

COMPLAINT INVESTIGATION REPORT

Complaint Number: 21.22.31
Complaint Investigator: [Redacted]
Date Complaint Filed: May 27, 2022
Date of Report: [Redacted]

Issues Investigated

1. Did the MDT find the Student eligible for special education services as a student with Autism, pursuant to 92 NAC 51-006.048?
2. Did the Student's most recent IEP include the Student's most recent evaluation of the child pursuant to 92 NAC 51-007.07B2?
3. Does the Student's IEP include a statement of the Student's present levels of academic achievement and functional performance pursuant to 92 NAC 51-007.07A1?
4. Does the Student's IEP include a statement of goals that result from the educational needs resulting from the child's disability pursuant to 92 NAC 51-007.07A2?
5. Does the Student's IEP include a statement of the special education and related services pursuant to 92 NAC 51-007.07A5?
6. Did the Student's IEPs ensure that extended school year services are available as necessary pursuant to 92 NAC 51-007.07C5?
7. Did the District provide special education and related services to the Student in accordance with the Student's IEP pursuant to 92 NAC 51-007.02; 007.01 and 31 CFR 300.17?
8. Did the District make the Student's IEP accessible to the staff and were the staff informed of their responsibilities to implement the Student's IEP pursuant to 92 NAC 51-007.02C & D?
9. Did the IEP team revise the Student's IEP pursuant to 92 NAC 51-007.09C & 007.10?

Information Reviewed by Investigator

From the Complainant

- Letter of Complaint received by NDE on May 27, 2022, with attachments including:
 - Prior Written Notice dated May 23, 2022
 - IEP dated March 3, 2022,
- A series of 9 email copies from the Student's parent, received on June 13, 2022, including the emails of May 18 and 19, 2022
- Email from the Student's parent on June 29, 2022

From the School District

- Letter of Response dated June 24, 2022
- Link to Drop Box dated June 24, 2022, containing the following:
 - Notices,
 - Progress reports,
 - Individualized Educational Plans (IEPs) dated March 9, 2021, and March 3, 2022,
 - The agenda for the IEP dated March 3, 2022
 - Prior Written Notice dated May 23, 2022
 - Multidisciplinary Team Reports (MDTs) dated May 2, 2014, and March 8, 2021,
 - Emails between parties,
 - Emails from counsel, and,

Interviews

- Telephone interview conducted with Student's parent on June 28, 2022
- Telephone interview conducted with District representatives and counsel on June 28, 2022

Introduction

This matter arises on a State Complaint filed by the Student's parent, on behalf of the Student, against the School District on May 27, 2022. On about June 24, 2022, the School District, through counsel, filed a Response to the Complaint filed by [Student's parent] on behalf of [Student] against [School District]. Pursuant to 92 NAC 51-009.1, the Nebraska Department of Education (NDE), Office of Special Education, must resolve complaints alleging violations of the Individuals with Disabilities Act, 20 U.S.C. § 1400, et seq., (IDEA), which are alleged to have occurred not more than one year before the date the complaint was received.

An outside investigator has conducted the investigation, along with a complaint investigator with the NDE Office of Special Education. Documents received from the Student's parent and from the School District were reviewed. Telephone calls were undertaken with the Student's parent, and with representatives of the School District. Two attempts were made to call a para-professional suggested by the Student's parent, but there was no answer and the voice-mail box was full, so a message could not be left.

Only violations which may have occurred one year prior to May 27, 2022, and through May 27, 2022, as the date the Complaint was filed, will be considered. Matters outside of this window, if any, are provided for context purposes only.

Findings of Fact

1. The Student is currently ten years old (IEP dated March 3, 2022).
2. The Student was in the 3rd grade as of the IEP dated March 3, 2022, is not now in summer school or extended school year, and will begin the 4th grade with the Fall semester (IEP dated March 3, 2022).
3. On May 2, 2014, a Multidisciplinary Evaluation Report (MDT) was issued which found the Student to have the primary disability of speech language impairment, and that the Student should be qualified for special education services (MDT dated May 2, 2014).
4. By way of background, an Individual Education Plan (IEP) was issued on April 20, 2015, the Student was eligible for special education services for a speech language impairment.
5. After another MDT assessment, on March 8, 2021, a MDT Report was issued finding the Student eligible for verification of Autism (AU) as the primary disability (MDT dated March 8, 2021).
6. The Student's parent agreed with the MDT Report dated March 8, 2021.
7. The MDT dated March 8, 2021, did not contain any data suggesting regression or recoupment issues for the Student to be placed in extended school year (ESY) services (MDT dated March 8, 2021).
8. There were no other assessments or other "data" provided in this investigation to show the need for ESY services due to regression or recoupment.
9. An IEP dated March 9, 2021, noted an Autism/Social Communication Assessment, with the Prior Written Notice reflecting the "current MDT data," among other things (IEP dated March 9, 2021).
10. In relevant part, a new IEP was created on March 3, 2022, after an IEP meeting or conference on March 3, 2022 (IEP dated March 3, 2022).
11. The agenda for the March 3, 2022, IEP meeting stated the Student's eligibility verification was AUT (Autism) (IEP Agenda dated March 3, 2022).
12. The IEP dated March 3, 2022, noted the team determined that the data did not indicate that the Student qualified for ESY (IEP dated March 3, 2022, p. 13).
13. The attached Prior Written Notice to the IEP dated March 3, 2022, stated the evaluations and assessments used for its proposals were unnamed or undated "MDT data," classroom performance, IEP progress, DIBELS data, and MAP data (IEP dated March 3, 2022, p. 15).
14. The IEP dated March 3, 2022, did not state that the Student was verified or eligible for services due to Autism (AU) as the primary disability (IEP dated March 3, 2022, p. 15).

