

COMPLAINT INVESTIGATION REPORT

Complaint Number: 20.21.04

Complaint Investigator: [Redacted]

Date Complaint Filed: September 14, 2020

Date of Report: [Redacted]

Issues Investigated

1. Did the District afford the Parents the opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the Student and the provision of FAPE to the Student, as required by 92 NAC 51-009.01A?
2. Did the District review, revise, and implement the Student's IEP in accordance with 92 NAC 51-007.01?
3. Did the District ensure that the Student's placement decision was made by a group of persons, including the Parents and other persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options, and that the placement decision was made in conformity with the least restrictive environment requirements in 92 NAC 51-008.01 and based on the Student's unique needs and not on the Student's disability, as required by 92 NAC 51-008.01C?
4. Did the District provide PWN to the Parents a reasonable time before the District proposed or refused to initiate or change the educational placement of the Student or the provision of a FAPE to the Student, as required by 92 NAC 51-009.05A?
5. Did the District provide a copy of the Student's IEP to the Parents in accordance with 92 NAC 51-007.09D?
6. Did the District provide special education and related services to the Student in accordance with the Student's IEP, as required by 92 NAC 51-007.02?

Documents Reviewed by Investigator

From the Complainant

- Letter of Complaint dated September 8, 2020; received by NDE on September, 2020;
- Emails between the Parent and District staff, dated May 14, 2020;

- Diagnostic and Consult the two Clinic team report and diagnoses, dated June 15, 2017;
- Letter from Richard V. Andrews, M.D. regarding medical diagnoses for the Student, dated January 27, 2020;
- Recommendation for Home Bound Schooling for the Student from Mary Dek, M.D., Student's pediatrician, dated January 13, 2020
- Health Care Provider's Input for In-School Nursing Services, provided by Student's physician, Richard V. Andrews, M.D., dated September 15, 2020; and
- Email to complaint investigator from Melissa Kresky, RN, dated September 24, 2020, regarding factual timeline.

From the School District

- Response from District dated October 5, 2020; received by complaint investigator on October 7, 2020;
- Student's original Multidisciplinary Evaluation Team (MDT) Report, dated June 19, 2017;
- Student's Individualized Education Program (IEP), dated August 7, 2019;
- Notice of IEP Team Meeting scheduled for May 13, 2020;
- Student's IEP, dated May 13, 2020;
- Notice and Consent for Evaluation, signed by Parent, dated February 18, 2020;
- Emails between District and Parent regarding virtual learning, March-April, 2020;
- Physical Therapy (PT) Log for the Student for the 2019/2020 school year;
- Occupational Therapy (OT) Log for the student for the 2019/2020 school year;
- Speech/Language (SLP) Log for the Student, March 24 – May 14, 2020;
- Early Childhood Special Education (ECSE) Log, March 20 – May 15, 2020;
- District's state-approved Continuity of Learning Plan, dated March 16, 2020
- Progress Reports for the Student for terms 1, 2, and 3 of the 2019/2020 school year;
- Student's enrollment history in the District;
- Student's attendance history in the District;
- Communications between District staff and the Parent during the 2019/2020 school year;
- Emails with Parent to schedule May 13, 2020, IEP team meeting;
- Email to Parent with a copy of Student's May 13, 2020 IEP and PWN; and
- Draft of IEP discussed at September 9, 2020, IEP team meeting.

Introduction

The Student is 5 years of age and resides with the Parents. The Student's initial multidisciplinary evaluation was conducted by another district in the state in June, 2017, just before the Student turned two years of age (June 30, 2017, MDT). The MDT determined that the Student is a student with a disability and is eligible to receive special education services under the disability classification of Other Health Impairment (OHI) (June 30, 2017, MDT). The Student's previous district developed an Individualized Family Service Plan (IFSP) for the Student. The Student transferred into the District in July, 2017. The District initially adopted the previous district's IFSP and then developed its own IFSP on September 1, 2017. On May 10, 2018, the District convened an IEP team meeting for the Student to transition the Student from Early Intervention to Early Childhood services. Additional IEP team meetings were scheduled and held February 21, 2019, and May 20, 2019, during the 2018/2019 school year. The documentation indicates that the Parents were invited to, and participated in, all of the IFSP and IEP team meetings during the 2017/2018 and 2018/2019 school years. On August 7, 2019, the Student's IEP team, including the Parents, met to review and revise the Student's IEP. On May 13, 2020, the Student's IEP team, including the Parents, met to review and revise the Student's IEP. On September 3 and September 9, 2020, the Student's IEP team, including the Parents met to review the Student's IEP. The revisions and/or amendments to the Student's May 13, 2020, IEP were never finalized by the IEP team. The Parents filed their Complaint on September 14, 2020. The parties thereafter agreed to participate in mediation, and at the mediation the parties came to a conditional agreement which was in writing but not signed. However, the conditions set forth in the agreement were not met, so the complaint investigation continued and the Complaint Investigation Report was completed.

