

COMPLAINT INVESTIGATION REPORT

Complaint Number: 22.23.04
Complaint Investigator: Redacted
Date Complaint Filed: August 10, 2022
Date of Report: Redacted

Issues Investigated

1. Did the District ensure that the placement decision was made by a group of persons, including the parents and other persons knowledgeable about the child, and in accordance with the least restrictive environment requirements? [92 NAC 51-008.01C]
2. Did the District consider the special education and related services and supplementary aids and services to enable the child to participate in extracurricular and other nonacademic activities and to be educated and participate with other children with disabilities and nondisabled children? [92 NAC 51-007.07A5b, c]
3. Did the District consider the use of positive behavioral interventions, supports, and strategies to address the Student's behavior? [92 NAC 51-007.07B3]
4. Did the District follow appropriate procedures to determine whether the behavior that led to disciplinary removal was a manifestation of the Student's disability and/or the direct result of the District's failure to implement the IEP? [92 NAC 016.02E]

Information Reviewed by Investigator

From the Complainant

- Letter of Complaint received August 10, 2022
- Additional Documentation received August 10, 2022

From the District

- Letter of Response dated and received September 8, 2022
- Email correspondence dated September 21, 2022
- Timeline of Events received September 8, 2022
- Emails dated February 16 & 17, 2022
- MDT dated December 1, 2021
- IEP dated December 15, 2021
- IEP dated August 15, 2022

Introduction

The Student enrolled in kindergarten in the fall of 2021. After a number of incidents of physical aggression toward other students, use of foul language,

non-compliance, inappropriate behavior in the bathroom, and elopement, an evaluation was conducted and the Student was found eligible for special education as a student with an Other Health Impairment. The Student was served at the local elementary school through the support of an IEP from mid-December, 2021 until mid-February, 2022 before being placed in a special school, a placement that constituted a more restrictive environment.

Issue # 1

Did the District ensure that the placement decision was made by a group of persons, including the parents and other persons knowledgeable about the child, and in accordance with the least restrictive environment requirements? [92 NAC 51-008.01C]

92 NAC 51-008.01C states:

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

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

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

Allegations/Parent Position

The District predetermined the Student's placement without providing the Parent opportunity for input into this decision. (Letter of Complaint received August 10, 2022)

District Response

The District acknowledges that "procedural errors" were made in the change of placement but maintains that the Student has been "served in a manner that provides FAPE in the LRE."

Investigative Findings

- The Student was found eligible for special education services as a student with an Other Health Impairment on December 1, 2021 (MDT dated December 1, 2021)

- Three behavior incidents were documented from the time the Student began receiving special education services (December 16, 2021) and the subsequent meeting (February 16, 2022) (Email correspondence; dated and received September 21, 2022)
- A meeting was held on February 16, 2022 involving all required members of the IEP team (Email correspondence; dated and received September 21, 2022)
- The District did not develop a Notice of Meeting documenting the purpose for this meeting (Email correspondence; dated and received September 21, 2022)
- In this meeting, the District proposed to change the Student's placement from the current setting to a more restrictive environment (a special school) (Email correspondence; dated and received September 21, 2022)
- The Parent expressed concerns about this change of placement though the District maintained that the more restrictive environment was the most appropriate placement (Email correspondence; dated and received September 21, 2022)
- A Change of Placement was not completed, nor was the change of placement documented in the Student's IEP (Email correspondence; dated and received September 21, 2022)
- A Prior Written Notice outlining the options that the District had considered and rejected and the reasons they were proposing this change of placement was not provided (Email correspondence; dated and received September 21, 2022)
- The Parent sent an email to the principal following the February 16 meeting that stated, "I would like to see [the Student] finish out the school year at [current placement]. I think it is in the best interests for [the Student] being that there are only 3 months left, especially how [the Student] has shown progress with the new dose of medication and has only had the one incident. I believe we are on the right track with [the Student], I don't think it is fair to [the Student] or [the Student's] friends if [the Student] is shut out of the rest of the school year." (Email dated February 16, 2022)
- The principal's response to the Parent's email stated, "The IEP team made the decision today to seek an alternate placement for [the Student], not due to this one incident of physical aggression, but as a culmination of all the events from this year. We are willing to work with you (along with [after school program]) to help accommodate your work schedule." (Email dated February 16, 2022)