15. The IEP dated March 3, 2022, was silent as to verification or eligibility (IEP dated March 3, 2022).
16. The IEP dated March 3, 2022, statement of services noted that while the school was open to in-person services the IEP would be followed as written (IEP dated March 3, 2022, p. 9).
17. The IEP dated March 3, 2022, concluded the Student had difficulties with listening comprehension which impacts the Student's ability to be independently successful in the general education curriculum (IEP dated March 3, 2022, p. 5).
18. The IEP dated March 3, 2022, concluded that the Student had difficulties with social skills which impact the Student's ability to be independently successful in the general education curriculum (IEP dated March 3, 2022, p. 5).
19. In the statement of special education and related services, the IEP dated March 3, 2022, stated there would be "[r]edirection by adult as needed," and that the Student would "[r]ead aloud passages to [the Student] for reading comprehension as needed." (IEP dated March 3, 2022, p. 10).
20. In the assessment participation statement, the IEP dated March 3, 2022, stated the Student would be given "[r]edirection by an adult as needed," and that the Student would "[r]ead aloud passages to [the Student] for reading comprehension as needed." (IEP dated March 3, 2022, p. 12).
21. The Student's parent attended the meeting (IEP dated March 3, 2022).
22. On May 18, 2022, the Student's parent sent an email to the School District stating that the IEP dated March 3, 2022, failed to contain the Student's eligibility or verification of Autism and that it failed to include ESY services (Email #1 from Student's parent to School District dated May 18, 2022).
23. By a second email on May 18, 2022, the Student's parent sent an email to the School District stating a formal request for an "emergency IEP meeting," and seeking a new IEP to be in place for the Fall, to be completed by the end of May (Email #2 from Student's parent to School District dated May 18, 2022).
24. On May 19, 2022, the Student's parent followed with a third email to the School District requesting a meeting "asap" due to the Student not qualifying for ESY, and seeking it to be active during summer for implementation (Email #3 from Student's parent to School District dated May 19, 2022).
25. On May 23, 2022, the School District forwarded a Prior Written Notice to the Student's parent which denied the request for a new IEP meeting because, according to the School District, verification of Autism is not required to be placed in the IEP since "services articulated in the IEP are

driven by [the Student's] needs, not by [the Student's] verification;" additionally, the School District denied the request to hold an IEP for ESY because the issue had been decided and that there was no new data to demonstrate regression or recoupment (School District Responses, Request for IEP Meeting – Prior Written Notice, May 23, 2022).

26. The Complaint was filed on May 27, 2022 (Letter of Complaint dated May 27, 2022).

27. Should additional factual elements be included in the analysis and investigative findings below then they are by reference now incorporated into these findings.

Issue No. 1

Did the MDT find the Student eligible for special education services as a student with Autism pursuant to 92 NAC 51-006.04B?

In relevant part, 92 NAC 51-006.04B states:

006.04. *Eligibility for Special Education*

006.04B. *Autism*

006.04B1. *To qualify for special education services in the category of Autism, the child must have a developmental disability which:*

006.04B1a. *Significantly affects verbal and nonverbal communication and social interaction;*

006.04B1b. *Is generally evident before age three; and*

006.04B1c. *That adversely affects the child's educational performance.*

006.04B1d. *Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental*

change or change in daily routine, and unusual responses to sensory experiences.

006.04B2. *Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance as defined in 92 NAC 51-006.04E.*

006.04B3. *A child who manifests the characteristics of autism after age 3 could be verified as having autism if the other criteria in 92 NAC 51-006.04B1 are met.*

Allegations/Parent Position

The MDT should reflect the Student's eligibility and verification to be Autism, and included as part of the IEP dated March 3, 2022.

District Response

The MDT found the Student eligible for services due to Autism, and, as a result, an IEP is not required to list the verification of disability.