Issue # 1

Did the District afford the Parents the opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the Student and the provision of FAPE to the Student, as required by 92 NAC 51-009.01A?

State rule 92 NAC 51-009.01A provides as follows:

009.01A The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child.

Issue # 4: Did the District provide PWN to the Parents a reasonable time before the District proposed or refused to initiate or change the educational placement of the Student or the provision of a FAPE to the Student, as required by 92 NAC 51-009.05A?

State rule 92 NAC 51-009.05A provides as follows:

009.05A Prior written notice shall be given to the parents of a child with a disability a reasonable time before a school district or approved cooperative proposes to initiate or change the identification, evaluation, or educational placement of a child or the provision of a free appropriate public education, or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

Issue # 5: Did the District provide a copy of the Student's IEP to the Parents in accordance with 92 NAC 51-007.09D?

State rule 92 NAC 51-007.09D provides as follows:

007.09D State rules provide that the school district or approved cooperative shall provide a copy of the IEP to parents at no cost.

Allegations:

The Parents have been denied the opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the Student and the provision of FAPE to the Student. The District failed to timely provide prior written notice (PWN) to the Parents before the District proposed or refused to initiate or change the educational placement of the Student or the provision of a FAPE to the Student. The Parents were not provided a copy of the Student's IEP in a timely manner.

Parent Position:

District staff informed the Parents that the Student's "MDT" was due. The District provided the Parents with less than 48 hours notice of the May 13, 2020, IEP team

meeting. The District changed the May 13, 2020, IEP without the Parents' knowledge or consent. The Parents did not receive a PWN that the Student was removed from a self-contained special education classroom to a general education classroom. The Parents were not provided with a copy of the May 13, 2020, IEP until they requested it from the District's service coordinator months later. In August, 2020, District staff informed the Parents that they would not be permitted to "attend the MDT."

District Response:

The District's Letter of Response dated October 5, 2020, states that in early 2020, District staff informed the Parents that the Student's three-year multidisciplinary evaluation was approaching and requested consent for the evaluation. On February 18, 2020, the Parent provided signed consent for the evaluation. Due to the suspension of in-person learning beginning March 16, 2020, the District was not able to conduct the Student's three-year evaluation during the fourth quarter. In April, 2020, the District agreed with the Parents to hold the Student's IEP team meeting in May, and sent out a timely Notice of Meeting. Two days prior to the IEP team meeting, the District contacted the Parents to request that the Student's PT be excused from the IEP meeting due to a death in her family. The Parent responded that she was having oral surgery the morning of the scheduled IEP team meeting and requested that the meeting be rescheduled. The District agreed and proposed three days the following week. The Parents agreed to May 13th, and the District emailed a Notice of Meeting to the Parents on May 10th. The Parents attended the Student's IEP team meeting on May 13, 2020, and an IEP was developed and placement was agreed to for the Student for the 2020/2021 school year in a general education kindergarten classroom. The May 13, 2020, IEP and attached PWN states that the IEP team considered various placement options before agreeing to the Student attending a general education kindergarten classroom. On June 5, 2020, the District emailed a copy of the May 13, 2020, IEP and PWN to the Parents. The effective date for the Student's change in placement was August 18, 2020, the first day of school for the 2020/2021 school year. The Parent attended and participated in two additional IEP team meetings on September 3 and 9, 2020.

Investigative Findings:

1. The Student's initial multidisciplinary evaluation was conducted by another district in the state on June 30, 2017 (June 30, 2017, MDT).

