

COMPLAINT INVESTIGATION REPORT

Complaint Number: 20.21.05
Complaint Investigators: [Redacted]
Date Complaint Filed: October 1, 2020
Date of Report: [Redacted]

Issues Investigated

1. Did the District afford Student's Parents an opportunity to participate in meetings regarding the identification, evaluation, educational placement, and provision of a free appropriate public education? [92 NAC 51-009.01A]
2. Did the District ensure that Student's education placement was made by a group of persons, including the Parents and other individuals knowledge about the child, the meaning of the evaluation data and the placement options and was made in conformity with the least restrictive environment requirements? [92 NAC 51-008.01C]
3. Did the District provide special education and related services to Student and report the Student's progress in accordance with the IEP? [92 NAC 51-007.02]
4. Did the District afford Student's Parents an opportunity to inspect and review education records relating to Student? [92 NAC 51-009.03]
5. Did the District protect the confidentiality of Student's personally identifiable information? [92 NAC 51-009.03K]
6. Did the District deny Student a free appropriate public education? [92 NAC 51-003.24]

Information Reviewed

From the Parents

- Letter of complaint with accompanying documents received October 1, 2020
- Emails with additional documents/recordings/photographs received the week of November 16, 2020
- Phone interview with the Mother on November 18, 2020

From the School District

- Letter of Response dated October 21, 2020
- Exhibits 1A through 7 consisting of the following:
 - Exhibit 1A – IEPs and related documents from October 1 through present

- Exhibit 1B – Notice of August 10, 2020 IEP meeting
- Exhibit 1C – IEPs and related documents from September 10 and September 30 IEP meetings
- Exhibit 2 – All prior written notices between October 1, 2019 and the date of the District's response
- Exhibit 3 – All IEP meeting notes between October 1, 2019 and the date of the District's response
- Exhibit 4 – The Student's last comprehensive evaluation
- Exhibit 5 – All relevant correspondence between the District, Parents and/or the Student's private providers between October 1, 2019 and the date of the District's response
- Exhibit 6 – District policies relating to the identified issues
- Exhibit 7 – Information received from the Student's medical providers
- Emails with additional documents received the week of November 16, 2020
- Phone interviews with District staff during the week of November 16, 2020

Allegations

1. Did the District afford Student's Parents an opportunity to participate in meetings regarding the identification, evaluation, educational placement, and provision of a free appropriate public education? [92 NAC 51-009.01A]
2. Did the District ensure that Student 's education placement was made by a group of persons, including the Parents and other individuals knowledge about the child, the meaning of the evaluation data and the placement options and was made in conformity with the least restrictive environment requirements? [92 NAC 51-008.01C]
3. Did the District provide special education and related services to Student and report the Student's progress in accordance with the IEP? [92 NAC 51-007.02]
4. Did the District afford Student's Parents an opportunity to inspect and review education records relating to Student? [92 NAC 51-009.03]
5. Did the District protect the confidentiality of Student's personally identifiable information? [92 NAC 51-009.03K]
6. Did the District deny Student a free appropriate public education? [92 NAC 51-003.24]

Introduction

The complaint was filed on behalf of the Student whose Parents requested homebound instruction for the Student, based on the guidance they received from the Student's medical providers.

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

To conduct the complaint investigation, an outside investigator was used along with a complaint investigator with the NDE Office of Special Education. The documents received from the Parents and the School District were reviewed, and interviews were conducted with the Mother and School District personnel.

This investigation is limited to a review of alleged IDEA violations that occurred not more than one year prior to October 1, 2020, the date the complaint was received by the NDE. Any facts that are discussed that occurred outside the one-year time period for this investigation are provided for context purposes only.

Finding of Facts

1. The Student is 4 years old and initially received special education services from the District through an Individualized Family Service Plan (IFSP) beginning in July 2017.
2. On September 12, 2019, the Student's IEP team met and developed an IEP with a starting date of September 13, 2019 and an ending date of September 12, 2020.
3. The Student's IEP dated September 13, 2019 provided, in relevant part:
 - a. The primary disability was Other Health Impairment (OHI)
 - b. The effect of the Student's disability in participation in appropriate activities consisted of global delays in all areas of development that affects participation in classroom activities and learning new skills.
 - c. Parents and other IEP Team members concerns for enhancing educational performance included:
 - i. Safety concerns and elopement.
 - ii. No physical restraint or seclusion was to be used with the Student.
 - iii. Parents wanted to be contacted with concerning behavior.
 - d. Supplemental aids and services included "1:1 Nurse."
 - e. The Student's annual goals included:

- i. Goal 1: The Student will participate in the classroom setting by transitioning from a preferred to a non-preferred activity, responding to the Student's name and participating in an activity for at least 3 minutes on 3 of 5 days of the week as measured by charting and observation. Three short-term objectives supported the goal, one of which provided:
- ii. Goal 2: The Student will improve play and social skills by engaging in simple rational play, interact with non-preferred item for at least 2 minutes and play near a peer on 3 of 5 days as measured by charting and observations. Three short-term objectives supported the goal.
- iii. Goal 3: The Student will improve communication skills by following a "give me" request, following a proximal point for joint attention and imitating actions in songs/fingerplays on 4 of 5 days as measured by charting and observations. Three short-term objectives supported the goal, which provided:
 - 1. Objective 1: Given verbal cues and visual cues with sensory supports (weighted compression vest, weighted lap pad, chewy tube, sensory motor breaks, etc.) as needed, the Student will sit at the table for 305 minutes for breakfast/snack time on 3 out of 5 opportunities.
 - 2. Objective 2: Given structure, visual cues, and sensory supports as needed, the Student will stay with the group and participate in songs by imitating actions during circle time for 3 to 5 minutes on 3 out of 5 opportunities provided.
 - 3. Objective 3: Given a model with verbal and visual cues, the Student will participate in fine motor tasks to 1) place 3 out of 5 shapes into a container and 2) stack 3-4 blocks to build a tower, without throwing the toys on 3 out of 5 opportunities.
- iv. Goal 4: The Student will safely access and participate in the school environment including stairs, playground and classroom with adult assistance 5 out of 5 days. Three short-term objectives supported the goal.
- v. Goal 5: Given verbal and visual cues and sensory support as needed, the Student will increase participation with and independence in, fine motor and self-help tasks completed at school, 3 out of 5 days per week, as measured by teacher

report and observation. Three short-term objectives supported the goal, one of which provided:

1. Given verbal cues and visual cues with sensory supports as needed, the Student will participate in mealtime to 1) eat at least $\frac{1}{4}$ of the meal orally and 2) not throw food during mealtime on 3 out of 5 opportunities provided.
- f. The communication of progress provided that progress would be reported using the IEP Progress Report form on a quarterly basis.
- g. The special education services for the student included:
 - i. Early Childhood Special Education – A.M. to be provided by the ECSE teacher five times per week for 168 minutes daily.
 - ii. Early childhood Special Education based speech/language therapy for 20 minutes three times per week.
 - iii. Physical therapy as a related service nine times per year.
 - iv. Occupational therapy as a related service four times per year.
 - v. Nursing services to be provided by a contracted provider five times per week for 180 minutes daily.
- h. Placement was an early childhood special education (ECSE) A.M. classroom.
- i. The Student was not eligible for extended school year.
4. A Prior Written Notice (PWN) of Change of Placement was provided to the Parents after the IEP team meeting on September 12, 2019. The PWN informed the Parents that the District proposed to change the Student's placement from early intervention services in the home to early childhood special education services with physical therapy, occupational therapy and speech-language therapy. The school assignment and start date would be determined upon completion of the placement process.
5. A meeting was held on September 27, 2019 with District staff, the Mother and a nurse to discuss the Student's transition to School A. The nurse discussed the process for feeding food to the Student while at school. (Interview with special education teacher.)
6. The Student began attending a ECSE class at School A on October 30, 2019.
 - a. The class consisted of 12 students, two of whom were non-disabled peers. Interview with special education teacher.
 - b. The classroom was arranged with different activity areas, and physical structures, such as bookcases, totes and bins holding the

different play items were used to designate different activity areas for the students. (Interview with special education teacher.)

7. The District had a special education services agreement with a service agency to provide a nurse in the school setting for the Student with a start date of October 8, 2019 and an end date of May 23, 2020. The agreement addressed the confidentiality of student data and provided that the service agency and its agents were subject to the District's policies and guidelines. Student information received by the service agency or its agents was confidential and may only be used to provide the services set forth in the agreement. Information gained through the course of providing services would not be shared with any entity other than the student, parent, guardian, District or service agency without the express agreement of the District or the service agency. To monitor and evaluate student progress the District was permitted to provide to service agency employees limited FERPA protected personally identifiable information from students' education files. Those individuals receiving the information were expected to maintain the share information in confidence. (Special Education Services Agreement.)
8. The Student attended Monday, Tuesday and Wednesday morning class with a nurse assigned to the Student. The Student did not attend on Thursday or Friday, as there was no nurse available. The Student attended School A for 10 days. (Interview with special education teacher.)
9. On November 4, 2019, both Parents observed the Student's classroom. Upon entering the classroom, the Parents had concerns regarding:
 - a. The bins, totes, bookshelves and other items that were present in the room.
 - b. It appeared that the children with disabilities were "barricaded" in the middle of the room with their nondisabled peers outside the "barricaded" area.
 - c. The Student's nurse was assisting other students and was not by the Student to provide assistance.
 - d. Staff attempted to feed the Student applesauce and water when the Student was 100% tube fed at the time.
 - e. Staff was observed sitting with legs over the Student to keep the Student at the table to eat the applesauce and drink the water. (Email from Mother dated November 18, 2020; Interview with Mother.)

10. The special education teacher stated that the nurse assigned to the Student was the only adult that fed the Student, and she never saw the nurse place a leg over the Student while feeding. The nurse did assist several other students when those students appeared to be upset but did not assist other students on a regular basis. Other staff also worked directly with the Student. (Interview with special education teacher.)
11. When the Mother observed the classroom on November 13, 2019, the Mother noticed that the nurse assigned to the Student in the classroom was with another child in a rocking chair and that the Student was inside “barricades” with other students with disabilities. (Interview with Mother.)
12. During the Mother’s visit to the classroom on November 13, 2019 the physical therapist (PT) worked with the Student and nurse on reciprocal ball play and observed the Student move throughout the educational environment. The student moved safely around the classroom with one redirection from the nurse to sit when he crawled up on a toy couch and stood. (Physical Therapy Notes.)
13. On November 20, 2019, Student’s Mother visited the Student’s classroom. Immediately following her classroom visit, the Mother sent a text to the special education teacher and indicated that she had observed the Student pulling a little girl’s hair. The Mother was concerned because the nurse assigned to the Student was not right next to the Student and the Mother wanted to ensure that the Student did not hurt other Students in the classroom. The Mother also visited with the principal about her concerns. The principal visited the classroom to observe and to speak with the special education teacher. (Text message; interview with Mother; interview with principal.)
14. The special education teacher was near the Student, saw the Student touch the other little girl’s hair and moved the Student’s hand. The Student did not cause any harm to the other student. Although the little girl had a bruise on her forehead, it was not caused by the Student. (Interview with special education teacher.)
15. The speech language pathologist was in the room working one-on-one with the Student at the time the Mother visited on November 20, 2019. (Interview with special education teacher.)
16. After the special education teacher read the Mother’s text message, she informed the nurse assigned to the Student that she needed to work primarily with the Student, and that the other students in the

classroom were the responsibility of the other staff in the classroom. (Interview of special education teacher.)