Investigative Findings

The MDT dated March 8, 2021, found the Student to be eligible for special education services as a student with Autism, pursuant to NAC 51-006.04B (MDT dated March 8, 2021). Specifically, it addressed the initial verification date of April 22, 2004. It concluded that the Student met the verification for Autism, with the primary disability of Autism. The Student's parent signed the document in agreement with the Student's primary disability as Autism (MDT dated March 8, 2021). An IEP dated March 9, 2021, noted an Autism/Social Communication Assessment, with the Prior Written Notice reflecting the "current MDT data," among other things (IEP dated March 9, 2021). Subsequently, an IEP dated March 3, 2022, did not include Autism as a verification or eligibility (IEP dated March 3, 2022). As noted, as this issue presents itself, the MDT found the Student eligible for services due to Autism. Whether the IEP of March 3, 2022, requires the eligibility or verification of Autism is discussed below in Issue 2.

Summary and Conclusions

The issue as noted is whether the MDT found the Student qualified for services due to Autism. It did. There was no violation. **No corrective action** is required on this issue.

Issue No. 2

Did the Student's most recent IEP include the Student's most recent evaluation of the child pursuant to 92 NAC 51-007.07B2?

In relevant part, 92 NAC 51-007.07B2 states:

007.07B. *In developing, reviewing or revising each child's IEP:*

007.07B2. *The IEP team shall consider the results of the initial evaluation or most recent evaluation of the child, and the academic, developmental, and functional needs of the child.*

Allegations/Parent Position

The IEP dated March 3, 2022, must state the most recent evaluation of the Student (MDT concluding Autism), coupled with a statement of verification and basis for eligibility.

District Response

All assessments have been noted in the IEP, although the most recent assessment for MDT and verification is not required to be stated in the IEP dated March 3, 2022, since the School District used the most recent evaluation information when it considered and drafted the "March 3, 2021" IEP and subsequent IEPs.

Investigative Findings

On March 8, 2021 a MDT assessment found the Student qualified (was eligible) for services as a student with Autism. MDT, March 8, 2021. On March 9, 2021 an IEP reflected that an Autism Social Communication assessment had been reviewed and considered (IEP, March 9, 2021). The March 9, 2021 IEP did not specifically state that the MDT of March 8, 2021 was the assessment noted, but it did state the assessment of Autism Social Communication (IEP, March 9, 2021). A subsequent IEP was entered on March 3, 2022, which is the IEP at issue in this Complaint (IEP, March 3, 2022). The School District's date of "March 3, 2021" as an IEP date in its Response is deemed a typographical error and will be considered to read as March 9, 2021, since there has been no IEP entered after the March 3, 2022.

According to the most recent IEP, dated March 3, 2022, under the subheading of "Results of an initial or recent evaluation(s)," IEP March 3, 2022, pp 3-4, "MDT data" was addressed as an evaluation tool used as a basis under the Prior Written Notice Section of the IEP (See IEP, March 3, 2022, Prior Written Notice Section, pp. 14-15). The agenda for the IEP Meeting stated that the Student's verification for which the IEP meeting was to be held was for Autism (Agenda Letter, IEP, March 3, 2022). The Student's parent does not contest whether the academic, developmental, and functional needs of the Student were not met by the IEP as written. The Student's parent's only concern was that the eligibility, or verification, of Autism was not stated (Student's parent interview, June 28, 2022).

Review of the Nebraska Department of Education's form sample Individualized Education Plan (IEP) (Nebraska IEP sample) includes an eligibility term. The Nebraska sample, NDE SPED Revised August 2012, see <https://www.education.ne.gov/wp-content/uploads/2017/07/iep-form.pdf>, however, is only a sample. The Nebraska rules control in this situation. There is no requirement in the Nebraska rules that the eligibility must be stated in the IEP (92 NAC 51-007.07B2). Similarly, the Student's parent does not contest that the most recent MDT data was not considered (Student's parent interview, June 28, 2022).

Summary and Conclusions

The Student's parent and the IEP Team were aware that the agenda showed Autism was the verified eligibility for the March 3, 2022 IEP meeting. The Team considered the most recent MDT data. Although the March 3, 2022 IEP did not include eligibility, the Nebraska rules do not require eligibility to be stated. As a result, there is no violation under the Complaint process and **no corrective action** is required.

Issue No. 3

Does the Student's IEP include a statement of the Student's present levels of academic achievement and functional performance pursuant to 92 NAC 51-007.07A1?

In relevant part, 92 NAC 51-007.07A1 states:

007.07A. *The IEP shall include:*

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

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

Allegations/Parent Position

The present levels of performance contained in the IEP dated March 3, 2022, were vague and inappropriate for not stating the Student's disability.

District Response

The School District has included how the Student's disability affects involvement and progress in the general education curriculum, yet does not have to name the disability in the IEP to do so.