2. On February 18, 2020, the Parent signed a Notice and Consent for Evaluation which provides, in relevant part, as follows:
 - a. the District proposed to conduct a multidisciplinary reevaluation of the Student because the Student was due for the Student's three-year reevaluation; and
 - b. a full evaluation of the Student was requested by the Parent.
3. On March 12, 2020, the District announced the suspension of in-person learning at all District schools beginning March 16, 2020. The District did not conduct the Student's three-year reevaluation during the fourth quarter of the 2019/2020 school year. On April 24, 2020, the District informed the Parents that due to the school closure the Student's three-year reevaluation would be completed when the District was able to re-open.
4. On April 24, 2020, the District contacted the Parents and proposed two dates to hold the annual review of the Student's IEP: May 8 and May 14, 2020. On April 27, 2020, the Parent responded to the District's proposal and agreed to meet on May 8, 2020. On April 27, 2020, the District emailed a notice of meeting to the Parents for the May 8, 2020, IEP team meeting.
5. On May 6, 2020, the District contacted the Parents to request that the Student's PT be excused from the IEP team meeting due to a death in her family. On May 7, 2020, the Parent responded that she was having oral surgery on the morning of May 8, 2020, and requested that the IEP team meeting be rescheduled. The District agreed and proposed three dates the following week. On May 9, 2020, the Parents agreed to meet on May 13, 2020, and the District emailed a Notice of Meeting to the Parents on May 10, 2020.
6. The Parents attended and participated in the Student's IEP team meeting on May 13, 2020, and an IEP was developed for the Student. At the IEP team meeting the team agreed that the school the Student attended for kindergarten beginning August, 2020, would need to have a full-time nurse, and the team agreed that the Student would attend a specific elementary school in the District that had a full-time nurse. On May 14, 2020, the Parent contacted the chosen elementary school to enroll the Student. After an initial refusal by that school was corrected, the Student was accepted to attend kindergarten at the agreed-upon school.
7. The Student's May 13, 2020, IEP states that the Student would attend, and receive all special education and related services in, a general education kindergarten classroom.

8. On June 5, 2020, the District emailed a copy of the May 13, 2020, IEP to the Parents. Attached to the Student's May 13, 2020, IEP is a Prior Written Notice dated May 13, 2020. The PWN attached to the Student's May 13, 2020, IEP states that in the Fall [2020] "the Student will move from an early childhood special education classroom to a general education kindergarten classroom with resource support (in the classroom), speech, OT and PT services." The PWN indicates that the team considered other options but agreed that the Student would be successful in a general education classroom.

Summary and Conclusions:

The IDEA Federal regulations and State Rule 51 require that each school district or approved cooperative must ensure that parents of children with disabilities have the opportunity to participate in meetings described in 92 NAC 51-009.01A, or are afforded the opportunity to participate. 92 NAC 51-009.01B and 009.02C. In developing the IEP school personnel are required to consider the concerns of the parents for enhancing the education of their child (20 USC §1414(d)(3)(A)(ii)). A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Board of Education*, 993 F. 2d 1031,1036 (3rd Cir. 1993).)

The IEP team should work towards a general agreement, but the district is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a FAPE and to make sure that eligibility determinations are appropriately conducted. "The core of the statute, however, is the cooperative process that it establishes between parents and schools. School districts have a 'natural advantage' in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them." *Schaffer v. Weast*, 126 S. Ct. 528, 536 (2005). Although parents are "equal" participants in the IEP process, they do not have veto power over the IEP. *Garden Grove Unified Sch. Dist.*, 115 LRP 20924 (SEA CA 05/05/15). Also, there is not a "majority vote" rule for making decisions in IEP team meetings. According to the ED, if the team cannot reach consensus, the public agency must provide the parents with PWN of the agency's proposals or refusals, or both, regarding the child's educational program. 34 CFR §300.503(a); Letter to Richards, 55 IDELR 107 (OSEP 2010) and Letter to Lieberman, 56 IDELR 141 (OSEP 2008); and *Buser v. Corpus Christi Indep. Sch. Dist.*, 20 IDELR 981 (S.D. Tex. 1994), *aff'd*, 22 IDELR 626 (5th Cir. 1995). As set

forth in the Federal regulations and state rules, the required notice shall be given to the parents a reasonable time before a school district or approved cooperative proposes to initiate or change the identification, evaluation, or educational placement of the student. In Letter to Chandler, 59 IDELR 110 (OSEP 2012), OSEP explained that the notice must be provided so that parents have enough time to fully consider the change and respond to the action before it is implemented.