- The Parent requested a meeting with the principal to discuss concerns about the change in placement (Email dated February 17, 2022)
- An informal meeting was held on February 18, 2022 (Email correspondence; dated and received September 21, 2022)
- The Student started at the new placement on March 2, 2022 (Timeline of Events received September 8, 2022)
- The IEP was not amended to reflect the changes and has still not been amended (Email correspondence; dated and received September 21, 2022)
- The Student's current IEP indicates that the Student is provided 50 minutes per week of special education services (IEP dated December 15, 2021)

Summary and Conclusions

The above facts uncover significant errors in the process undertaken by the District, a process which ultimately denied the Parent the rights afforded under the IDEA. First, no documentation was completed to reflect the meeting held on February 16 as an IEP meeting and/or the purpose of this meeting. Placement decisions are made in the context of IEP team meetings. The Parent made multiple efforts to communicate concern about the change of placement, concerns that were not properly considered, and no other placement options were presented or discussed. The District's actions constitute *predetermination of placement*. "Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (H.B. v. Las Virgenes USD, 239 Fed. Appx. 342- 9th Circuit, 2007) The heart of predetermination is the District's failure to consider the input of the Parent in making a placement decision.

Two additional issues are raised by the above facts:

92 NAC 51-009.05 states:

009.05 *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:*

009.05A *Proposes to initiate or change the identification, evaluation, or educational placement of a child or the provision of a free appropriate public education*

The prior written notice requirements provide the appropriate means of documenting the District's actions. In addition, this document provides an explanation of why the action was taken, a description of all options considered

and why other options were rejected, the data used as the basis for the proposal, and perhaps, most importantly, a statement that outlines protections afforded the parents under the IDEA. Should the Parent disagree with the placement decision proposed by the District, it is the responsibility of the District to provide the Parent information about their rights and resources that will help them to understand these provisions.

The second violation that is raised by the above facts is that the District did not amend the IEP to reflect not only the change of placement, but the change in services being provided until August 15, 2022. The Student was moved from a general education environment to a special school that provides specialized instruction throughout the school day, while the Student's IEP indicated that only 50 minutes per week of special education services were required. Consequently, for the last 3 or more months of the school year, the Student was not served in the least restrictive environment according to the IEP, and the IEP did not reflect the Student's needs.

Based on the above, the District failed to implement the requirements of 92 NAC 51-008.01C1; 009.05A; and 007.01. Thus **corrective action is required** and will be detailed at the end of this report.

Issue # 2

Did the District consider the special education and related services and supplementary aids and services to enable the child to participate in extracurricular and other nonacademic activities and to be educated and participate with other children with disabilities and nondisabled children? [92 NAC 51-007.07A5b, c]

92 NAC 51-007.07 states:

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 provide 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:*

007.07A5b *To be involve in and progress in the general*

*education curriculum
and to participate in
extracurricular and
other nonacademic
activities*

Allegations/Parent Position

The Parent alleges that prior to the start of the 2022-23 school year, the District had “taken away” the Student’s before and after school care options, a service that was provided during the spring of 2022. (Letter of Complaint dated and received August 10, 2022)

District Response

The principal called the Parent prior to the start of the 2022-23 school year and communicated the Student did not require services and accommodations before and after school. However, when the Parent filed a state complaint, the District convened an IEP meeting and the Student was offered direct services from 8:00 to 8:20 am and 2:20 to 3:20 each day.

Investigative Findings

- There is no documentation of this service being part of the Student’s special education or related services during the 2021-22 school year (IEP dated December 15, 2021)
- An IEP meeting was held on August 15, 2022 and the District agreed to provide the services described above (Letter of Response dated September 8, 2022)
- There is a Prior Written Notice reflecting the proposal of services offered, though the new IEP does not include these services on the IEP itself (IEP dated August 15, 2022)

Summary and Conclusions

While the District’s provision of these services in the spring of 2022 suggest that the IEP team believed that the Student needed services before and after school, the District failed to document this as a needed service in the IEP. The IEP team convened in the fall of 2022 and agreed to continue to offer special education services before and after school, though have not included this as a service on the IEP.

Based on the above facts, the District failed to implement the requirements of 92 NAC 51-007.07A. Thus **corrective action is required** and will be detailed at the end of this report.

Issue # 3

Did the District consider the use of positive behavioral interventions, supports, and strategies to address the Student's behavior? [92 NAC 51-007.07B3]

92 NAC 51-007.07 states:

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

007.07B3 *In the case of a child whose behavior impedes his or her learning or that of others, the IEP team shall consider the use of positive behavioral interventions, and supports and other strategies to address that behavior*

Allegations/Parent Position

The Student was making progress, having recently started new medication.