Investigate Findings

The March 3, 2022 IEP contains a section headed as "Present Level of Academic Achievement and Functional Performance" (IEP, March 3, 2022, pp. 5-6). In this section listening comprehension, social communication, and participation in physical education are noted in how the Student's disability affects the Student's involvement and progress in the general education curriculum. The IEP states that the Student has difficulties with listening comprehension, which impact the Student's ability for independent success in the general education curriculum. As for social communication, the IEP notes that the Student has difficulties with social skills, which impact the ability for independent success in the general education curriculum. The Student will participate in regular physical education, under the IEP.

Much like in Issue 2, above, eligibility is not required by the Nebraska rules to be included in the face of the IEP. The IEP Team, including the Student's parent, relied on the MDT data reflecting the Student's verification for special education services to be for Autism. There is no challenge from the Student's parent that present levels of academic achievement and functional performance, including how Autism affects the Student's involvement and progress in the general education curriculum, are inappropriate. The only concern from the Student's parent is that the face of the IEP was vague because it did not include the eligibility term of Autism (Student's parent interview, June 28, 2022).

Summary and Conclusions

The language in 92 NAC 51-007.07A requires the Team to consider " [h]ow the child's disability" affects involvement and progress. 92 NAC 51-007.07A & A1a. This was done, despite the IEP not stating that the disability eligibility was Autism. There was no violation and **no corrective action** is required.

Issue No. 4

Does the Student's IEP include a statement of goals that result from the educational needs resulting from the child's disability pursuant to 92 NAC 51-007.07A2?

In relevant part, 92 NAC 51-007.07A2 states:

007.07A. The IEP shall include:

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

007.07A2a. Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; or for preschool children, as appropriate, to participate in appropriate activities, and

007.07A2b. Meet each of the child's other educational needs that result from the child's disability

Allegations/Parent Position

The goals contained in the IEP dated March 3, 2022, were vague and inappropriate as the goals did not state the Student's disability.

District Response

The School District has included goals on how the Student's needs resulting from the Student's disability enable the Student to be involved in and make progress

in the general education curriculum, and to meet other educational needs resulting from the Student's disability, despite the absence of the named disability in the IEP.

Investigative Findings

The March 3, 2022 IEP contains two goals described as measurable annual goals: social communication, and listening comprehension (IEP, March 3, 2022, pp. 7-8).

The social communication goal is for the Student to demonstrate social communication skills with peers during activities by demonstrating an understanding of nonverbal cues with a baseline of 65% to 75% of opportunities, by demonstrating topic maintenance from a baseline of 63% to 73% of opportunities, to ask questions and make comments to peers from a baseline of 65% to 75% of opportunities, and to understand self-perspective and that of others from a baseline of 45% to 55% of opportunities (IEP, March 3, 2022, p. 7).

The listening comprehension goal is that based on "direct instruction, practice, and feedback in listening comprehension," the Student will improve comprehension skills with a baseline of "60% accuracy to 75% accuracy by his next IEP." (IEP, March 3, 2022, p. 8.)

For much the same rationale explained in the analysis of Issues 2 and 3 above, yet now under the goals section of 92 NAC 51-007.07A2, although these two annual goals fail to include the disability terms of Autism, they were nonetheless considered by the Team for which the "needs" results were measured. 92 NAC 51-007.07A2a & b. That is what is required by the Nebraska rules. The only concern from the Student's parent is that the face of the IEP was vague because it did not include the eligibility term of Autism and because it did not include the Autism term then the needs were not stated. Student's parent interview, June 28, 2022. The Student's parent's position is unpersuasive.

Summary and Conclusions:

Again, similar to Issue 3, above, - "[t]he IEP shall include" goals to meet the needs resulting from the Student's disability. 92 NAC 51-007.07A2, a & b. The Student's parent does not contest, however, that there was no statement of special education and related services, but only that the face of the IEP failed to include Autism as the eligibility upon which the services were based. The Nebraska rules do not require the disability to be stated. 92 NAC 51-007.07A2. As a result, there is no violation and no corrective action is required.

Issue No. 5

Does the Student's IEP include a statement of the special education and related services pursuant to 92 NAC 51-007.07A5?

In relevant part, 92 NAC 51-007.07A5 reads:

007.07A. *The IEP shall include:*

007.07A5. *A statement of the special education and related services and supplementary aids and services based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child:*

007.07A5a. *To advance appropriately toward attaining the annual goals;*

007.07A5b. *To be involved in and progress in the general education curriculum and to participate in extracurricular and other nonacademic activities[.]*

Allegations/Parent Position

Special education and related services on an "as needed" basis are vague and do not meet the threshold to be included for appropriate services.

District Response

The IEP dated March 3, 2022, services provision of "as needed" is refined by on-going progress and needs, to be determined by educational experts.