17. The Parents provided several photographs of the Student in the classroom that were taken by the Parents in November 2019, including the following:
 - a. A photograph of the Student standing on a small wooden step with sides and a waist high board running the length of the step. Two adults are within arm's reach of the Student. Another student is sitting nearby in a chair.
 - b. A photograph of the Student crouched over with hands on the floor. It appears the Student is partially under a table. An adult hand can be seen over the Student.
 - c. A photograph of the Student sitting on the floor playing with a toy and a little girl is sitting on the floor slightly behind the Student. The little girl appears to be looking at the toy in the Student's hands. A pathway can be seen to another area in the room where another student is sitting at a round table.
 - d. A photograph of the Student sitting on the floor looking down with several toys next to the Student, and the same little girl is sitting on the floor slightly behind the Student playing with a toy. Bins can be seen behind the students, along with a small wooden step with sides and a waist high board running the length of the step.
 - e. A photograph of the Student sitting on the floor in the classroom with a toy. A bookcase is behind the Student and stacked bins are along a wall.
 - f. A photograph of the Student sitting at a table with an adult sitting next to the Student holding a spoon with applesauce near the Student's mouth. The photograph does not show any type of restraint of the Student or an adult's legs over the Student's lap.
18. The Student's nurse resigned from her position on November 20, 2019, and the Student did not return to School A after that date as there was no nurse available for the Student in the school setting. (Interview with Mother; interview with special education teacher.)
19. On November 25, 2019, the Father emailed and set forth his concerns:
 - a. The Father didn't understand the entire situation of the nurse getting so angry that she quit prior to the Parents having an opportunity to speak with her or the concerns shared with the teacher in the Mother's text message.
 - b. The Father believed the concerns were taken out of context as the Parents were not mad, but simply wanted to establish boundaries

for the nursing staff at school, ensure the Student was not harming others, and have a plan in place for behavioral needs such as hair pulling or biting.

- c. The Father apologized if staff believed the Parents were initially upset with the school.
20. The principal responded to the Father's email on November 25, 2019 and set forth his understanding of what had occurred:

"Concerning the situation you mentioned, here is what I'm aware of. During the day, last Wednesday, your wife was observing in the classroom. After she left, [special education teacher] received a text message from your wife detailing the responsibilities of [Student's] nurse. [Special education teacher] read the text and let [nurse] know that she had received it and that I outlined the responsibilities and procedures for her. [Nurse] then asked what the text message said, so [special education teacher] read it to her. Soon after, your wife came to the office to share the concerns with me. I then went to the room to see what was happening. I stayed in the room for a while. I observed [nurse] working with [Student] exclusively. As the morning session ended, I had the opportunity to speak with [special education teacher] about the concerns shared by your wife. [Special education teacher] explained the situation with the little girl with the abrasion on her head and how [nurse] works in the room. I explained several times that your wife was not upset at all or wanting to get anyone in trouble but rather was just concerned for the safety of all students and [Student's] needs."

"[Special education teacher] stated that [nurse] apologized to her at the end of the morning session. She believes that [nurse] thought she had gotten her in trouble since I had come to the room to observe. [Special education teacher assured her] that she wasn't in trouble and that everything was fine and that I had just come to visit like I have in the past."

21. The nurse emailed the principal on December 6, 2019 in response to an email that she believed had been sent to her by the principal pertaining to the event on November 20, 2019 in the Student's classroom. However, the principal had not emailed the nurse and noticed that the email sent to the nurse was the email he had sent to the Father on November 25, 2019, but which contained modifications consisting of added and deleted language from the original email.

The modified email is set forth below with the added language in bold and underlined, and the deleted language in bold and strikethrough:

“Concerning the situation you mentioned, here is what I’m aware of. During the day, last Wednesday, your wife was observing in the classroom **where she witnessed children pulling hair**. After she left, [special education teacher] received a text message from your wife detailing the responsibilities of [Student’s] nurse. **I received a call from security that the group didn’t sign out**. [Special education teacher] read the text and let [nurse] know that she had received it and that I outlined the responsibilities and procedures for her. [Nurse] ~~then~~ **repeatedly** asked what the text message said, so [special education teacher] read it **in full** to her. Soon after, **I was contacted by the special education supervisor. your wife came to the office to share the concerns with me**. I then went to the room to see what was happening **with staffing ratios**. I stayed in the room for a while **because I was unaware there was a staffing absence**. I observed [nurse] working with [Student] exclusively. As the morning session ended, I had the opportunity to speak with [special education teacher] about the concerns shared by your wife. [Special education teacher] explained the situation with the little girl with the abrasion on her head and how ~~[nurse] works in the room [Student] was pulling her hair. I explained several times that your wife was not upset at all or wanting to get anyone in trouble but rather was just concerned for the safety of all students and [Student’s] needs.~~ I spoke with the speech pathologist and para educator who felt they could have done a better job monitoring and subsequently separating the students before your wife’s arrival because they noticed the girl took a toy [Student] favors. It was **unfortunate timing and atypical of that class.**”

“[Special education teacher] stated that [nurse] apologized to her at the end of the morning session. She believes that [nurse] thought she had gotten her in trouble since I had come to the room to observe **ratios**. [Special education teacher assured her] that she wasn’t in trouble and that everything was fine and that I had just come to visit like I have in the past. **I have begun the search for another para and appreciate this matter being brought to my attention by the special education supervisory staff. In the interim we do have a substitute and will not count nursing into our ratios.**”

22. On December 11, 2019, the special education teacher at School A sent the Mother an email stating that the Student was missed and asked whether there were any updates regarding a new nurse for the Student. The Mother responded to the email on the same day and stated that the Parents had been unable to find a replacement nurse through they were searching. The agency that supplied the nurse did not have a replacement. The Mother stated she will update the teacher when she had a better idea of when the Student would be able to return to school. (Text messages dated 12/11/19.)
23. A Progress Report dated December 20, 2019 was provided to the Parents. The Progress Report provided the Parents the following information:
- a. Goal 1: Classroom Participation.
 - i. The Student enjoyed being around his peers.
 - b. Goal 2: Play and Social Skills.
 - i. The Student needs hand over hand support to stack blocks, add a ring to a ring stack or roll a car for at least 3 minutes on 5 of 5 opportunities.
 - ii. The Student needs hand over hand support to remove a non-preferred item from his view and place it in a spot n 10/10 opportunities.
 - iii. With nurse support at centers, the Student will sit and play near a peer for at least 3 minutes on 10/10 opportunities provided.
 - c. Goal 3: Communication.
 - i. Communication continues to be an emergent skill for the Student. The Student does not follow the "give me" prompt and needs hand-over-hand support to exchange items.
 - ii. "Look" continues to be an emergent skill.
 - iii. Participation in circle time with nurse support the Student stayed at circle time for 10 minutes on 5/5 opportunities.
 - d. Goal 4: Access and Participation.
 - i. During an observation, the Student rolled a ball back and forth with the Student's nurse.
 - ii. There was no opportunity to access outdoor playground equipment as the playground was closed due to construction.
 - iii. The PT saw the Student one time for PT services as the Student was out of school the month of December.
 - e. Goal 5: Fine Motor/Self Help.

- i. The Student would sit at the breakfast table with nurse's support for approximately 15 minutes or the duration of the meal 3 out of 3 days of attendance.
 - ii. The Student's nurse reported that the Student attempted to throw a few pieces of toast at each breakfast meal.
 - iii. The Student needed hand over hand assistance for all container play 10/10 opportunities, and hand over hand assistance to stack and release blocks 10/10 opportunities.
 - iv. The OT saw the Student one time for OT services as the Student was out of school the month of December.
24. On December 30, 2019, the Mother sent an email to the special education supervisor and the principal of School A requesting a meeting to discuss the Student, as the Mother did not want the Student to return to School A. The Mother believed there were issues with the classroom setup, felt there was a lack of adequate supervision, and believed there had been a breach of confidentiality regarding the text she sent to the special education teacher on November 20, 2019.
25. The Mother sent a second follow-up email on December 30, 2019 and indicated that the Student's doctors felt that School B was a better fit for the Student and that she was told to request an IEP meeting. The Mother again set forth her concerns that students were being barricaded in the classroom which she felt was a form of restraint and was a safety issue.
26. A meeting with District staff and the Parents was initially scheduled for January 7, 2020 but was rescheduled for January 10, 2020 with District staff. During the January 10, 2020 meeting, the Mother shared her concerns regarding seclusion, restraint, climbing and falling, and the breach of confidentiality. The Mother asked for another placement and the District agreed to look into the Mother's concerns and look into an alternative placement for the Student. Although the Mother requested School B, she was informed that School B does not have a preschool program and was not an option at that time. Email dated January 2, 2020. Based the Mother's request for a different school, the Student was assigned to School C.
27. On January 27, 2020, the Mother emailed the special education supervisor in response to a voice mail message from the supervisor and stated that the Parents were unwilling to use a particular company for nursing services for the Student while at school because of certain events that had previously occurred. The Mother further stated that the Parents were actively working with nurse case managers to figure

- out a solution to best meet the Student's needs so he could return to school. The Mother also informed the supervisor that the Student had been ill, and the Parents were waiting for test results.
28. On February 3, 2020, the special education supervisor emailed the Mother to determine whether there were any updates regarding the Student that could be shared. It was noted that the supervisor and other staff had left voice mail messages previously.
 29. On February 3, 2020 in response to the special education supervisor's email the Mother responded that the Student's pediatrician did not feel it was safe for the Student to return to school at that time.
 30. On February 12, 2020, District staff spoke to the Mother by telephone and were informed that the Student would be out of school until after the flu season, based on doctors' recommendations. Staff informed the Mother that they would determine whether a particular nursing agency requested by the Mother was certified by the Nebraska Department of Education and obtain a contract with that agency.
 31. Between February 25, 2020 and February 27, 2020, the District's nursing supervisor exchanged emails with a healthcare company's director regarding the paperwork needed to be an approved agency through the Nebraska Department of Education to provide nursing services for the Student in a school setting.
 32. On March 14, 2020, the District issued an announcement that its schools would be closed indefinitely beginning on March 16, 2020 due to the COVID-19 pandemic. School closures continued through May 15, 2020. Families were provided information as to where learning packets could be obtained on a weekly basis and digital resources for all levels of learning were updated weekly for students and parents. Interview with special education director.
 33. On April 12, 2020, the Mother emailed the special education teacher at School C and provided her with an overview of the Student's needs. The Mother asked for information regarding what special education services would be available to the Student during the pandemic and what an educational plan for the Student might look like.
 34. The special education teacher at School C responded to the Mother's email on April 13, 2020 and stated that special education services could be provided to the Student if the Parents were interested.
 35. On April 14, 2020, the teacher emailed the Parents to inform them that a prior written notice needed to be completed through an IEP meeting. The team would not write a new IEP but would only discuss how virtual services will work.