The facts set forth above indicate that the District did take appropriate actions to ensure that the Parents had an opportunity to participate in the meetings involving the Student. Timely notice of such meetings was provided to the Parents. With respect to the notice provided for the May 13, 2020, IEP team meeting, it should be noted that timely notice was originally provided by the District, but the meeting was rescheduled at the Parent's request because of a conflicting medical appointment. In any event, the Parent did attend and participate in the May 13, 2020, IEP team meeting, so any lack of timely notice does not rise to the level of a substantive violation by the District. The documentation indicates that the Parents expressed their concerns with the Student receiving special education services in the general education classroom for the 2020/2021 school year, and that the Parents' concerns were considered by the IEP team. Therefore, it is concluded that the District did afford the Parents the opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the Student and the provision of FAPE to the Student, as required by 92 NAC 51-009.01A. As to Issue No. 1, the District is not cited. Corrective Action is not required.

In their Complaint, the Parents allege that they were not provided timely notice that the Student's placement for the 2020/2021 school year was being changed from an Early Childhood special education classroom to a general education kindergarten classroom. The Parents argue that the District unilaterally changed the Student's placement to a general education classroom and did not provide timely PWN to the Parents. However, the documentation does not support the Parent's arguments. The May 13, 2020, IEP and attached PWN both indicate that the IEP team considered various placements for the Student and proposed a general education kindergarten classroom. The Parent admits that she expressed her concerns to the team regarding the general education placement. The May 13, 2020, IEP and attached PWN were provided to the Parents by email no later than June 5, 2020, approximately two months prior to

the proposed change of placement. It is concluded that under the circumstances of this matter, two months was enough time for the Parents to fully consider the proposed change of placement and respond to the action before it was implemented in August, 2020. Therefore, it is concluded that the District did provide PWN to the Parents a reasonable time before the District proposed or refused to initiate or change the educational placement of the Student or the provision of a FAPE to the Student, as required by 92 NAC 51-009.05A. As to Issue No. 4, the District is not cited. Corrective Action is not required.

The above facts also indicate that the District did provide a copy of the Student's May 13, 2020, IEP to the Parents by email dated June 5, 2020. This was approximately three weeks following the May 13, 2020, IEP team meeting. State Rule 51 does not provide a specific time within which a district must provide a copy of the IEP to parents following the conclusion of the IEP team meeting, only that the district must provide a copy at no expense to the parents. Best practice would certainly be to provide a copy of the IEP to the Parents at, or immediately following, the IEP team meeting. However, in view of the fact that the IEP team meeting took place virtually (via a Zoom meeting), at the end of the 2019/2020 school year, and proposed a program and change of placement for the 2020/2021 school year, a three-week delay in providing a copy to the Parent does not appear to violate the IDEA or State Rule 51. Moreover, the Student's IEP was provided at no cost to the Parents. Therefore, it is concluded that the District did provide a copy of the Student's IEP to the Parents in accordance with 92 NAC 51-007.09D. As to Issue No. 5, the District is not cited. Corrective Action is not required.

Issue # 3: Did the District ensure that the Student's placement decision was made by a group of persons, including the Parents and other persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options, and that the placement decision was made in conformity with the least restrictive environment requirements in 92 NAC 51-008.01 and based on the Student's unique needs and not on the Student's disability, as required by 92 NAC 51-008.01C?

State rule 92 NAC 51-008.01C provides as follows:

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 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, 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 on the child's disability.

Allegations:

The District refused to place the Student in a self-contained special education classroom claiming that the team felt general education was the best placement for the Student. The District also refused to provide a 1:1 aide for the Student in the general education classroom despite the Student's private therapist, RN and home health aides' recommendations. The District has refused to follow the recommendations of the Student's medical providers in making the placement decision for the Student.

Parent Position:

At the May 13, 2020, IEP team meeting the District refused to place the Student in a self-contained special education classroom for the 2020/2021 school year, even though the Student is at risk for eloping. The District also refused to provide a 1:1 aide for the Student in the general education placement despite the Student's private therapist, RN and home health aides' indicating that the Student's behavioral, medical and life skill needs are greater than a general education placement would offer the Student. The District agreed to a special education classroom placement at the IEP team meeting and later unilaterally changed the Student's IEP to a general education classroom.

District Response:

In the District's Letter of Response dated October 5, 2020, the District states that the Student's placement decision was appropriate and was proposed by District staff who had worked with the Student during the previous school year. The decision was further supported by the Student's current OHI eligibility determination, the fact that the Student was moving to Kindergarten from Pre-K and the Student's progress during 2019/2020 school year. The Parents' concerns

were considered by the District. The concerns of the Parents and the recommendations of the Student's medical providers were considered by the District, but the District determined that the needs of the Student and the Rule 51 LRE requirements would be best met in a general education classroom with the Student's nondisabled peers.