Investigative Findings

The IEP dated March 3, 2022, contains two matters, in two different places, where, initially, the Student is to be provided special education and related services "as needed," and subsequently exactly stated as accommodations for

regular state and district assessments. IEP, March 3, 2002, pp. 9-10, 11-12. Both places include the same language: "Redirection by an adult as needed," and "[r]ead aloud passages to [the Student] for reading comprehension as needed." (IEP dated March 3, 2002, pp. 9-10, 11-12.)

The issue in this matter, however, relates only to special education and related services, although it relates collaterally to accommodations, given the nature of the language. The School District's position is that the "as needed" provisions are based on professional judgment and discretion of the educator at the time (School District Interview, June 28, 2022). This is unpersuasive.

92 NAC 51-007.07A5 requires a statement of the special education and related services that must be provided to the Student, based on peer-reviewed research to the extent practicable, so the Student can advance appropriately and attain goals, and to be involved in and to advance in the general education curriculum. Having redirection "as needed," and reading aloud passages "as needed," does not meet this standard. Reading the rule in context, it sets a high threshold which first requires peer-review research, yet, only if not practicable, then to otherwise move forward and then state the services needed to advance appropriately toward attaining annual goals. "As needed" not meet that standard.

Summary and Conclusions

"As needed" does not meet the threshold to state what services for reading comprehension by reading aloud and redirection by an adult require. "As needed" is not a statement of services for the Student to "advance appropriately toward attaining the annual goals." 92 NAC 51-007.07A5a. As a result, there is a violation and **corrective action is required**.

Corrective Action

Reconvene the IEP

1. Within 30 days from the date of this Investigation Report, the School District will revise the IEP dated March 3, 2022, to include with specificity when redirection and reading aloud of passages in the special education and related services section is required, on page 10.
2. The School District will send the revised IEP and corresponding PWN to Christopher Chambers, Complaint Specialist, NDE Office of Special Education.

Training

1. Within 60 calendar days, the School District must develop and provide training to all staff in the District regarding the inclusion of specific information in the IEP about when accommodations and modifications

are required for individual students. Staff involved in the training should include:

- a. General education preschool or early childhood teachers;
 - b. Special education preschool or early childhood teachers;
 - c. Principals or individuals who may serve as the representative of the school district as described in 92 NAC 51-007.03A4; and
 - d. Related service personnel providing services to preschool children within the District; and
 - e. Any other school personnel who are responsible for attending IEP meetings who may be responsible for determining the educational placement of a child with a disability.
2. The training and trainer(s) must be approved by the NDE Office of Special Education two weeks prior to the training.
 3. The School District must provide the Christopher Chambers with copies of the participant sign-in sheets, including the role of the participant at the conclusion of the training(s).
 4. A random sample of three student IEPs will be reviewed on or before April 1, 2023, to ensure correction has been made.

Issue No. 6

Does the Student's IEP ensure that extended school year services are available as necessary pursuant to 92 NAC 51-007.07C?

92 NAC 51-007.07C states:

- | | |
|------------|--|
| 007.07C5. | <i>Extended School Year Services (ESYS)</i> |
| 07.07C5a. | <i>Each school district or approved cooperative shall ensure that extended school year services are available as necessary to provide a free appropriate public education consistent with 92 NAC 51-007.07C5b.</i> |
| 007.07C5b. | <i>Extended School Year (ESY) services must be provided only if a child's IEP team determines, on an individual basis, in</i> |

accordance with Section 007, that the services are necessary for the provision of a free appropriate public education.

007.07C5c. *In implementing the requirements of this section, a school district or approved cooperative may not limit extended school year services to particular categories of disability or unilaterally limit the type, amount, or duration of those services.*

Allegations/Parent Position

The IEP dated March 3, 2022, failed to include ESY services, which should be required because, due to the general nature of Autism, and without any other additional data, the Student may suffer regression and recoupment due to his need for summer social skills.

District Response

There existing data, which was considered by the IEP Team, does not reflect Student regression or recoupment which would require ESY.

Investigative Findings

The four corners of the March 9, 2022, IEP reflect the need for services based on the Student's social and emotional needs, rather than only academic achievement. Although in a different context than ESY, persuasive guidance is found in a recent case from the *Eastern District of California in Rocklin Unified Sch. Dist. v. J.H.*, 122 LRP 5961 (E.D. Cal. Feb. 15, 2022). In *J.H., id.*, a student with good academic performance, yet nevertheless who had difficulties with focus, organization, writing, peer interactions, and interpersonal skills, was found to need special education services, and accordingly, subsequent unilateral placement reimbursement from the school district was ordered. *Id.* In this current Nebraska Complaint, the Student has good academic skills, yet has

difficulties with social skills. Social and emotional needs will be considered – not just academic achievement.