36. An IEP team meeting with the Parents was originally scheduled for April 16, 2020 but was rescheduled to April 23, 2020 at Parents' request.
37. On April 23, 2020, an IEP team meeting with the Parents and School C staff was held virtually. The team discussed how services could be provided to the Student while education was being provided remotely to all students. After the meeting a PWN was provided to the Parents setting forth the IEP team's determination that educational services would consist of a weekly email listing some ideas for activities and strategies to try at home, as well as possibly joining the video meetings for a short time with a sibling. The IEP team determined that the Student was unable to sit for video meetings and that giving Parents ideas to do at home would be most helpful.
38. On April 29, 2020, the special education teacher sent the Parents a list of activities by email for the Student that was jointly developed with input from the OT, PT and SLP, as well as the special education teacher.
39. On May 14, 2020, the special education teacher at School C provided activities to the Student's Parents by email that could be tried at home over the summer.
40. On May 26, 2020, the special education teacher at School C emailed the Parents the 4th quarter progress report dated May 15, 2020 for Student. The progress report set forth the different ideas that were provided to the Parents, including:
 - a. Ideas for play and social skills included an idea to work on early predication skills where a ball or small car could be rolled through a tube to see if the Student noticed and then looked for it at the bottom after a few times of doing the activity.
 - b. Ideas for transitioning in the classroom included putting a visual stop sign on the door to indicate when it wasn't time to go outside to help if the Student was struggling with this.
 - c. Ideas for access and participation included incorporating movements with singing songs with him, such as when on the trampoline singing 5 Little Monkeys with the Student.
 - d. Ideas for communication included videos of different songs, such as Head, Shoulders, Knees and Toes, with actions and labeling (body parts) or singing songs if the Student was not interested in the videos.
 - e. Ideas for fine motor and sensory included ways to incorporate water play (a preferred activity), container play, sorting and matching.

41. On July 13, 2020, the Mother emailed medical orders from one of Student's medical providers which requested homebound schooling and listed the Student's diagnoses.
42. On July 28, 2020, the special education supervisor emailed the Mother and informed her that since the doctor stated it was unsafe for the Student to return to school, the District would provide home services. The team at School C would be contacted as there needed to be an IEP team meeting held.
43. On August 4, 2020, a special education teacher at School C emailed the Parents to set up a meeting date to hold the Student's IEP meeting.
44. On August 7, 2020, a decision was made by the District to move to 100% remote learning for all students and schools within the District due to the COVID-19 pandemic.
45. On August 7, 2020, the special education supervisor emailed the Student's IEP team members to inform them that homebound services would not be an option for the Student since the District made the decision to move to 100% remote learning.
46. On August 7, 2020, a special education teacher at School C emailed the Parents a copy of a draft IEP for the Student. That same day the Mother emailed the special education director and emphasized that remote learning was not an option for the Student.
47. On August 10, 2020, the special education supervisor emailed the Mother asking her to contact the Student's IEP team when she was ready to hold an IEP meeting. The Student's IEP annual review was due by September 12, 2020, and the supervisor wanted the Student assigned to a classroom with remote services as soon as possible.
48. On August 10, 2020, the Mother emailed the special education director and asked what services were being offered to the Student to ensure remote learning provided FAPE. The Mother further stated that she pulled the Student out of school after the Student was physically restrained by his teacher and forced to sit at a table and secluded with totes, tubs and bookshelves and that an incident report was not provided to her.
49. On August 12, 2020, the Mother emailed the special education teacher at School C and the special education director and informed them that the consultation of services provided by the OT and PT during the remote learning in the spring did not provide the Student with services, and that the Mother did not receive any information regarding the Student. In response, the special education teacher emailed the Mother and informed her that the PT, OT, SLP and the

- teacher compiled activity lists that were provided through email, which was decided on at the IEP meeting.
50. On the evening of August 12, 2020, the Parents emailed District staff and stated “[p]lease find our written request to withdrawal (sic) [student from [District] at this time.” In response to the Parents’ email, a Notice of Discontinuation of Placement in Special Education dated August 13, 2020 was provided to the Parents. Parents were informed that the Student “will remain eligible to receive services. Parents can notify the Special Education Division if they would like to restart services. A new IEP will need to be held at that time.”
 51. On August 14, 2020, the Father emailed District staff and requested a meeting with the superintendent. The Father also set forth certain concerns, including:
 - a. No response was received by the Mother regarding her request for “data collection” information.
 - b. Certain goals on the IEP were unrealistic.
 - c. Staff restrained the Student and forced the Student to do things against medical advisement.
 - d. Parents specifically refused the use of restraint, isolation or seclusion.
 - e. The special education supervisor approved homebound services, and no PWN was received changing the approval.
 52. On August 20, 2020, the Mother emailed District staff concerned that she had not received a complete copy of her child's educational records, which had been requested. A list of the missing documents was provided by the Parent, including:
 - a. Homebound placement record
 - b. Incident reports
 - c. Data collection for previous remote learning at School C
 - d. PT, OT and speech documentation for remote learning at School C
 53. Between August 17, 2020 and August 27, 2020, the Mother and the student records clerk exchanged emails regarding the Mother's request for records. Records were forwarded to the Mother on August 17, 2020 and additional records from the Student's cumulative file were sent on August 27, 2020 in an email from the student records clerk indicating that all of the documents had been provided to the Mother. Emails dated August 17, 20, 24 and 27, 2020.
 54. In the August 20, 2020 email the Mother stated she had been forced to unenroll from the District the Student because:
 - a. Student's Parents and medical team felt remote learning was detrimental to Student.

- b. Without the data collection records the Parents were unable to sufficiently prove remote learning was not effective at providing the Student FAPE.
 - c. Staff informed the Mother that data collection for another two weeks should occur before requesting an IEP meeting.
 - d. No options were presented to the Parent.
 - e. No PWN was received after the District removed homebound services that were agreed to by an email from the special education supervisor on July 28, 2020.
- 55. On August 25, 2020, the Mother emailed District staff and:
 - a. Asked that an IEP meeting be scheduled as soon as possible.
 - b. Requested that the Student be enrolled back into homebound services as listed on the Student's IEP.
 - c. Asked that Parents be provided with a PWN regarding homebound services.
 - d. Stated the Student's IEP had not been followed as the Student was physically restrained and barricaded into isolated spaces.
- 56. On August 27, 2020, the Mother sent district staff an email stating:
 - a. Unless the District changed the Student's IEP without her consent, the Student should be enrolled in homebound services, not School C.
 - b. The Student's placement at School C was prior to homebound and was inappropriate.
 - c. Completed "data" from remote learning has not been received.
 - d. A PWN had not been received denying homebound services.
- 57. On August 28, 2020, the Parents were informed by email that the Student was reenrolled in the District at Parents' request and that an IEP meeting would be held with School C staff. The Parents were also notified that the Student's placement had not changed and would not change unless it occurred through an IEP team meeting.
- 58. On August 28, 2020 the Mother emailed District staff regarding the Parents' requests and concerns:
 - a. The District agreed to provide home services, but those services have not been provided as agreed.
 - b. The Parents requested home services since remote learning is not an option for the Student.
 - c. District staff informed the Mother that more data on remote learning needed to be collected.
 - d. The Student did not receive speech, PT or nursing during remote learning, as required by the IEP.

- e. Completed data from remote learning has not been received.
 - f. A draft IEP was requested as soon as possible so it could be reviewed.
 - g. A date for the IEP meeting was requested.
59. On August 31, 2020 District staff emailed the Mother that the Student was enrolled into the District on that date. The Parent was further informed that:
- a. The District received the medical information that it was unsafe for the Student to attend school in person.
 - b. In July, the District's plan was to provide the Student with home services and be in school.
 - c. In August, the District transitioned to a remote learning instructional model for all students for health and safety reasons, which affected the District's ability to welcome students for in-person services.
 - d. The District was continuing to work to bring students back and expand in-person services.
60. On September 9, 2020 the Parents attended an IEP team meeting virtually for Student's sibling. A staff member inadvertently shared her screen with the IEP team participants while she searched for the family's name in order to quickly find the appropriate file. The shared screen was viewed by the IEP team members for the sibling. The screen set forth the names of seven students, including the Student's name, all of whom had the same or similar last name. Additionally, each student's grade was identified, each student's ID number was set forth, and a partial birthdate could be seen.
- a. Upon receiving information regarding the Parent's concerns regarding a breach of confidentiality, the District investigated and concluded that a breach did not occur, as the information shared was directory information.
 - b. The District reminded its special education administrators of the need for caution when staff share screens as meetings are held virtually due to the COVID-19 pandemic. Interviews with Mother; screen shot document; District response.
61. On September 10, 2020, a special education coordinator observed the Student virtually for approximately an hour and spoke with the Mother regarding the Student's needs and parent concerns. Based on the observation and information received, the draft IEP was revised and was emailed to the Mother for review prior to the scheduled IEP meeting held later that afternoon.