Investigative Findings:

1. The Student's three-year re-evaluation and MDT was due on June 30, 2020. In February, 2020, the District obtained written consent from the Parents to conduct the re-evaluation. The District did not conduct the Student's re-evaluation before the annual review of the Student's IEP was due in May, 2020, because of the school closures and restrictions on in-person meetings ordered by the state on March 12, 2020, due to COVID-19. In late April, 2020, the District agreed to conduct the Student's re-evaluation when in-person learning started again.
2. The Student's May 13, 2020, IEP indicates that the Student's placement decision was discussed by the IEP team, including District staff, the Parents and their medical advocates. The District proposed a general education classroom setting for the Student for the 2020/2021 school year, based on the Student's current OHI eligibility determination, the fact that the Student was moving to Kindergarten from Pre-K and the Student's progress during 2019/2020 school year. The Parents and their advocates expressed their concerns with a general education setting and requested a self-contained special education setting for the Student due to the Student's previous elopement and behavior issues. The District believed that the Student would be successful in the general education classroom. The District's proposal was accepted by the IEP team and on June 5, 2020, the District provided PWN to the Parents regarding the change of placement to a general education classroom setting for the 2020/2021 school year.
3. Prior to the start of the 2020/2021 school year, the District offered to conduct a virtual re-evaluation of the Student, but the Parent requested an in-person evaluation. The District made arrangements to conduct the re-evaluation in person. The Parent informed the District that the Parent wanted to sit with the Student during the evaluation. The District objected to this because it could affect or invalidate the evaluation results. The District reports that staff were looking at options for allowing the Parent to observe the Student's evaluation, which included using a room with a two-way mirror, but the re-evaluation did not get scheduled prior to the filing of the Parent's Complaint.

The District never convened an MDT meeting because the re-evaluation was never conducted.

4. Prior to the beginning of the 2020/2021 school year, the Parent requested an IEP team meeting, which the team agreed to hold on September 3, 2020. At the September 3, 2020, IEP team meeting the Parent requested a change of placement for the Student to a self-contained special education classroom or, in the alternative, to have a 1:1 paraprofessional aide assigned to the Student. District staff did not agree with the more restrictive proposals of the Parents. The District requested that the Student be allowed to participate in remote learning, but the Parents refused the District's request. The team agreed to reconvene the IEP team meeting on September 9, 2020.

5. Following the September 3, 2020, meeting the Parent requested that several of the pre-K school staff and the District's Director of Special Education no longer be involved with the Student's IEP team.

6. The IEP team reconvened on September 9, 2020. The Student's new IEP team offered to fully implement the May 13, 2020, IEP, to have several Special Education Coaches and a Board Certified Behavior Analyst observe the Student in the general education classroom, collect data on the Student's participation and performance, and to reconvene the IEP team to review the data and further discuss placement. The Parents did not accept this proposal and requested that the District issue a PWN regarding the District's refusal of their placement request. The District responded that the IEP team needed to complete the Student's IEP before the District would issue a PWN to the Parents.

7. The District made several attempts to schedule a meeting to complete the Student's IEP, but the Parents filed their Complaint and informed the District that they did not want to finish the IEP.

8. The Student's three-year re-evaluation was not conducted, and the Student's IEP was not completed, prior to the Parents filing their Complaint.

9. The District reports that the Student has not attended school, either virtually or in-person, following the May 13, 2020, IEP team meeting.

Summary and Conclusions:

Under the IDEA and Rule 51, the concepts of placement and LRE are two sides of the same coin; you can't discuss one without the other. The rules provide that 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 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, 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 on the child's disability. 92 NAC 51-008.01C. The school district or approved cooperative shall establish policies and procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or nonpublic schools and approved service agencies, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when 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. 92 NAC 51-008.01A. A child with a disability must not be removed from education in age appropriate regular classrooms solely because of needed modifications in the general curriculum. 92 NAC 51-008.01I. The "regular educational environment" encompasses regular classrooms and other settings in schools, such as lunchrooms and playgrounds, in which children without disabilities participate. 34 CFR § 300.117.