The Student's parent voiced a concern that the Student struggles with social interactions and has few friends (IEP dated March 3, 2022, p. 4). The Student's social communication skills reflect that the Student's "difficulties with social skills impact [the Student's] ability to be independently successful with the general education curriculum." (IEP dated March 3, 2022, p. 5.) As a result of the social communication difficulties, the social communication goal reflects that, among other things, the Student ask questions and make comments from peers, with a baseline 65% to 75% of opportunities (IEP dated March 3, 2022, p. 7). As well, the Student is to understand the perspective of self and others, with a baseline of 45% to 55% of opportunities (IEP dated March 3, 2022, p. 7). Speech services are to be provided to the Student in the area of social communication (IEP dated March 3, 2002, p. 4). Speech-language therapy are to be provided 20 minutes per day for two days a week (IEP dated March 3, 2022, p. 9). The IEP reflects the Student's needs.

The Student's parent sees the Student's need for supports and regression during summer months because the Student, as a person with Autism, requires a social environment and routine to meet [the Student's] special education needs (Interview with Student's parent, June 28, 2022). Stopping services for the summer halts the routine and discontinues the social interaction [the Student] needs. The Student's parent voiced that the Student needs a social interaction structure to communicate and move forward with social interaction skills.

Nonetheless, there is no new data to support the Student's parent's position, as the School District asserts (Interview with School District Members, June 28, 2022). The School District contends the Student does well after school breaks and does well when [the Student] returns (Interview with School District Members, June 28, 2022). The IEP considered the breaks, and the Student's success on returning.

Having considered the positions of the parties, the IEP reflects Student's difficulties with social skills, communication, and social speech services, yet it also reflects that there is no need for ESY services. There is no data to show, either in the IEP itself, or otherwise, that there will be significant regression should the Student not have ESY services. As considered by the District of Columbia, as general issue guidance, there must be significant regression, and although the Student may be prone to regression according to the student's parent opinion in that case, there was nothing to indicate that progress made during the school year would be significantly jeopardized, absent ESY. *Jackson Johnson v. Dist. of Columbia*, 112 LRP 36774 (D.C. D.C. Feb. 15, 2012), adopted 59 IDELR 101.

Summary and Conclusions

It is concluded that while the Student's social and emotional needs, rather than only academic achievement, are factors to consider, there is no data to otherwise support that ESY services are necessary for the provision of FAPE. 92 NAC 51-007.07C5b. There is **no violation**.

Issue No. 7

Did the School District provide special education and related services to the Student in accordance with the Student's IEP pursuant to 92 NAC 51-007.02, 007.01, and 34 CFR 300.17?

92 NAC 51-007.01 and 007.02, in relevant part, state:

- 007.01. *An IEP shall be developed, reviewed, revised, and implemented for each child who receives special education and related services.*
- 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.*

In relevant part, 34 CFR 300.17 states:

§ 300.17. *Free appropriate public education.*

Free appropriate public education or FAPE means special education and related services that -

- (a) *Are provided at public expense, under public supervision and direction, and without charge;*
- (b) *Meet the standards of the SEA, including the requirements of this part;*
- (c) *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) that meets the requirements of §§ 300.320 through 300.324.*

Allegations/Parent Position

Implementation of the IEP of March 3, 2022, requires hard copies of classroom notes to be provided to the parent, yet hard copies of notes have not been provided.

District Response

There were no hard copies of notes produced for the Student.

Investigative Findings

The issue in this case is based on a statement in the IEP dated March 3, 2022, that, as a service, “[h]ard copies of classroom notes will be provided.” (IEP dated March 3, 2022, p. 10.) The Student’s parent states she has not received any hard copies of classroom notes (Interview with Student’s parent, June 28, 2022). The School District’s position is that there have been no hard copies of classroom notes during the 3rd grade, because no notes were generated at that grade level, yet, because the IEP also looks forward into the 4th grade, hard copies of notes will be generated in the 4th grade (Interview with School District Representatives, June 28, 2022). Because there were no 3rd grade notes made, according to the School District, then there was nothing to disclose (Interview with School District Representatives, June 28, 2022). There is nothing received from the parties to indicate there were hard copies of notes generated from March 3, 2022 onward.

As for general guidance in interpreting this issue, a material implementation failure must arise. See *E.C. v. U.S.D. 385 Andover*, 76 IDELR 212 (D. Kan. 2020) (used persuasively for material failure, and only for general guidance). There being no notes generated in the 3rd grade to disclose, there is no material failure to implement the IEP dated March 3, 2022.

Summary and Conclusions

There is no material implementation failure for want of not disclosing hard copies of notes which do not exist. There is no violation. 34 CFR 300.17. 92 NAC 51-007.01 and 007.02. **No corrective action** is required.

Issue No. 8

Did the School District make the Student’s IEP accessible to staff and were staff informed of their responsibilities to implement the Student’s IEP pursuant to 92 NAC 51-007.02(C)&(D)?