62. At the IEP meeting held virtually on September 10, 2020, the draft IEP was reviewed with the Mother and her input was requested.
 - a. Parental input was received by the IEP team.
 - b. The draft IEP was reviewed and modified based on team input.
 - c. Placement was discussed, and it was determined a half day program in an ECSE classroom was appropriate at School D.
 - d. The Mother requested services as remote learning is not appropriate for the Student.
 - e. The team discussed that the Student would go to school when the District reopened for in-person learning. Early childhood programs would be opened in the first phase back to school.
 - f. Some students were going into school buildings for evaluations and certain special education services, but parents were not allowed into the building. The Mother clarified that the Parents did not want to drop the Student off at school without being able to come into the building.
 - g. The Mother proposed that the OT, PT and SLP work with the Student's private therapists while school is provided remotely.
63. On September 11, 2020, the IEP final draft was emailed to the Mother for review. The Mother was informed that IEP would be finalized once staff heard back from the Mother, at which time the final IEP and PWN would be provided.
64. On September 14, 2020, the Mother emailed District staff that the only change the Parents would like to see to the IEP was a change to the educational verification to reflect "multiple disabilities" as the Student has multiple disabilities that affect daily life and impact education. The Mother provided a list of the Student's diagnoses.
65. On September 14, 2020, the special education coordinator responded to the Mother's email with the following information:
 - a. The diagnoses provided by the Parent were included into the Student's IEP in the present levels section.
 - b. The Student's educational verification is Other Health Impairment (OHI). Before the verification can be changed an evaluation was needed and an MDT meeting would be scheduled with the Parents to share the results and decide on the educational verification.
 - c. A Consent for Evaluation would need to be signed to give permission to test the Student to obtain updated present levels and review medical information and current diagnoses.
 - d. A Consent for Evaluation form will be sent to the Mother with a return envelope.

- e. A Consent for Initial Provision form needs to be signed to give the District permission to provide special education.
 - f. Information regarding how the Parents wished to proceed with testing and a new MDT was requested.
66. After receiving the Mother's email on September 14, 2020 stating that the only change the Parents wanted was a change to the Student's educational verification, a PWN dated September 10, 2020 was provided to the Parents. The PWN stated in pertinent part:
- a. The Student's needs are best met by receiving special education services in the Early Childhood Special Education Classroom for 3 hours a day.
 - b. The Student will receive speech therapy, occupational therapy, physical therapy, nursing services.
 - c. Student's Mother suggested replacing the option of virtual services until the Student starts school with collaboration time between school staff and private therapy staff.
67. On September 14, 2020, the special education coordinator emailed the Mother to inform her that there were three documents needing parent signature:
- a. Consent for Evaluation for the Student's testing and a new MDT
 - b. Consent for Initial Provision giving the District permission to provide special education services; and
 - c. The IEP signature page from the Student's IEP.
68. On September 14, 2020, the special education coordinator emailed the Mother proposing an IEP meeting for September 16, 2020 with the team at School E, where the ECSE classroom for the Student was located.
69. On September 15, 2020, the Mother emailed School E staff that the Parents were not available for a meeting on September 16, 2020 and asked that times be provided to the Parents for an in-person meeting.
70. On September 15, 2020, the Father emailed District staff and stated in pertinent part:
- a. The IEP did not include a statement that the Student may have frequent absences due to medical conditions that are to be excused absences.
 - b. The IEP did not address the Student's primary immune deficiency diagnosis or neutropenia and need to be on the IEP as they are life threatening.
 - c. On three occasions the District predetermined the Student's educational placement.

- d. A new MDT testing is not needed if the need for a change in educational verification can be determined by the IEP team.
 - e. The nursing approval from the state and the District, combined with physician letters discussing the Student's multiple disabilities was sufficient to determine the Student should be classified as a child with multiple disabilities.
 - f. The Father asked for information regarding what the District did about the FERPA violations that occurred.
71. On September 16, 2020, the special education director emailed the Parents and stated the a change to the Student's educational verification was through a Multidisciplinary Team Meeting (MDT), where the team will consider whether the Student meets the definition of multiple impairments based on the information gathered through the evaluation and current medical information.
72. On September 16, 2020, the Father emailed the special education director asking that an MDT be scheduled as soon as possible. The Father further inquired that if students are going back to in-person learning would the Student be assigned homebound services until it was safe for the Student to return in person to School E, as it was anticipated in-person learning would begin in the near future within the District's schools.
73. On September 16, 2020, the Mother emailed District staff indicating the Parents were assuming the meeting to be scheduled would be with the homebound services team since the Student was ordered to have homebound instruction until COVID-19 was no longer an issue. The Parents did not feel the school team was listening to them or respecting physician orders and asked for an explanation.
74. On September 16, 2020, the Father emailed District staff and stated that the Student should be placed into homebound instruction as approved by the District since in-person learning was starting up. A request to know when homebound would be provided was made.
75. In preparation for in-person instruction, District personnel conducted extensive research and received recommendations from medical and health experts within the state and community regarding the appropriate safety precautions necessary to keep everyone in attendance safe. (Interview with special education director).
76. The District implemented the recommended safety precautions in its schools for in-person attendance which began in September 2020.
77. On September 17, 2020, the Father emailed District staff that the doctor faxed homebound orders directly to the District, and

- homebound services were approved by the District on July 28, 2020. The Father inquired when homebound services would start for the Student since other students were going back to in-person learning, and the Student would only return to the classroom when the doctors felt COVID no longer posed a life or death scenario to the Student.
78. On September 21, 2020, the special education coordinator emailed the Parents and provided the following information:
- a. When the special education coordinator observed the Student on September 10, 2020, she asked the Mother about homebound services for the Student and understood that the Student needs to be home until there is no longer a risk of COVID.
 - b. The Mother informed the special education coordinator that she wanted the Student in school as soon as possible and that homebound services were being requested because remote services were inappropriate for the Student.
 - c. The IEP team discussed the Student starting in the ECSE classroom as soon as students were able to return and the Mother agreed with this recommendation at the IEP team meeting on September 10, 2020.
 - d. The IEP team discussed a meeting with the School E team as soon as possible so the Mother had an opportunity to meet the team and share information with the team members prior to the Student starting at School E.
 - e. Homebound services were not considered during the IEP team meeting because the Mother stated she no longer wanted those services and that the Mother wanted the Student to start school once students begin attending in-person.
 - f. If the Parents want to reconsider homebound services for the Student another IEP meeting is needed since it would be a change of services from what the IEP team decided on September 10, 2020.
 - g. The majority of the IEP would remain the same but the IEP team would need to discuss what special education services will be until the Student can attend school in person.
 - h. Three forms that required parent signature were attached:
 - i. IEP signature page for September 10, 2020 IEP
 - ii. Consent for Evaluation
 - iii. Prior Written Notice for Initial Provision of Special Education Services.

79. On September 21, 2020, the Father responded to the special education coordinator by email and provided the following information:
- a. The doctors asked for homebound, which the District took away.
 - b. Parents have not waived on homebound services.
 - c. Parents will always follow what the doctors feel is safest and best for the Student.
 - d. Parents understood that School E would be the Student's placement once the COVID threat was not present since the District had already approved homebound services.
 - e. The District should have provided PWN when it decided not to provide homebound services after approving such services.
 - f. The Parents understand a new IEP is needed for homebound and the date and time for the IEP and MDT are requested.
 - g. The District may be misinterpreting silence as agreement on the part of the Parents.
80. On September 23, 2020, the special education coordinator emailed the Parents with the following information:
- a. The Student's IEP team from School E was available on September 29, 2020 to discuss the Parents' request for homebound services.
 - b. The Student has nursing as a service on the IEP. In order to provide this service the District needed the Initial Provision of Special Education Services form signed by the Parents.
81. On September 23, 2020 the Father emailed the special education coordinator and clarified:
- a. The homebound request was not the Parents' request.
 - b. Homebound was requested based on a medical order to keep the Student safe, which the District agreed to, but withdrew.
 - c. The Parents never agreed to the changes regarding homebound services.
 - d. The Parents had previously signed the provision of special education.
82. Beginning on September 23, 2020 the District provided in-person instruction five days per week, including for ECSE classrooms. 20-21 District Master Calendar.
83. An IEP meeting was held on September 29, 2020. The team's discussion included:
- a. When the special education coordinator observed the Student on September 10, 2020 it was her understanding that the Parents wanted the Student in school.

- b. The Parent stated that District administrators had agreed to homebound instruction, and a doctor put homebound services in an order.
 - c. Staff clarified that the District is not required to follow the doctor's order. The decision is made by the IEP team.
 - d. The District offered homebound services in July, but subsequently new health precautions were put into place to safely serve students.
 - e. Staff asked for clarification from the Parents and the Student's healthcare professionals what needed to be in place in order for the Student to attend school.
 - f. District staff offered the Parents the following options:
 - i. Services to the Student in the classroom with COVID-19 precautions in place.
 - ii. Remote learning with a nurse in the home.
 - g. The Parent believed that the District predetermined the Student's placement.
 - h. With regard to homebound services, District staff stated that:
 - i. Based on the information in place, the District could not place the Student in homebound services.
 - ii. If the Student's doctor provided the District with additional information regarding what precautions are needed for the Student to attend school and the IEP team determined the District is unable to provide those accommodations, homebound services would be considered.
84. The Student's IEP dated September 10, 2020 was amended to include language that the Parents requested homebound services, that the school team believed the classroom staff could keep the Student safe with the precautions the District had put into place, and listed the school precautions being used to ensure the safety of the Student and other students in the classroom under the supplementary aids and services section.
85. A PWN dated September 29, 2020 was provided to the Parents. The PWN stated in pertinent part:
- a. The Student's Parents are requesting homebound services for the Student for the duration that COVID is a risk to the Student's health.
 - b. The District proposes services in the ECSE classroom with health and safety procedures in place to protect the Student while at school.
 - c. Homebound services were rejected because the District is implementing intensive health and safety procedures in school

- based on the recommendations for medical experts in the community. The procedures are outlined in the Student's IEP.
- d. The proposal is based on the Student's current developmental and educational needs and the previous IEP held on September 10, 2020 where the IEP team agreed that ECSE classroom services were most appropriate for the Student.
 - e. The Mother was notified during the IEP meeting that if the Student's doctor sends information regarding the health practices required to ensure the Student's safety, the District would accommodate those practices.
 - f. If the District is unable to accommodate the required health and safety practices, the District would reconvene to consider homebound services.
86. On September 29, 2020, the Mother emailed District staff and informed them that:
- a. She spoke with some of the Student's medical team and they collectively came up with a list of 14 items the District needed to complete in order for the Student to return safely to in-person learning. The list included:
 - i. Every child and adult must wear gloves, gowns and use N95 masks
 - ii. HEPS filters must be installed school-wide
 - iii. The ionizer cannot be used due to Student's chronic lung disease
 - iv. No fresh fruit, vegetables or flowers can be brought into the school
 - v. The Student cannot be near anyone who had been vaccinated within the previous 2 weeks
 - vi. A sterile environment for tube feeds
 - vii. The Student cannot be near anyone who has traveled outside the country within the previous 4 weeks
 - viii. The Student cannot be near anyone with a temperature
 - ix. The Student cannot be near anyone who has been exposed to COVID, including family members
 - x. No bodies of stagnant water at school
 - xi. No paper money or newspapers at school
 - xii. Inform the family of another student that is not immunized that the Student can put other immunocompromised children at risk.
 - xiii. Provide the Student a mask exemption

- xiv. Ensure the COVID scale is green or “low”
 - b. If the list of items could not be completed, the Student needed to be provided homebound services.
 - c. The District has repeatedly refused to provide the Parents with remote learning data showing remote learning is not an appropriate educational placement for the Student.
87. The District received additional medical information from the Student's health care providers after October 1, 2020.

