accordance with Student's IEP. [92 NAC 51-007.07]

92 NAC 51-007.07 states:

007.07 IEP Development

007.07A The IEP shall include:

007.07A1 A statement of the child's present levels of academic achievement and functional performance, including:

007.07A1a How the child's disability affects the child's involvement in and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children);

007.07A2 A statement of measurable annual goals, including academic and functional goals, designed to:

007.07A2a Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; or

	for preschool children, as appropriate, to participate in appropriate activities, and
007.07A2b	Meet each of the child's other educational needs that result from the child's disability;
007.07A4	A description of how the child's progress toward meeting the annual goals described in 92 NAC 51-007.07A2 will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.

#### *Allegations/Parent Position*

Complainant alleges that the Student's OT-related IEP goal cannot be properly progress monitored based on how the goal was prepared in the IEP. Specifically, the information needed to properly monitor progress is either unobtainable or, if able to obtain, inaccurate. Furthermore, the District was unable to progress monitor the goal because no one from the District was actually monitoring the task(s) be completed by the Student (per Letter of Complaint).

#### *District Response*

The District asserts that the Student's OT-related goal identified how it would be measured and evaluated. Specifically, periodic progress reports would be provided quarterly with report cards. Progress reports were provided to Parent pursuant to the IEP. Additionally, beyond what was required in the IEP, the District regularly communicated with the Parent about the OT-related goal and the progress made (per Letter of Response dated June 9, 2022).

In regards to how the District monitored progress, District asserts that it monitored progress daily by evaluating the daily checklist completed by the Student (per Letter of Response dated June 9, 2022).

### *Investigative Findings*

This issue is threefold: (1) is the goal measurable; (2) was the District progress monitoring; and (3) did the District measure progress appropriately.

#### *Sub-Issue 1(a): Measurability - Baseline*

A student's present levels of academic achievement and functional performance ("PLAAFP") are required to be included in their IEP. 92 NAC 51-007.07. The PLAAFP helps establish the student's current-level of functioning and creates a "baseline" to measure future progress. Bakersfield City Sch. Dist., 51 IDELR 142 (SEA CA 2008). If the statement of PLAAFP does not establish a baseline, the IEP may deny FAPE. See, e.g., *Friedman v. Vance*, 24 IDELR 654 (D. Md. 1996); *Dover-Eyota Indep. Sch. Dist. #533*, 113 LRP 23875 (SEA MN 02/13/13); and *J.L.N. v. Grossmont Union High Sch. Dist.*, 75 IDELR 101 (S.D. Cal. 2019).

Here, there is nowhere in the Student's IEP that establishes a baseline related to their completion of daily hygiene tasks. The only comments included in the PLAAFP, or elsewhere in the IEP, that were related to the Student's then-current level of functioning related to their hygiene were: "Personal hygiene skills are a concern. [Student] needs lots of reminders and doesn't like to take the time to do it . . . [Student] doesn't like to brush teeth or hair due to sensory issues." This is not a measurable statement. It fails to describe what the Student's then-current level of functioning was in regards to completing daily hygiene tasks. As no baseline was established, the goal is not measurable.

#### *Sub-Issue 1(b): Measurability - Objectivity*

As the goal reads, it is difficult to decipher what must be accomplished for the Student to progress. The goal states: "By the next annual review date, [Student] will maintain cleanliness/hygiene with assistance for 90% of [their] school week as measured by a daily checklist." Specifically, the issue is the 90% success rate. Is the 90% rate tracking whether the Student completed each of the five daily hygiene tasks contained on the checklist or is the goal tracking whether the Student completed the daily checklist?

District's special education teacher states the goal was meant to track whether the Student completed the daily checklist (per telephonic interview with the special education teacher on June 21, 2022).

If that is the case, how can the Student complete the checklist 90% of the school week? No matter if the school week is one or seven days, the Student would have to complete the checklist every day to reach (but actually exceed) the 90% target; anything less would put the Student below the target percentage. As written, Student must be perfect every week otherwise the Student will not be able to achieve the target percentage.



In the telephonic interview, District's OT said they wanted the Student to be successful 4/5 days a week. When asked whether the Student was to complete the five hygiene tasks or the checklist 4/5 days a week, the OT stated they wanted the checklist to be completed 4/5 days a week (per telephonic interview with the OT on June 30, 2022). If the intent was to get the Student to be successful at completing the checklist 4/5 days a week, the goal should have stated just that.

IEP goals should be objectively measurable. *Bridges v. Spartanburg County Sch. Dist. Two*, 57 IDELR 128 (D.S.C. 2011). A well-written goal should pass the "stranger test" – a person unfamiliar with the IEP can implement the goal, implement the assessment of the student's progress on the goal, and determine whether the student's progress was satisfactory. *Mason City Cmty. Sch. Dist.*, 46 IDELR 148 (SEA IA 2006).

Here, the goal does not pass the "stranger test" as it is difficult to determine what the Student should be measured on. Thus, the goal is not measurable, as written, as it lacks objectivity.

#### Sub-Issue 2: Progress Monitoring

Disregarding the above finding regarding measurability, District failed to progress monitor, as required. Pursuant to the findings in Issue #1, the goal was not implemented until February 21, 2022. Thus, it was impossible for the District to measure the Student's progress for 42 days.

#### Sub-Issue 3: Progress Report Measurability

While District did provide the Parent with a progress report on March 21, 2022. The contents of the progress report are not measurable (see Findings of Facts #16). As the goal requires a target percentage to be met, a percentage must be included in the progress report to determine whether the Student is progressing. No percentage or numerical figure is included in the progress report; it is not measurable.