In relevant part, 92 NAC 51-007.02(C)&(D) state:

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.*

007.02C. *The child’s IEP is accessible to each regular education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation; and 007.02D. Each teacher and*

provider described in 92 NAC 51-007.02C must be informed of his or her specific responsibilities related to implementing the child's IEP; and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

Allegations/Parent Position

The Student's physical education teacher was unaware of the IEP dated March 3, 2022, or the Student's disability of Autism, which impacted action taken.

District Response

The School District made the IEP available to all educational service providers entitled to access, the physical education teacher had access to the IEP, and was informed of specific responsibilities for implementation.

Investigative Findings

This issue arises on the allegation that the Student's physical education teacher was unaware the Student was on the Autism spectrum (Letter of Complaint dated May 27, 2022). Because the physical education teacher was unaware of the Student's eligibility or verification, then action taken regarding the Student's "attitude," due to the Student's processing limited verbal ability, may have been treated in a different manner (Letter of Complaint dated May 27, 2022). The School District's position is that their duty is to give access to the IEP to all educators, and that since the physical education teacher presumably had access to the IEP then it met its duty (Interview with School District Representatives, June 28, 2022). The School's psychologist represented at the Investigation interview that the psychologist had no contact with the physical education teacher regarding the Student's parent's representation of the discussion that the physical education teacher might have acted differently had it been known the Student was on the Autism spectrum (Interview with School District Representatives, June 28, 2022). Additionally, the Student's parent represented that on February 11, 2022, that a school official talked with the Student's parent and said she would talk with the physical education coach, and that this resulted in a call about February 14, 2022, where the coach apologized for the actions (Interview with Student's parent, June 28, 2022). There being no materials to contradict the Student's parent's version, it being the more complete version, with dates and times, the Student's parent's version will be accepted. In sum, the physical education teacher was not made aware of the IEP, the eligibility, and responsibilities under it.

There are two steps under 92 NAC 51-007.02(C)&(D). The first provision is that the IEP is to be accessible to School District education and providers, under 92 NAC 51-007.02(c). The second provision is that the School District must also implement the IEP appropriately, that is, the provider must be *“informed of his or her specific responsibilities related to implementing the child's IEP; and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP (92 NAC 51-007.02D).”* The physical education teacher was unaware of the IEP and that the Student was on the Autism spectrum and may have done things differently had there been knowledge. The School District failed to inform the physical education teacher of associated responsibilities and accommodations and supports, thus violating 92 NAC 51-007.02(D). This is found to be a material failure to implement, see, e.g., *E.C. v. U.S.D. 385 Andover*, 76 IDELR 212 (D. Kan. 2020) (used as general guidance, persuasively) – that is, had the physical education teacher known the Student was on the Autism spectrum then things may have been approached differently as to a confrontation about the Student's “attitude.” This also highlights the difficulty which arises because the Student's verification or eligibility of Autism is not included in the IEP. Even if the IEP was “accessible” to the physical education teacher, as the School District asserts, the physical education teacher, as a service provider educator, would not have known of the Student's unique characteristics of Autism.

Summary and Conclusions

There was a material failure to implement the IEP dated March 3, 2022, with the physical education teacher. There is a violation. 92 NAC 51-007.02(D).

Corrective action is required.

Corrective Action

1. Within 45 days from the date school resumes in the Fall semester the School District will share the revised IEP with the regular education teacher, special education teacher, related service providers, and other service providers who are responsible for its implementation, and will inform them of their specific responsibilities related to implementing the Student's IEP; and the specific accommodations, modifications, and supports that must be provided for the Student in accordance with the IEP. Each educator or provider will sign a statement acknowledging receipt of the IEP and of their understanding of responsibility in implementing the IEP.
2. The School District will send a correspondence within the 45 day period to Christopher Chambers, Complaint Specialist, NDE Office of Special Education, stating that compliance has occurred and attaching to it

copies of compliance receipts and acknowledgments from educators and service providers.

3. Within 60 calendar days, the School District must develop and provide training to all staff in the District regarding information about staff members roles and responsibilities with implementing student's IEPs including the individualized accommodations/modifications. Staff involved in the training should include:
 - a. General education preschool or early childhood teachers;
 - b. Special education preschool or early childhood teachers;
 - c. Principals or individuals who may serve as the representative of the school district as described in 92 NAC 51-007.03A4; and
 - d. Related service personnel providing services to preschool children within the District; and
 - e. Any other school personnel who are responsible for attending IEP meetings who may be responsible for determining the educational placement of a child with a disability.
4. The training and trainer(s) must be approved by the NDE Office of Special Education two weeks prior to the training.
5. The School District must provide the Christopher Chambers with copies of the participant sign-in sheets, including the role of the participant at the conclusion of the training(s).

Issue No. 9

Did the IEP Team revise the Student's IEP pursuant to 92 NAC 51-007.09C & 007.10?