However, there are students with disabilities who will not benefit from a placement in a regular education classroom setting. The individual needs of each student with a disability override a placement in the regular education setting when necessary for the student to receive FAPE. *Hartmann v. Loudoun County Bd. of Educ.*, 26 IDELR 167 (4th Cir. 1997), cert. denied, 111 LRP 18076, 522 U.S. 1046 (1998). In other words, the IDEA's LRE requirement is subordinate to the IDEA's requirement that educational placements be based on individual needs (hence the "to the maximum extent appropriate" caveat in the requirement). See Letter to Lott, 16 IDELR 84 (OSEP 1989); Letter to Vergason, 17 IDELR 471 (OSERS 1991); and Letter to Goodling, 18 IDELR 213 (OSERS 1991).

The individual and unique needs of a specific child with a disability determines whether a particular program is appropriate for the child or not. The IEP team must keep this very basic and very important requirement in mind when making the placement decision. When reviewing the appropriateness of a placement decision, the reviewer is likely to give far more weight to the opinions of witnesses who have worked with the child or are familiar with the program in question. In *S.T. v. Howard County Public School System*, 64 IDELR 268 (D. Md. 2015), aff'd, 66 IDELR 270 (4th Cir. 2016, unpublished), three district employees testified about the parents' preferred autism program's ability to implement the child's IEP. Their detailed testimony about the district's available services and the

child's unique needs proved to be far more effective than the generalized evidence the parents offered in support of their preferred program.

School districts have a great deal of discretion in selecting the educational methodology for a student with a disability as long as the chosen methodology provides FAPE. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 553 IDELR 656 (1982), the U.S. Supreme Court held that as long as the school district's choice of educational methodology is reasonably calculated to provide students with disabilities with educational benefit, that choice is entitled to court deference, even in the face of strong parental opposition. Similarly, in *Endrew F. v. Douglas School District RE-1*, 69 IDELR 174 (2017), the Supreme Court noted that the "reasonably calculated" qualification reflects a "recognition that crafting an appropriate program of education requires a prospective judgment by school officials." The Court also explained that appropriate methods will be determined by a "fact-intensive exercise" that is informed by the expertise of school officials and by the input of parents or guardians. *Id.* Generally, IEPs are written without a great deal of specificity so that many different methods and techniques can be used to meet a child's specific educational needs. *Gill v. Columbia 93 Sch. Dist.*, 31 IDELR 29 (W.D. Mo. 1999), *aff'd*, 32 IDELR 254 (8th Cir. 2000).

As set forth above, Rule 51 requires Districts to consider the concerns of the parents. However, consideration does not mean acquiescence. In this matter, at the May 13, 2020, IEP team meeting, the Parents expressed their belief that the best placement for the Student is in a self-contained special education classroom. The District considered the Parent's request and determined that the Student would be successful in a general education classroom with the Student's non-disabled peers, which is the Student's LRE. The District then provided a PWN to the Parents describing the rationale for why the placement chosen by the IEP team was the most appropriate. It should be noted that at the time of the May 13, 2020, IEP, the Student's three-year re-evaluation was not yet due and had not been completed. The District was not at that time in violation of the IDEA Federal regulations or Rule 51 regarding the re-evaluation. However, after June 30, 2020, a determination of eligibility for, and/or an IEP developed for, the Student could be seriously deficient without the information provided by the Student's three-year re-evaluation and MDT report.

The issue of the timing of the Student's re-evaluation in connection with the review of the Student's IEP and a potential change of placement is clearly, and unfortunately, affected by the restrictions against in-person educational services during the COVID-19 pandemic. Prior to the COVID-19 restrictions being put in place, it would certainly have been a violation of Rule 51 for a district to fail to

timely conduct a student's three-year re-evaluation prior to making a determination of eligibility and need and developing an IEP. However, in this matter the Student's current IEP was developed by the District on May 13, 2020, while the Student's eligibility was current, resulting in an IEP that did not violate the requirements of Rule 51. And because the IEP team meetings in September, 2020, did not result in a new or revised IEP for the Student, the District has not developed an IEP for the Student which was not based upon a current evaluation. The documentation does indicate that in-person learning in the District has resumed as of October 5, 2020, but this occurred after the date the Parents filed their Complaint. The District should be well advised hereby that a failure to take all appropriate actions to timely schedule and conduct the Student's three-year re-evaluation, make a determination of eligibility and educational need and develop an appropriate IEP for the Student, could result in an IEP that is not appropriate for the Student and thus a violation of FAPE.

Therefore, it is concluded that the Student's placement decision was made by a group of persons, including the Parents and other persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options, and that the placement decision was made in conformity with the least restrictive environment requirements in 92 NAC 51-008.01 and based on the Student's unique needs and not on the Student's disability, and the District implemented the requirements of 92 NAC 51-008.01C. As to Issue No. 3, the District is not cited. Corrective Action is not required.