Issue # 1

Did the District afford Student's Parents an opportunity to participate in meetings regarding the identification, evaluation, educational placement, and provision of a free appropriate public education? [92 NAC 51-009.01A]

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 of the child.*

School districts must make a reasonable effort to ensure that parents are given the opportunity to meaningfully participate in the IEP process. Districts should consider parent suggestions and, to the extent appropriate, incorporate them into the IEP. However, the requirement that parent suggestions be considered does not mean that the District must acquiesce in every instance. The IDEA does not require that districts “simply to accede to parents’ demands without considering any suitable alternatives. *Blackmon v. Springfield R-XII Sch. Dist.*, 31 IDELR 132 (8th Cir. 1999).

Allegations/Parents’ Position

The Parents assert that the District failed to provide Student with homebound services as ordered by the Student's physician due to Student's multiple disabilities, to which the District had agreed to provided.

The Parents further assert that the District refused to change Student's primary disability from “Other Health Impairment” to “Multiple Disabilities.”

District Response

On July 28, 2020, District staff informed the Parents that homebound services were approved since the Student's doctor stated that it was unsafe for the Student to return to school. The Parents were further informed that an IEP team meeting would need to be held. At the time the Parents were informed that

homebound services could be provided, the District was planning to return to school 100% in person in August. After an IEP meeting was scheduled, but before it was held, the District announced that the school year would begin with 100% remote learning, and that there would be no in-person instruction.

The District asserts that it informed the Parents of the IEP team process for changing a student's educational verification and provided the Parents with the necessary form in order to receive parent consent to begin the process.

Investigative Findings

The Parents participated in the four IEP meetings regarding the Student that were held on September 13, 2019, April 23, 2020, September 10, 2020, and September 29, 2020. In each of these IEP meetings the Parents provided input regarding their child's needs and the educational services and placement the Parents wanted for the Student. Based on parent input, changes were made to the draft IEPs discussed in each of the IEP meetings. It is clear that not all of the Parents' requests were included when the IEPs were finalized. PWN was provided to the Parents after each of the four IEP meetings, informing them of the District's offer of FAPE. (Fact 2, 3, 4, 37, 63, 67, 84 and 86.).

The Parents made multiple requests for homebound services for the Student beginning in mid-July, 2020 (Fact 41). On July 28, 2020, District staff provided the Parents with an email stating that homebound services would be provided based on the information received from the Student's doctor (Fact 42). The Parents were informed in that email and by email on August 28, 2020 an IEP team meeting must be held in order for the IEP to be amended to reflect a change in placement (Fact 42 and 57). District staff also addressed the Parents' requests for homebound services on multiple occasions (Fact 45, 78, 80, 83 and 84).

At the September 10, 2020 IEP team meeting, the team discussed an ECSE program for the Student at School E and discussed District personnel collaborating with the Student's private therapy providers so that staff was prepared for the Student on the first day school reopened for in-person instruction (Fact 62). After the IEP meeting, the IEP was sent to the Mother for her review with the agreed-upon changes discussed during the meeting and asked if she had any concerns about its content (Fact 63). The response received by the District was that the only change requested was a change to the Student's educational verification (Fact 64). The District then finalized the IEP and provided PWN to the Parents (Fact 66).

Based on the Parents' request that the Student's educational verification be changed, the Parents were informed of the assessment process and were

provided with the consent form needed by the District to begin conducting assessments (Fact 65 and 71). The information collected through the assessment process would then be viewed by the IEP team to determine which educational verification best identified the Student. The Father emailed his disagreement that further assessments were necessary, as he believed there was current existing information that identified the Student's multiple disabilities (Fact 70). Although the Father was in disagreement that additional assessments were necessary, the District followed the proper procedures to address the possible change in the Student's educational verification.

At the September 29, 2020 IEP team meeting the Parents made it very clear that they were requesting homebound services for the Student, at the request of the Student's health care providers (Fact 83 and 85). However, the only information that the District received on behalf of the Parents' request was the physician's request for homebound services on July 13, 2020, which simply stated "home bound schooling" and identified the Student's diagnoses (Fact 41). District staff explained to the Parents that the original homebound services request had been received when the District was intending to begin the 2020-21 school year with in-person instruction (Fact 42, 45, 83 and 85). The District subsequently determined to begin the school year with remote services for all students due to the COVID-19 pandemic (Fact 45). Further, in an effort to begin in-person services as soon as it was safe to do so, District staff reached out to health care professionals at the national, state and local levels for guidance on the appropriate actions and precautions to take in school buildings to ensure the safety of students and staff and implemented those precautions when in-person instruction began in September. (Fact 75 and 76).

The precautions that were implemented by the District in each school building and classroom as it phased into in-person learning in September were discussed at the September 29, 2020 IEP meeting with the Parents (Fact 85). The Parents were requested to provide information from the Student's physicians regarding what precautions were needed in order to keep the Student safe, at which time the IEP team would convene and revisit whether homebound services were appropriate, based on a review of the precautions already in place, whether additional precautions could be put in place, or whether the precautions identified by the Student's physicians were not possible to put in place in the school setting (Fact 85). PWN of the IEP team's decision was provided to the Parents (Fact 85).

While the Mother provided an email to the District on September 29, 2020 after the IEP meeting, and listed 14 items the District needed to complete in order for the Student to safely return to in-person learning based on discussions she had

with the Student's medical team, the information did not come from the medical team directly (Fact 86). Information from the Student's medical team was not available for the IEP team to review on September 29, 2020, other than the original request for homebound services received by the District on July 13, 2020, and additional information was not received by the district until after the Parents filed their complaint (Fact 41 and 87).

Based on the facts, the Parents have been afforded an opportunity to participate in meetings with respect to the identification, evaluation and educational placement of the Student and the provision of FAPE of the Student.

Summary and Conclusions

Based on the information discussed above, the District implemented the requirements of 92 NAC 51-007.07C4 and **no corrective action** is required.

Issue # 2

Did the District ensure that Student's education placement was made by a group of persons, including the Parents and other individuals knowledge about the child, the meaning of the evaluation data and the placement options and was made in conformity with the least restrictive environment requirements? [92 NAC 51-008.01C]

92 NAC 51-008.01C states:

008.01C *In determining the educational placement of a child with a disability, including a preschool child with a disability, school districts and approved cooperatives must ensure that:*

008.01C1 *The placement decision is made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and*

008.01C2 *The placement decision is made in conformity with the least restrictive environment requirements in 92 NAC 51-008.01 and based on the child's unique needs and not the child's disability.*

Placement decisions must be made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the

evaluation data, and the placement options. Placement decisions must be in conformity with the least restrictive environment (LRE) requirements. Once the IEP is developed, the IEP team makes a placement decision. *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994). The IEP team should consider a continuum of alternative placements in which the IEP can be implemented. What is relevant in making a placement determination will differ greatly depending on the individual needs of a particular student.

LRE requirements mandate that students be educated in regular classroom settings to the maximum extent appropriate. Further, special classes, separate schooling, or other removal of children with disabilities from the regular educational environment may only occur if the nature or severity of the disability is such that education in regular classes, with the use of supplementary aids and services, cannot be achieved satisfactorily. 34 CFR 300.114.

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

The LRE mandate does not override the FAPE requirement. If a child's placement does not confer a "meaningful benefit" to the student and a more restrictive program is likely to provide such benefit, the child is entitled to be placed in that more restrictive environment. See *Hartmann v. Loudoun County Bd. of Educ.*, 26 IDELR 167 (4th Cir. 1997), cert. denied, 111 LRP 18076, 522 U.S. 1046 (1998).

Predetermination occurs when district members of an IEP team unilaterally decide a student's placement in advance of an IEP meeting. The difference between preparation and predetermination is the district's willingness to have an open mind and listen to the parents' concerns. *T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 253 (2d Cir. 2009). A district can avoid predetermination by documenting the parents' input and noting the changes to the completed IEP. *A.P. and S.P. v. New York City Department of Education*, 66 IDELR 13 (S.D.N.Y. 2015).

Allegations/Parents' Position

All of the allegations and Parents' positions discussed above in the previous sections are incorporated herein by reference.

The Parents assert that the District predetermined the Student's educational placement when an individual not part of the Student's IEP team made the decision that the Student would not receive homebound services.

District Response

All of the District's responses discussed above in previous sections are incorporated herein by reference.

The District asserts that the Student's placement was determined through the IEP team, and no predetermination occurred.

Investigative Findings

A discussion of the facts surrounding the Parents' request for homebound services is set forth above in the Investigation Findings regarding Issue #1. The Parents were initially led to believe the Student would receive homebound services based on the email received on July 28, 2020 when staff indicated homebound services would be provided based on the doctor's note that was received (Fact 42). However, District staff informed the Parents in the July 28, 2020 email and by email on August 28, 2020, that an IEP team meeting would need to be convened and the Student's IEP amended before a change in placement could occur (Fact 57).

Although the Parents believe that predetermination occurred when District staff informed them that the District would not provide homebound services without an IEP team meeting, the District would have predetermined placement had it amended the Student's IEP to provide for homebound services as requested by the Parents without an IEP meeting. Since no change in placement occurred, no PWN was required to be issued by the District.

As discussed in Issue #1, the Parents were involved in two IEP team meetings where placement was determined after their request for homebound services in July 2020. At the September 10, 2020 IEP team meeting, the team discussed the Student's attendance at an ECSE classroom at School E, the Mother was in agreement at that time, and there was consensus that the placement was appropriate for the Student once in-person instruction resumed, which was anticipated to occur in the next few weeks (Fact 62, 64 and 66).

During July, August and September 2020, and at the September 29, 2020 IEP meeting the Parents made it very clear that they were requesting homebound services for the Student's placement (Fact 41, 51, 55, 56, 58, 72, 73, 74, 77, 79, 81,

83, 84 and 85). However, the IEP team is required to determine the LRE placement for the Student, and whether the use of supplementary aids and services could be used to allow the Student to attend an ECSE classroom, a less restrictive educational environment than homebound services.