Subsequently, in the May 31, 2022 progress report, District provided a numerical figure when reporting on the Student's progress (see Findings of Fact #32). The District reports that the Student filled out the checklist independently, without reminders 91% of the time. From the text included in the progress report, it can be inferred that the District is indicating the Student completed 33 checklists during this reporting period. Doing basic math, it appears the Student completed 30 checklists without a reminder. (Note: Only 32 completed checklists were provided to the Investigator.)

However, the problem with the progress report is that the special education teacher and the OT both indicated in the telephonic interviews that the goal was tracking whether or not the Student completed the daily checklists. It did not matter whether the Student needed reminded to complete the checklist or not. (Again, the issue of an objectively measurable goal arises.)

If the Student was being progress monitored on whether they needed a reminder to complete the checklist or not, there is no indication on any of the completed checklists whether it was completed with or without a reminder. Further, no other documentation was provided that indicated whether the Student was reminded to complete the checklist or not. Thus, it is impossible to confirm whether the reported percentage was accurate or not.

Based on the findings of Issue #1 and the information obtained during the course of this investigation, the Student should have been measured on whether the checklist was completed, with or without a reminder to do so. The Student's progress was not measured in that way and, again, the progress reported is not measurable to the goal.

In conclusion, the District could not measure progress without establishing a baseline; the District did not measure progress until after February 21, 2022; the District improperly measured the Student's progress in the March 2022 progress report by failing to include a measurable, numerical figure; and the District improperly measured the Student's progress in the May 2022 progress report by measuring progress in an alternative fashion not pursuant to the requirements of the goal. Thus, the District failed to fully implement the requirements of 92 NAC 51-007.07 and the following **corrective action is required**.

### **Corrective Action**

1. Pursuant to the corrective action under Issue #1, the IEP must be amended. The District shall pay careful attention that any new IEP goals have identified baselines and be objectively measurable.
2. District must train all special education staff in the district regarding IEP development within 60 calendar days of the date of this Letter of Finding. Specifically, what must be included in the PLAAFP to establish current levels of functioning (i.e., baselines).
  - a) The training materials must be approved by Mary Lenser at least 14 days prior to the training.
  - b) District must provide Mary Lenser with copies of the participant sign-in sheets at the conclusion of the training(s).
3. A random sample of IEPs of three students will be reviewed on or before March 1, 2023, to ensure PLAAFP requirements are being met.

4. District must train all special education staff in the district regarding measurability of progress reports within 60 calendar days of the date of this Letter of Finding. Specifically, the requirement to use the same method of measurement that is indicated in the IEP goal(s) so that the progress noted is measurable.
  - a) The training materials must be approved by Mary Lenser at least 14 days prior to the training.
  - b) District must provide Mary Lenser with copies of the participant sign-in sheets at the conclusion of the training(s).
5. A random sample of IEPs and accompanying progress reports of three students will be reviewed on or before March 1, 2023, to ensure measurability of progress reporting requirements are being met.

### *Issue #3*

Whether the School District provided special education and related services to Student using properly licensed and trained staff. [92 NAC 51-010.01]

92 NAC 51-010.01 states:

- |         |   |
|---------|---|
| 010     | Qualifications of Special Education Personnel for Program Approval and Reimbursement  |
| 010.01  | School districts and approved cooperatives shall ensure that all personnel necessary to carry out this Chapter are appropriately and adequately prepared and trained including that those personnel have the content knowledge and skills to serve children with disabilities, subject to the requirements of Section 2122 of the Elementary and Secondary Education Act of 1965.   |
| 010.01A | Instructional personnel shall hold valid Nebraska Department of Education certification, be endorsed in the assigned area. Instructional personnel may serve children with visual impairments and children with hearing impairments in a multicategorical program if the instructional personnel have attended training approved by the Department of Education or have received consultation from an individual endorsed in the area of visual |

hearing impairments. This section does not apply to individuals providing inservice.

010.01B

Each person employed as a special education teacher who teaches elementary school, middle school, or secondary school shall be a teacher meeting IDEA 2004 criteria as defined in 92 NAC 51-003.62.

#### *Allegations/Parent Position*

Complainant alleges that the District required the school secretary, whom had no training to monitor Student's goals nor had ever been involved in Student's education, to monitor Student's OT-related goal (per Letter of Complaint).

#### *District Response*

District asserts that all individuals providing special education and related services to the Student were properly licensed and trained. The District's school secretary was not providing special education and related services to the Student. Nor was the school secretary tasked with evaluating the Student's progress on the OT-related goal. Rather, the special education teacher would verify with the school secretary whether or not the Student entered the bathroom to complete their daily hygiene tasks. As the Student did not require further assistance to complete their daily hygiene tasks, Student was not provided physical assistance or monitoring while completing hygiene tasks and the school secretary's involvement related to this goal was appropriate (per Letter of Response dated June 9, 2022).

#### *Investigative Findings*

The OT-related IEP goal is a poorly written goal. However, based on conversations with District staff and the Parent, the purpose of the IEP goal was for the Student to complete daily hygiene tasks. Student received OT services to address the Student's personal hygiene and the daily checklist was used so that the Student and District staff could track whether the Student was completing the daily hygiene tasks or not. The special education teacher oversaw the use of the daily checklist and the OT provided related services. Both the occupational therapist and the special education teacher are properly licensed and trained staff members.

The secretary's involvement with this goal was simply informing the special education teacher whether the Student physically entered the office bathroom. The secretary did not provide any special education or related service to the

Student. Thus, the secretary is not required to hold the licensure and training noted in 92 NAC 51-010.01.

#### *Summary and Conclusions*

As the secretary was only reporting on whether the Student was physically present in an area, and not providing special education and related services, the District implemented the requirements of 92 NAC 51-010.01 and **no corrective action** is required.

#### **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:

Mary Lenser, Complaint Investigation Specialist  
NDE Office of Special Education  
nde.speddr@nebraska.gov