Issue # 2: Did the District review, revise, and implement the Student's IEP in accordance with 92 NAC 51-007.01?

State rule 92 NAC 51-007.01 provides as follows:

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

Issue # 6: Did the District provide special education and related services to the Student in accordance with the Student's IEP, as required by 92 NAC 51-007.02?

State rule 92 NAC 51-007.02 provides as follows:

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

Allegations:

The District failed to implement the Student's IEP and provide special education and related services to the Student during the time remote learning was in place.

Parent Position:

The Student did not receive the services listed on the Student's IEP while remote learning was in place. The Parents have not received data on the Student during remote learning.

District Response:

The District's Letter of Response dated October 5, 2020, indicates that on March 12, 2020, the District announced that as a result of the COVID-19 pandemic all in-person learning was suspended beginning March 16, 2020. The Student's school team communicated frequently with the Parent during this time and the Student continued to receive remote special education services from the Early Childhood Special Education Teacher and remote OT, PT and SLP services in keeping with the District's Continuity of Learning Plan. The District began its 2020/2021 school year remotely due to the COVID-19 pandemic. The Parent has picked up the Student's school materials and iPad but has not allowed the Student to attend school remotely. During the 2020/2021 school year the Student has not received any special educational or related services.

Investigative Findings:

1. On March 12, 2020, the District announced that as a result of the COVID-19 pandemic all in-person learning at District schools was suspended beginning March 16, 2020. The District developed and implemented a Continuity of Learning Plan approved by the NDE designed to allow continued instruction to students through virtual and remote learning.

2. The District's Continuity of Learning plan provides the following options for providing instruction to students with disabilities: accessible distance technology, online or virtual instruction, instructional phone calls, paper packets or worksheets, textbooks, consultation between the special education and general education teacher and other curriculum-based activities. Personal nursing services were not allowed to be provided, and other related services such as OT, PT and SLP services would be provided remotely.
3. District records indicate that the Student's Early Childhood teachers were in very regular contact with the Parents and the Student. In early April, 2020 the Student's teachers reached out to the Parent to determine the Student's availability and preferences for virtual learning and services. The Parent informed the Student's teachers that the Student was available for services during the school day and that video conferencing would be the best option so the Student feels included and can visually see what the Student is doing.
4. The Student's Early Childhood teachers provided weekly packets and video lessons and other activities for the Student. Email records indicate that the Student was accessing these online resources and the Parent did pick up the paper packets at the Student's school.
5. Following the school closure order on March 16, 2020, the OT and PT assigned to the Student contacted the Parents through email to provide directions, suggestions and resources for the Parents to use at home.
6. On March 27, 2020, the OT and PT for the Student prepared an instructional email to the Parents regarding OT and PT activities for the Student to work on at home.
7. District records include a PT Log which identifies and describes weekly virtual PT visits with the Student and Parents, beginning April 16, 2020, through the end of the 2019/2020 school year.
8. District records include an OT Log which identifies and describes weekly virtual OT visits with the Student and Parents beginning April 23, 2020, through the end of the 2019/2020 school year.
9. On March 24, 2020, the Student's SLP contacted the Parents to discuss any current needs for the Student. The SLP contacted the Parents on March 26 to provide the communication packet link and strategies for the Student's goals.
10. District records include a SLP Log which identifies and describes weekly virtual SLP visits with the Student and Parents, and also with the Student's teachers, beginning April 16, 2020 through the end of the 2019/2020 school year.

11. District records include a log of the Early Childhood Special Education teacher's daily and weekly interactions with the Student and Parents, beginning on March 20, 2020 through the end of the 2019/2020 school year.
12. District records include Progress Reports for the Student for the first, second and third quarters of the 2019/2020 school year. The reports indicate that the Student was making Adequate Progress on all of the Student's Annual Goals.
13. The District's Continuity of Learning plan indicates that due to the COVID-19 pandemic restrictions and change to remote learning, the District must report the Student's progress for the fourth quarter of the 2019/2020 school year once schools re-open. No progress reports are available for the Student for the 2020/2021 school year prior to the filing of the Parent's Complaint.
14. The Student's May 13, 2020, IEP and the attached PWN, contain a notice regarding a temporary change in the Student's educational services for the remainder of the 2019/2020 school year due to the COVID-19 pandemic restrictions as follows:
 - a. "For the remainder of the 2019-20 school year, [the Student] will receive virtual services that include access to the lesson plans, including accommodations, on the school website, video lessons on Class Dojo, and weekly video meetings."
15. The Student's May 13, 2020, IEP and the attached PWN, also contain a notice regarding a change in the Student's placement for the 2020/2021 school year as follows:
 - a. "In the fall, [the Student] will move to a general education kindergarten classroom with resource (in the classroom), speech, OT and PT services. Early childhood special education transportation eligibility will end after the 2019-20 school year."