In relevant part, 92 NAC 51-007.09C & 007.10 state:

007.09. IEP Meeting

007.09C. *The IEP team shall review the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved.*

007.10. *The IEP team shall revise the IEP as appropriate to address:*

007.10A. *Any lack of expected progress toward the annual goals described in 92 NAC 51-007.07 and in the general education curriculum, if appropriate;*

007.10B. *The results of any reevaluation conducted under 92 NAC 51-006.05A;*

- 007.10C. *The information about the child provided to, or by, the parents, as described in 92 NAC 51-006.06A1;*
- 007.10D. *The child's anticipated needs; or*
- 007.10E. *Other matters.*

Allegations/Parent Position

The School District did not set an “emergency IEP” to revisit ESY service denial and the addition of Autism as a verification, or disability eligibility, for inclusion in an IEP.

District Response

There was no requirement to have another IEP meeting because the only two matters asserted for the “emergency IEP” had been considered in the prior IEP meeting of March 3, 2022.

Investigative Findings

This issue arises based on two emails from the Student's parent to the School District, seeking an “emergency IEP.” Because the requested IEP meeting was denied by the School District, the Student's parent filed her current Complaint. Reference will be limited to the alleged grounds for the request for the “emergency IEP,” and matters associated with that request.

On May 18, 2022 the Student's parent, via email, wrote to the School District that the March 2002 IEP had been reviewed and that there were two concerns: the verification of Autism was not on the Student's IEP, and that the Student was in need of ESY services (Student's Parent Email #1 dated May 18, 2022). On May 18, 2022, the Student's parent then sent another email to the School District stating that she was making a formal request for an emergency IEP meeting and sought to have a new IEP in place for the Student for the Fall, to be completed before the end of May (Student's Parent Email #2 dated May 18, 2022). On May 19, 2022, the Student's parent sent another email to the School District stating that a firm request was being made for an IEP meeting to address ESY and for implementation for summer to be “ready to go for the Fall.”

Reviewing the three requests for an IEP in context, then, the “emergency IEP” was requested for two matters: ESY, and Autism to be included in the IEP. There is no reference to have an IEP meeting to address her later concerns regarding modifications and accommodations being stated “as needed.” Thus, the only two requested reasons for the “emergency IEP” were to add the verification of Autism to the four corners of the IEP, and to address ESY services.

The School District responded to the Student's parent's request for the IEP meeting with a Prior Written Notice of May 23, 2022 (Request for IEP Meeting - Prior Written Notice dated May 23, 2022). The School District denied the request. It informed the Student's parent that denial was based on its conclusion that the matters had been addressed in the IEP dated March 3, 2022, already. The School District's position was that Autism was not required to be in the IEP because services for the Student are driven by the Student's needs, not [the Student's] verification, and that ESY had been considered, but that there was no data to demonstrate the Student had unique issues of regression and recoupment (Request for IEP Meeting - Prior Written Notice dated May 23, 2022).

Having reviewed the contents of the emails and other materials, it is concluded the School District was correct in not conducting another IEP meeting. In essence, the request for an "emergency IEP" was an attempt to revisit, or seek reconsideration of, the March 3, 2022, terms, rather than to bring new matters before the IEP Team. There were no new suggested new goals or anticipated needs requested for the "emergency IEP," or any new information or materials. 92 NAC 51-007.09C & 007.10. The matter had been finalized and was ripe for additional review through the Complaint process or due process request, rather than reconsideration.

Of note, however, is that during the investigation process the Student's parent also contested the "as needed" goals and modifications as a part of the IEP. In response to the Investigator's request, the Student's parent submitted a number of new proposed modifications and accommodations which the Student's parent would have liked to be included in the IEP dated March 3, 2022 (Email from Student's Parent to Investigator dated June 29, 2022). These included, among other things, to check for understanding, for directions to be "broken down," for the Student to be prepared for changes in schedule before they arise, for preferential seating, for close proximity to adults to address bullying, to read passages aloud, to use math manipulatives, for assessments in separate seating areas, for directions in assessments to be read aloud, for extended time for assessments, close proximity to adults during assessments, and for hard copy classroom notes to be taken home (Email from Student's Parent to Investigator dated June 29, 2022). While some of these may not have been considered at the IEP dated March 3, 2022, - the IEP does not disclose that they were considered, except for the hard copies of notes - and may be new information for an additional IEP meeting, they were not made a part of the request for the "emergency IEP." As a result, they are not now considered as to whether a violation occurred.

Summary and Conclusions

The only two matters requested for the “emergency IEP” were reconsideration of ESY services and reconsideration of having Autism noted in the IEP. There was, therefore, no violation, and **no corrective action** is required as to a new “emergency IEP” to be held. 92 NAC 51-007.09C & 007.10.

Notice to District

Documentation must be submitted following the completion of the corrective actions, as indicated in each issue. All documentation of correction must be sent to:

Christopher Chambers, Complaint Specialist
NDE Office of Special Education
Nde.speddr@nebraska.gov