District Response

The District considered, and has implemented the use of positive behavioral interventions, supports, and strategies to address the Student's behavior. The Student's IEP documents a number of positive behavioral interventions, supports, and strategies to address the Student's behavior. (Letter of Response dated September 8, 2022)

Investigative Findings

- The Student's 2021-22 IEP included a behavior plan that was implemented in the less restrictive environment (IEP dated December 15, 2021)
- The 2021-22 IEP also includes a long list of strategies that are needed (IEP dated December 15, 2021)
- The IEP was amended on August 15, 2022 to include a new behavior intervention plan which addresses the Student's needs in the more restrictive environment (IEP dated August 15, 2022)

Summary and Conclusions

The December, 2021 IEP reflected the Student's needs in the less restrictive setting. The new IEP reflects the current needs, though was not developed until August of 2022. This means for many months, the Student's IEP did not reflect the behavior interventions, supports, and strategies that were needed.

Based on the District's failure to amend the IEP in a timely manner, the District failed to implement the requirements of 92 NAC 51-007.07B. Thus, **corrective action is required** and will be detailed at the end of this report.

Issue #4

Did the District follow appropriate procedures to determine whether the behavior that led to disciplinary removal was a manifestation of the Student's disability and/or the direct result of the District's failure to implement the IEP? [92 NAC 016.02E]

92 NAC 51-016.02 states:

016.02E *Manifestation Determination*

016.02E1 *Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the school district or approved cooperative, the parent, and the relevant members of the child's IEP team shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:*

016.02E1a *If the conduct in question was caused by or had a direct and substantial relationship to the child's disability; or*

016.02E1b *If the conduct in question with the direct result of the school district's or approved cooperative's failure to implement the IEP.*

Allegations/Parent Position

This issue was not raised by the Parent, but rather, included by the investigator.

District Response

Because the Student's change of placement was not due to a direct violation of the student code of conduct, the provisions described above are inapplicable.

Investigative Findings

- The Student was suspended from school for a total of 7 partial or full days during the 2021-22 school year (Email correspondence; dated and received September 21, 2022)

Summary and Conclusions

It is true that the District's change of placement was not directly a disciplinary matter, and the manifestation determination requirements are irrelevant.

Based on the fact the Student did not miss 10 or more days, the requirement for a Manifestation Determination Meeting did not exist. As a result, the District implemented the requirements of 92 NAC 51-016.02 and **no corrective action is required.**

Corrective Action

Training

1. The District shall develop training outlining the IEP process from initial evaluation through the delivery of services including:
 - a. Procedural requirements for the development of an IEP;
 - b. Provision of a notice of meeting;
 - c. Requirements for a change of placement; and
 - d. District responsibility in ensuring the procedural safeguards are afforded to parents
2. Training must include all administrative and certified special education staff.
3. Training shall be submitted to NDE for approval by October 30, 2022 and conducted no later than November 30, 2022.
4. Sign-in sheets with roles of attendees will be submitted to NDE within 10 days of the completion of the training (no later than December 10, 2022).

Reconvene the IEP Team

1. On or before October 30, 2022, the District shall reconvene the Student's IEP team to do the following:
 - a. Consider all current and relevant data
 - b. Ensure that the IEP directly reflects all the Student's needs and all services both during and outside the school day that are necessary for the Student to make progress on IEP goals.

- c. Consideration of placement and what type of placement is most appropriate to meet the needs established in the IEP, within the context of LRE requirements
- d. Discussion and documentation of all special education and related services and supplementary aids and services the Student needs to participate in before and after school activities.
- e. Documentation of the specific behavior interventions, supports, services, and strategies needed for the Student to make progress on IEP goals.

Follow Up File Review

- 1. NDE will conduct a follow up file review of three students.
- 2. NDE will send a request for 3 student files. The file review will include:
 - a. Notification of Meeting
 - b. IEP includes supplementary aids and services for both during and outside of the school day
 - c. Includes positive behavior intervention, supports, services and strategies
 - d. Change of Placement form, if applicable

Notice to District

Unless otherwise indicated, the corrective action specified must be completed within sixty (60) calendar days of the date of this report. Documentation must be submitted as soon as possible following the completion of the corrective actions. All documentation of correction must be sent to:

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