Although the Parents were not in agreement, the school members of the IEP team believed more information was needed before the team could conclude that a more restrictive learning environment - homebound services - was necessary for the Student. PWN was provided to the Parents declining to provide the homebound services placement (Fact 85). While recommendations from the Student's medical team must be considered by the IEP team, the determination of an appropriate educational placement in the LRE is an IEP team's decision, not a medical decision.

Summary and Conclusions

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

Issue #3

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

92 NAC 51-007.02 states:

007.02 *School districts or approved cooperatives must provide special education and related services to a child with a disability in accordance with the child's IEP.*

As soon as possible following the development of an IEP, the special education and related services must be made available to the child in accordance with the child's IEP. 34 CFR § 300.323(c)(2). School districts are required to ensure that students' IEPs are implemented by each regular education teacher, special education teacher, the related services provider, and any other service provider responsible for its implementation. 34 CFR § 300.323(d).

A child who needs school health services or school nurse services in order to receive FAPE must be provided such services, as indicated in the child's IEP. 71 Fed. Reg. 46,574 (2006). When an IEP requires a nurse to provide services, district should plan to have coverage during absences.

If a school district closes its schools to slow or stop the spread of COVID-19, there may be exceptional circumstances that could affect how a particular service is provided to a student. An IEP team would be required to make an individualized determination as to whether educational services can be

provided. If a student does not receive services after an extended period of time, an IEP team would be required to make an individualized determination whether and to what extent compensatory services may be needed, including to make up for any skills that may have been lost. *Questions and Answers on Providing Services to children with Disabilities During the Coronavirus Disease 2019 Outbreak* (OSEP 2020).

If a school district continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. To the greatest extent possible, each student with a disability must be provided the special education and related services identified in the student's IEP. *Questions and Answers on Providing Services to children with Disabilities During the Coronavirus Disease 2019 Outbreak* (OSEP 2020).

Districts are responsible for providing educational services set forth on a student's IEP only during the time period that a parent has provided consent for special education and related services. Pursuant to the IDEA, parents may revoke consent for the continued provision of special education and related services at any time. Once a parent revokes consent in writing, a district may not continue to provide special education and related services to a student but must provide PWN before ceasing the provision of special education and related services. 34 CFR § 300.300(d)(4).

Allegations/Parents' Position

All of the allegations and Parents' positions discussed above in the previous sections are incorporated herein by reference.

The Parents assert that the District failed to implement Student's IEP when staff isolated and physically restrained the Student for "safety reasons" and when it failed to provide the Student with a nurse at school.

The Parents further assert that the District failed to accurately document Student's progress on the IEP goals during the time the Student was participating in remote learning.

District Response

All of the District's responses discussed above in previous sections are incorporated herein by reference.

The District denies that restraint or seclusion occurred with the Student while in attendance at School A.

The District asserts that appropriate Progress Reports were provided to the Parents.

Investigative Findings

October 30, 2019 through November 20, 2020

The Student attended School A from October 30, 2019 through November 20, 2019 (Fact 6 and 18). At the time the Student attended School A the IEP dated September 13, 2019 provided that the Student's educational program consisted of five mornings per week in an ECSE classroom (Fact 3). The Student attended three days a week, on Monday, Tuesday, and Wednesday, when a nurse was available. However, the Student was unable to attend class on Thursday and Friday as a nurse was not available to care for the Student on those days (Fact 8).

The Student received the services identified on the IEP consisting of the early childhood special education, speech language therapy, physical therapy and occupational therapy while in attendance during this time, but only during the three days the Student was in attendance (Fact 3 and 8).

The Parents believed the Student's assigned nurse was not spending her time solely with the Student but was acting as an aide in the classroom due to a shortage of staff. On the three occasions that the Mother observed the classroom the nurse was in the classroom but was not always in arm's reach of the Student (Fact 9, 11 and 13). The nurse did attend to several other students when those students appeared to be upset, but the nurse did not attend to other students on a regular basis. Other staff worked directly with the Student during which time the nurse was not immediately needed. There was no evidence that the Student was in medical distress while attending School A, nor was there any indication that the school nurse services were not provided to the Student during that time.

The Parents believed that the Student was isolated and secluded by staff due to the arrangement of the classroom, where there were bins, totes, and other items that "barricaded" the Student in one location (Fact 9, 11, 24, 25, 26, 48, 51 and 55). The Parents were concerned that the Student would climb on various items, causing a safety risk to the Student and others. The classroom was arranged to have different areas with activities for the students and the items appropriate for each activity were located in those different areas of the classroom (Fact 6). There was no evidence that the Student was barricaded by the arrangement of the classroom, nor was the Student unable to freely move around the room. On one occasion the Student was seen standing on a small couch, which could have been a safety issue, but the nurse assigned to the Student directed the

Student to sit (Fact 12). The Student was able to be near other students in the classroom at various times, as demonstrated by the photographs provided by Parents (Fact 17).

The Parents believed that the Student was restrained by a staff member by placing a leg over the Student in order to force feed the Student breakfast, and that the Student should not have been fed, as the Student had a g-tube (Fact 9). The Student's IEP dated September 13, 2019 had a short-term objective that provided for participating at mealtime to eat at least $\frac{1}{4}$ of the meal orally and not throw food during mealtime (Fact 3). The Student's IEP was discussed during a meeting on September 27, 2019 and the nurse in attendance discussed the process for feeding food to the Student while at school (Fact 5). The nurse assigned to the Student was the only person in the classroom who fed the Student (Fact 10). There is no indication that the nurse, or another staff member in the classroom, attempted to restrain the Student during breakfast, nor does the photograph provided by the Parents showing the Student being fed reveal any attempt to restrain the Student, or that the Student was force fed food (Fact 17).

The Parents further believed that the Mother saw the Student harm another student by pulling her hair while visiting the classroom on November 20, 2019 (Fact 13). However, the information reveals that two staff members were next to the Student and one of the staff members removed the Student's hand from the little girl's hair. No harm to another student was caused by the Student (Fact 14 and 15).

What is disconcerting, however, is the fact that the principal's email to the Father setting forth the principal's understanding of what occurred in the classroom on November 20, 2019 was modified and forwarded to the Student's nurse, who had resigned. The principal was surprised to receive an email from the nurse in response to the modified email, as he had not sent the initial email to her (Fact 20 and 21).

The Parents were provided a first quarter Progress Report dated December 20, 2019, which set forth an overview of the Student's progress towards meeting each goal (Fact 23).

From October 30, 2019 to November 20, 2020, the District failed to provide all of the special education and related services to Student as identified on the Student's IEP, as the Student was only able to attend school three days a week when the nurse was available.

November 21, 2020 through March 13, 2020

The last day of the Student's attendance at School A was November 20, 2019 because the school nurse assigned to the Student resigned from her position (Fact 18). Between November 21, 2020 and early January 2020 District staff received several emails from the Parents regarding their concerns, and staff responded to those emails (Fact 19, 20 and 24).

A meeting with the Mother and District staff occurred on January 10, 2020, at which time the Parents' concerns were discussed, as well as a different school for the Student to attend (Fact 26). Further, on January 27, 2020, in response to the special education supervisor's voice mail message regarding obtaining a school nurse from a particular private company, the Mother responded that the Parents were not willing to use that company for nursing services (Fact 27).

The Student's IEP dated September 13, 2019 specifically provided that the Student would receive a "1:1 nurse" five times per week as a designated supplementary aid and service (Fact 3). While the District provided a nurse to accompany the Student to school three days a week from October 30, 2019 to November 20, 2019, the District did not provide nursing services for two days a week because a nurse was not available (Fact 8). Additionally, the District did not offer nursing services to the Student after November 20, 2020 when the nurse that accompanied the Student three days a week resigned her position (Fact 22, 27, and 31).

On February 3, and February 12, 2020, the Mother informed staff that that the Student's pediatrician did not feel it was safe for the Student to return to school until after flu season (Fact 29 and 30). However, the District did not request any documentation from the Student's doctor, nor did the District explore whether the Student might be able to attend when accompanied by a 1:1 nurse.

From November 21, 2019 to March 13, 2020, the District failed to provide special education and related services to the Student as identified on the Student's IEP. Because the Student had not attended school, nor had the Student been observed by staff, a Progress Report was not provided to the Parents.

March 16, 2020 through May 15, 2020

From March 16, 2020 to May 15, 2020, the last day of the 2019-20 school year, the District provided remote learning to all students due to the COVID-19 pandemic. No in-person instruction was provided due to health and safety concerns for students and staff (Fact 32). To address the closure of schools, and to determine the needs of each student with a disability, District staff contacted parents and arranged IEP meetings to discuss each students' needs and what services, if any, could be provided remotely (Fact 34, 35 and 36). Beginning on

March 16, 2020, the District provided learning packets for all students and phased in remote learning (Fact 32).

The Student's Mother contacted the special education teacher at School C on April 12, 2020 and asked what educational services would be available for the Student (Fact 33). The Parents were informed of the need for an IEP team meeting, and the Student's IEP team, including both Parents, met virtually on April 23, 2020 and determined that due to the Student's disabilities, the Student was not able to participate in remote learning (Fact 35, 36 and 37). Instead, it was agreed that weekly emails would be provided to the Parents with suggested activities for the Student (Fact 37). Although the sudden school closures affect all students, the District continued to provide educational opportunities to the general student population, and to the greatest extent possible, had an obligation to provide the Student with the special education and related services identified in the Student's IEP.

The Student's IEP team discussed how best to support the Parents during the remote learning, but staff were unable to provide the Student with services, as schools were closed and the Student was unable to participate in remote learning (Fact 37). It is clear that the emails provided to the Parents with suggestions for activities to try at home were not sufficient to provide the special education and related services to the Student as set forth in the September 13, 2019 IEP (Fact 38 and 39). From March 16, 2020 to May 15, 2020, the District was unable to provide special education and related services to Student.

The District provided the Parents with a fourth quarter Progress Report dated May 15, 2020 which set forth the IEP team's decision to provide emails with activities and strategies that the Parents could use with the Student while in the home (Fact 40).

[May 16, 2020 through August 12, 2020](#)

The Student's IEP dated September 13, 2019 provided that the Student was not eligible for extended school year services (Fact 3). Based on the Student's IEP, the District did not have an obligation to provide special education and related services to Student or report the Student's progress from May 16, 2020 through August 12, 2020.

[August 13, 2020 through August 30, 2020](#)

On August 13, 2020, the Mother withdrew the Student from the District (Fact 50). The Parents subsequently requested by email on August 25, 2020 that the District reenroll the Student and set forth their rationale as to why they initially requested the Student be withdrawn from the district (Fact 55). Pursuant to the Parents' request, the Student was reenrolled in the District effective August 31, 2020 (Fact

57 and 59). From August 13, 2020 through August 30, 2020 the Student was not enrolled in the District and it had no obligation to provide the Student with special education services.