Summary and Conclusions:

The IDEA provides that any party may present a complaint with respect to any matter relating to the identification, evaluation, educational placement, or provision of FAPE to a disabled student. 20 USC §1415(b)(6). Students with disabilities who are eligible under the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a FAPE that emphasizes special education and related services designed to meet their

unique needs and prepare them for further education, employment, and independent living. 34 CFR §300.1(a), and 92 NAC 51-006.01A. "Central to IDEA is the requirement that local school districts develop, implement, and annually revise an individualized education program (IEP) calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d)." Thompson R2-J School Dist. v. Luke., 540 F.3d 1143, 1144 (10th Cir. 2008). The "IEP is a written statement that sets forth the child's present performance level, goals and objectives, specific services that will enable the child to meet those goals, and evaluation criteria and procedures to determine whether the child has met the goals." Ass'n for Cmty. Living in Colo. v. Romer, 992 F.2d 1040, 1043 (10th Cir. 1993). The goals must enable the child to be involved in and make progress in the general academic educational curriculum and meet each of the child's other educational needs that result from the child's disability. 34 CFR § 300.320(a)(2)(ii); 92 NAC 51-007.07A2.

The IDEA and State rules require districts 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). Although school districts should strive to follow IEPs as closely as possible, the IDEA does not require perfect adherence to a child's IEP. Minor discrepancies between the services provided and the services called for by the IDEA do not give rise to an IDEA violation. Van Dun ex. rel. Van Dun v. Baker Sch. Dist. 5J, 502 F. 3d 811, 821 (9th Cir. 2007).

The IDEA provides that each public agency must ensure that "as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP." 34 CFR 300.323 (c)(2); 92 NAC 51-007.02. It should be noted that the phrase "as soon as possible" does not mean immediately. The IDEA permits some delay in the implementation of the IEP. Board of Educ. of Montgomery County v. Brett Y., 28 IDELR 460 (4th Cir. 1998) (holding that 30 days to implement an agreed-upon IEP was consistent with IDEA regulations); D.D. v. New York City Bd. of Educ., 46 IDELR 181 (2d Cir. 2006) (noting that the IDEA permits some delay in implementing an IEP but also requires a specific inquiry regarding the causes of and reasons for the delay). In a situation where the student is being denied a significant portion of the services prescribed by the IEP, a failure to timely implement may rise to a denial of FAPE. Wilson v. District of Columbia, 56 IDELR

125 (D.D.C. 2011). See also *Sarah Z. v. Menlo Park City Sch. Dist.*, 48 IDELR 37 (N.D. Cal. 2007) (A two-week lapse in services did not deprive the student of FAPE.).

In the Complaint, the Parent has alleged that the Student was not provided the special education services set forth in the Student's IEP during remote learning. However, as set forth above, the documentation clearly shows that the Student did receive the special education and related services, as amended in the Student's May 13, 2020, IEP, during remote learning following the closure of the District schools on March 16, 2020, and in compliance with the District's Continuity of Learning plan. The facts show that the District provided the Student with virtual services that included lesson plans, accommodations, video lessons and weekly video meetings, and remote OT, PT and SLP services for the remainder of the 2019/2020 school year. The documentation also indicates that the Parents chose to not have the Student participate in any further virtual or remote learning offered by the District at the beginning of the 2020/2021 school year. There is some indication in the documentation that the Parents have requested a change in placement for the Student to homebound services as recommended by the Student's medical providers, which request is currently being evaluated by the Student's IEP team. However, the Parent's Complaint does not directly deal with this issue.

Therefore, it is concluded that the District did review, revise, and implement the Student's May 13, 2020, IEP, as amended, in accordance with 92 NAC 51-007.01. As to Issue No. 2, the District is not cited. Corrective Action is not required.

It is further concluded that the District did provide special education and related services to the Student in accordance with the Student's IEP, as required by 92 NAC 51-007.02. As to Issue No. 6, the District is not cited. Corrective Action is not required.

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