August 31, 2020 through September 22, 2020

Although the District initially intending to begin the 2020-21 school year with in-person instruction, it began with 100% remote learning, which continued until September 23, 2020 when in-person instruction five days a week was implemented, including for the ECSE classrooms. (Fact 44 and 82).

The Parents were previously provided with PWN when the District began remote learning during spring 2020, when it was determined that the Student was not able to participate in remote learning (Fact 37). As discussed above, it is clear that the Student's inability to participate in remote learning resulted in the District's inability to provide the Student with special education services from August 31, 2020 through September 22, 2020.

September 23, 2020 to September 30, 2020

The District provided the Parents with a draft IEP on August 7, 2020, an updated draft on September 10, 2020, which was finalized at the IEP meeting on September 10, 2020 (Fact 46, 61 and 62). The Parents were provided with the IEP and PWN as the District's offer of FAPE (Fact 66). The IEP was revised on September 29, 2020 to include the IEP team's discussion regarding the Parents' request for homebound services, and PWN was provided to the Parents (Fact 84 and 85).

Although District staff, on several occasions, requested the Parents sign the IEP and sign for consent to provide special education services (Fact 65, 67 and 78), the Parents had not withdrawn their consent for special education. Although the Parents had withdrawn the Student from the District on August 12, 2020, and subsequently reenrolling the Student effective August 31, 2020 their actions did not result in the Parents' withdrawal of consent to provide special education services.

The District finalized the Student's IEP and provided the Parents with Written Notice dated September 10, 2020, as the District's offer of FAPE (Fact 66). The IEP provided that the Student would attend an ECSE classroom for in-person instruction, which the District had available for the Student at School E. However, the Parents disagreed with the placement, and made it clear that they would not send the Student to school.

At the IEP team meeting held on September 29, 2020 to discuss the Parents' request for homebound services, the Student's IEP was revised slightly to reflect

the team's discussion regarding homebound services, and PWN was provided to the Parents as the District's offer of FAPE, which the Parents were not in agreement with (Fact 83, 84 and 85). The evidence shows that the District offered special education and related services to the Student effective September 23 through September 30, 2020.

Corrective Action

Based on the information discussed above, the District failed to fully implement the requirements of 92 NAC 51-007.02 and the following corrective action is required.

1. For the time period of October 30, 2019 to November 20, 2019: The District shall make 12 hours of compensatory services available to the Parents for the time the Student was unable to attend school due to the unavailability of a nurse on Thursdays and Fridays.
 - a. 12 hours of academic and nursing services provided by a fully credentialed special education instructor and nurse
 - b. A team comprised of the District representatives and the Parents shall determine the schedule for provision of compensatory services for the remainder of the 2020-21 school year and beginning of the 2021-22 school year.
 - c. Compensatory services shall be completed by February 1, 2021. Student absence or refusal of the Parents to make the child available shall result in a waiver of service scheduled for that day. Staff absence, including the absence of a nurse, must be rescheduled. Any compensatory services declined or not utilized by February 1, 2021 shall be deemed waived (assuming the District has made a good faith effort to timely commence and provide all compensatory service).
 - d. The schedule for compensatory services shall be provided to NDE within 30 days from the date of this decision (November 30, 2020).
 - e. Service provider logs verifying completion of all compensatory education and nursing services must be submitted to NDE monthly until the service is complete and all service has been verified.
2. For the time period of November 21, 2019 to March 15, 2020: The District shall make 177 hours of compensatory services available to the Parents for the time the Student was unable to attend school due to the unavailability of a nurse.

- a. 177 hours of academic and nursing services provided by a fully credentialed special education instructor and nurse
 - b. A team comprised of the District representatives and the Parents shall determine the schedule for provision of compensatory services for the remainder of the 2020-21 school year and beginning of the 2021-22 school year.
 - c. Compensatory services shall be completed by October 1, 2021. Student absence or refusal of the Parents to make the child available shall result in a waiver of service scheduled for that day. Staff absence, including the absence of a nurse, must be rescheduled. Any compensatory services declined or not utilized by October 1, 2021 shall be deemed waived (assuming the District has made a good faith effort to timely commence and provide all compensatory service).
 - d. The schedule for compensatory services shall be provided to NDE within 30 days from the date of this decision (November 30, 2020).
 - e. Service provider logs verifying completion of all compensatory education and nursing services must be submitted to NDE monthly until the service is complete and all service has been verified.
3. For the time period March 16, 2020 to May 15, 2020: The Student's IEP team shall convene a facilitated meeting by February 1, 2021 to review the Student's need for recovery services due to school closure resulting from the COVID-19 pandemic.
- a. A team comprised of the District representatives and the Parents shall determine what recovery services are needed to allow the Student to be at the skill level the Student would have been at if school were in session and determine a schedule for those recovery services to be provided during the remainder of the 2020-21 school year and beginning of the 2021-22 school year.
 - b. Recovery services shall be completed by October 1, 2021. Student absence or refusal of the Parents to make the child available shall result in a waiver of service scheduled for that day. Staff absence, including the absence of a nurse, must be rescheduled. Any recovery services declined or not utilized by October 1, 2021 shall be deemed waived (assuming the District has made a good faith effort to timely commence and provide all compensatory service).

- c. The schedule for recovery services shall be provided to NDE within 10 days from the date facilitated IEP but no later than February 11, 2021.
 - d. Service provider logs verifying completion of all recovery education and nursing services must be submitted to NDE monthly until the service is complete and all service has been verified.
- 4. For the time period August 31, 2020 through September 22, 2020: The Student's IEP team shall convene a facilitated meeting by February 1, 2021 to review the Student's need for recovery services due to school closure resulting from the COVID-19 pandemic.
 - a. A team comprised of the District representatives and the Parents shall determine what recovery services are needed to allow the Student to be at the skill level the Student would have been at if school were in session and determine a schedule for those recovery services to be provided during the remainder of the 2020-21 school year and beginning of the 2021-22 school year.
 - b. Recovery services shall be completed by October 1, 2021. Student absence or refusal of the Parents to make the child available shall result in a waiver of service scheduled for that day. Staff absence, including the absence of a nurse, must be rescheduled. Any recovery services declined or not utilized by October 1, 2021 shall be deemed waived (assuming the District has made a good faith effort to timely commence and provide all compensatory service).
 - c. The schedule for recovery services shall be provided to NDE within 10 days from the date facilitated IEP but no later than February 11, 2021.
 - d. Service provider logs verifying completion of all recovery education and nursing services must be submitted to NDE monthly until the service is complete and all service has been verified.
- 5. The District shall review and revise, if necessary, the policies, procedures and practices regarding the provision of school nursing services for individual students.
- 6. The District must develop and provide training to staff in the District regarding requirements to provide the related services set forth on each student's IEP.

7. The District must provide the NDE Complaint Investigator with copies of the training materials and handouts used and participant sign-in sheets at the conclusion of the training(s).

Issue #4

Did the District afford Student's Parents an opportunity to inspect and review education records relating to Student? [92 NAC 51-009.03]

92 NAC 51-009.03 states:

009.03 *Opportunity to Examine Records*

009.03A *The parents of a child with a disability must be afforded, in accordance with the procedures of 92 NAC 51-009.03, an opportunity to inspect and review all education records with respect to: the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child.*

009.03B *Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained or used by the participating agency. The participating agency shall comply with such a request without unnecessary delay and before any meeting regarding an individualized education program or hearing pursuant to 92 NAC 55 or resolution session and in no case more than 45 days after the request has been made.*

Each school district must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the district. Education records are those records defined in the Family Educational Rights and Privacy Act. 34 CFR 300.611 and 300.613.

Education records are defined as those records that are directly related to a student and maintained by the school district, or by a party acting for the district. 34 CFR 99.3. Education records are records that exist at the time a parent requests to review the records. Not included within the definition of education records are records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute. 34 CFR 99.3.

Allegations/Parents' Position

All of the allegations and Parents' positions discussed above in the previous sections are incorporated herein by reference.

The Parents assert that that the District failed to provide Parents with certain education records, including a homebound placement record, incident reports, data collected for remote learning at school C, and PT, OT and speech documentation for remote learning at School C.

District Response

All of the District's responses discussed above in previous sections are incorporated herein by reference.

The District asserts that a copy of all of the Student's education records was provided to the Parents.

Investigative Findings

The facts established that all of the Student's education records that existed at the time the Mother made her request were provided to the Parents (Fact 53). The Parents were asking for records that did not exist (Fact 52), and the District had no obligation to generate records.

The District did not have a homebound placement record, as the issue of homebound as an educational placement was required to be decided by the Student's IEP team. The Parents sought incident reports regarding their assertions that the Student was restrained and secluded, but District staff did not find that restraint or seclusion occurred, and no incident reports were generated. The Student did not attend remote learning, as the IEP team determined remote learning was not appropriate for the Student, and no data was collected by staff (Fact 37 and 49). The Parents did receive a Progress report from the District dated May 15, 2020, in which the PT, OT and SLP provided an overview of the suggestions that were provided to the Parents for activities to try at home with the Student during the remote learning that occurred prior to the end of the 2019-20 school year (Fact 40). The District provided the Parents with a copy of the Student's education records to the extent those records existed.

Summary and Conclusions

Based on the information discussed above, the District implemented the requirements of 92 NAC 51-007.07C4 and **no corrective action** is required.

Did the District protect the confidentiality of Student's personally identifiable information? [92 NAC 51-009.03K]

92 NAC 51-009.03K states:

009.03K *Safeguards*

009.03K1 *Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.*

Education records are defined as those records that are directly related to a student and maintained by the school district, or by a party acting for the district. 34 CFR 99.3.

A school district may disclose personally identifiable information from an education record of a student without parental consent if the disclosure is to a contractor or other party to whom the district has outsourced institutional services or function that the district would otherwise use employees, is under the direct control of the district with respect to the use and maintenance of education records and is subject to the requirements governing the use and redisclosure of personally identifiable information from education records.

Directory information is information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. Directory information from student records that can be released to the public without parental consent. The District has identified the following information to be directory information:

- Name
- Grade level
- Date and place of birth
- Dates of attendance
- The current and most recent educational agency or institution attended
- Major field of study
- Degrees, honors, and awards received
- Participation in officially recognized activities and sports
- Weight and height of members of the athletic teams
- Photograph

Directory information includes a student's ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or

communicating in electronic system, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password or other factor know or possessed only by the authorized user. 34 CFR 99.3.

Allegations/Parents' Position

All of the allegations and Parents' positions discussed above in the previous sections are incorporated herein by reference.

The Parents assert the following violations occurred:

- The Student's privacy rights were violated when a special education teacher shared the text sent by the Mother with the Student's school nurse.
- The Student's privacy rights were violated when personally identifiable information was accessible to other individuals not part of Student's team.
- District staff communicated with individuals outside of the District regarding the Student's medical needs without a release from the Parents.

District Response

All of the District's responses discussed above in previous sections are incorporated herein by reference.

The District denies a violation of the confidentiality of the Student's records occurred.

The District acknowledged that a staff member inadvertently showed a screen shot during the Student's sibling's IEP meeting that set forth the names of seven students, including the Student's, as well as certain related information on all seen of the students. The District conducted an internal investigation and concluded no breach of confidentiality occurred, as the student names were directory information.

The District acknowledged that it obtained information from national, state and local health care providers and other experts regarding how best to protect the health and safety of all students in the school setting due to the COVID-19 pandemic, but denied that staff discussed the Student's individual medical or safety needs with health care providers or other experts.

Investigative Findings

Shared Text Message

It is unclear whether the special education teacher showed the school nurse the Mother's text or read it to her. The special education teacher, upon receiving the text from the Mother, told the school nurse that the Student was her main priority and the other students in the classroom would be assisted by other classroom staff (Fact 16).

If the text message was shared with the school nurse, no breach of confidentiality occurred, as the District had an agreement with the nurse's employing agency (Fact 7). The agreement addressed the confidentiality of education records and established that the agency's employees and agents were subject to the District's policies on the confidentiality of student information and would comply with the policies. The agreement further recognized that student information may be shared. The school nurse was performing a service that the District would otherwise have provided with an employee. The District did not violate the confidentiality of the Student's personally identifiable information.

Student Information

The screen shot of the staff member's computer screen showed the names of seven students, including the Student's, with the same or similar last names. In addition to each student's name, the student's grade was identified, each student's ID number was set forth, as well as a partial birthdate (Fact 60).

District policy establishes that a student's name, grade level and date of birth are directory information and may be released without prior parent consent. Further, each student's ID number constitutes directory information as it is not possible to access the student's education records without a PIN or other verifier. The District did not violate the confidentiality of the Student's personally identifiable information.

Health and Safety Information

In order to speak directly to the Student's medical providers, a signed release from the Parents would be necessary. While District staff conducted extensive research to obtain information from national, state and local health care providers regarding the best means by which to keep students safe while attending school in-person due to the COVID-19 pandemic, there is no evidence that school personnel discussed the Student's specific needs with any health care providers or other individuals or agencies outside of the District (Fact 75). The District did not violate the confidentiality of the Student's personally identifiable information.

Summary and Conclusions

Based on the information discussed above, the District implemented the requirements of 92 NAC 51-007.07C4 and **no corrective action** is required.

Issue #6

Did the District deny Student a free appropriate public education? [92 NAC 51-003.24]

92 NAC 51-003.24 states:

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

Federal regulations provide that a free appropriate public education (FAPE) means special education and related services that: 1) are provided at public expense, under public supervision and direction without charge to parents; 2) meet the standards of the state educational agency (SEA), including the requirements of the IDEA; 3) include an appropriate preschool, elementary school, or secondary school education in the State involved; and d) are provided in conformity with an individualized education program (IEP). 34 CFR 300.17.

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

Although school districts must strive to fully implement IEPs, the IDEA does not require perfect adherence. "A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Van Dun ex. rel. Van Dun v. Baker Sch. Dist.* 5J, 502 F. 3d 811, 821 (9th Cir. 2007). A review of the circumstances involved in the implementation of the IEP must be completed to determine whether FAPE was denied. *A.P. v. Woodstock Board of Educ.*, 55 IDELR 61 (2d Cir. 2010, unpublished).

Allegations/Parents' Position

All of the allegations and Parents' positions discussed above in the previous sections are incorporated herein by reference.

District Response

All of the District's responses discussed above in previous sections are incorporated herein by reference.

Investigative Findings

As set forth in Issue #3, the District failed to provide the Student with special education and related services, resulting in a material failure and a denial of FAPE as follows:

October 30, 2019 through November 20, 2020

From October 30, 2019 to November 20, 2020, the Student's IEP provided for five days a week of special education and related services, but the District only provided three days a week of services. This resulted in a material failure to provide two days a week of special education and related services to the student, resulting in a denial of FAPE.

November 21, 2020 through March 13, 2020

From November 21, 2019 to May 15, 2020, the District failed to provide special education and related services to the Student as identified on the Student's IEP, resulting in a denial of FAPE.

March 16, 2020 through May 15, 2020

From March 16, 2020 to May 15, 2020, the District was unable to provide special education and related services to Student due to the closure of schools and the Student's inability to participate in remote services, resulting in a denial of FAPE.

May 16, 2020 through August 12, 2020

The District did not have an obligation to provide special education and related services to the Student from May 16, 2020 through August 12, 2020. No denial of FAPE occurred.

August 13, 2020 through August 30, 2020

During the time the Student was not enrolled in the District from August 13, 2020 to August 30, 2020, the District did not have an obligation to provide special education and related services to the Student. No denial of FAPE occurred.

August 31, 2020 through September 22, 2020

From August 31, 2020 to September 23, 2020, the District was unable to provide special education and related services to Student due to the closure of schools and the Student's inability to participate in remote services, resulting in a denial of FAPE.

September 23, 2020 to September 30, 2020

From September 23, 2020 to September 30, 2020, the District offered special education and related services to the Student. No denial of FAPE occurred.

Corrective Action

Based on the information discussed above, the District did not fully implement the requirements of 92 NAC 51-003.24 and the following corrective action is required, consisting of the same corrective action as set forth in Issue #3.

1. For the time period of October 30, 2019 to November 20, 2019: The District shall make 12 hours of compensatory services available to the Parents for the time the Student was unable to attend school due to the unavailability of a nurse on Thursdays and Fridays.
 - a. 12 hours of academic and nursing services provided by a fully credentialed special education instructor and nurse
 - b. A team comprised of the District representatives and the Parents shall determine the schedule for provision of compensatory services for the remainder of the 2020-21 school year and beginning of the 2021-22 school year.
 - c. Compensatory services shall be completed by February 1, 2021. Student absence or refusal of the Parents to make the child available shall result in a waiver of service scheduled for that day. Staff absence, including the absence of a nurse, must be rescheduled. Any compensatory services declined or not utilized by February 1, 2021 shall be deemed waived (assuming the District has made a good faith effort to timely commence and provide all compensatory service).
 - d. The schedule for compensatory services shall be provided to NDE within 30 days from the date of this decision (November 30, 2020).

- e. Service provider logs verifying completion of all compensatory education and nursing services must be submitted to NDE monthly until the service is complete and all service has been verified.
- 2. For the time period of November 21, 2019 to March 15, 2020: The District shall make 177 hours of compensatory services available to the Parents for the time the Student was unable to attend school due to the unavailability of a nurse.
 - a. 177 hours of academic and nursing services provided by a fully credentialed special education instructor and nurse
 - b. A team comprised of the District representatives and the Parents shall determine the schedule for provision of compensatory services for the remainder of the 2020-21 school year and beginning of the 2021-22 school year.
 - c. Compensatory services shall be completed by October 1, 2021. Student absence or refusal of the Parents to make the child available shall result in a waiver of service scheduled for that day. Staff absence, including the absence of a nurse, must be rescheduled. Any compensatory services declined or not utilized by October 1, 2021 shall be deemed waived (assuming the District has made a good faith effort to timely commence and provide all compensatory service).
 - d. The schedule for compensatory services shall be provided to NDE within 30 days from the date of this decision (November 30, 2020).
 - e. Service provider logs verifying completion of all compensatory education and nursing services must be submitted to NDE monthly until the service is complete and all service has been verified.
- 3. For the time period March 16, 2020 to May 15, 2020: The Student's IEP team shall convene a facilitated meeting by February 1, 2021 to review the Student's need for recovery services due to school closure resulting from the COVID-19 pandemic.
 - a. A team comprised of the District representatives and the Parents shall determine what recovery services are needed to allow the Student to be at the skill level the Student would have been at if school were in session and determine a schedule for those recovery services to be provided during the remainder of the 2020-21 school year and beginning of the 2021-22 school year.

- b. Recovery services shall be completed by October 1, 2021. Student absence or refusal of the Parents to make the child available shall result in a waiver of service scheduled for that day. Staff absence, including the absence of a nurse, must be rescheduled. Any recovery services declined or not utilized by October 1, 2021 shall be deemed waived (assuming the District has made a good faith effort to timely commence and provide all compensatory service).
 - c. The schedule for recovery services shall be provided to NDE within 10 days from the date facilitated IEP but no later than February 11, 2021.
 - d. Service provider logs verifying completion of all recovery education and nursing services must be submitted to NDE monthly until the service is complete and all service has been verified.
- 4. For the time period August 31, 2020 through September 22, 2020: The Student's IEP team shall convene a facilitated meeting by February 1, 2021 to review the Student's need for recovery services due to school closure resulting from the COVID-19 pandemic.
 - a. A team comprised of the District representatives and the Parents shall determine what recovery services are needed to allow the Student to be at the skill level the Student would have been at if school were in session and determine a schedule for those recovery services to be provided during the remainder of the 2020-21 school year and beginning of the 2021-22 school year.
 - b. Recovery services shall be completed by October 1, 2021. Student absence or refusal of the Parents to make the child available shall result in a waiver of service scheduled for that day. Staff absence, including the absence of a nurse, must be rescheduled. Any recovery services declined or not utilized by October 1, 2021 shall be deemed waived (assuming the District has made a good faith effort to timely commence and provide all compensatory service).
 - c. The schedule for recovery services shall be provided to NDE within 10 days from the date facilitated IEP but no later than February 11, 2021.
 - d. Service provider logs verifying completion of all recovery education and nursing services must be submitted to NDE monthly until the service is complete and all service has been verified.

5. The District shall review and revise, if necessary, the policies, procedures and practices regarding the provision of school nursing services for individual students.
6. The District must develop and provide training to staff in the District regarding requirements to provide the related services set forth on each student's IEP.
7. The District must provide the NDE Complaint Investigator with copies of the training materials and handouts used and participant sign-in sheets at the conclusion of the training(s).

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:

Kelly M. Wojcik, Complaint Investigation Lead
NDE Office of Special Education
301 Centennial Mall So.
P.O. Box 94987
Lincoln, NE 68509-4987