

## COMPLAINT INVESTIGATION REPORT

**Complaint Number:** 22.23.21  
**Complaint Investigator:** [Redacted]  
**Date Complaint Filed:** February 7, 2023  
**Date of Report:** [Redacted]

### Issues Investigated

1. Should the District have and/or did the District conduct a manifestation determination review before changing the Student's placement because of disciplinary removals? [92 NAC § 51-016.02E]
2. Did the District properly determine Student's placement based on their least restrictive environment (LRE)? [92 NAC § 51-008.01]
3. Is the Student's IEP tailored to their unique needs and reasonably calculated to enable the Student to make progress appropriate in light of their circumstances? [92 NAC §§ 51-007.07 and 007.07C4]

### Information Reviewed by Investigator

#### *From the Complainant*

- Letter of Complaint dated February 6, 2023; received by NDE February 7, 2023.
- Telephone interview with Complainant on March 20, 2023.

#### *From the School District*

- Letter of Response dated March 3, 2023; received by NDE March 3, 2023.
- Zoom interview with District's Special Education Director, Elementary School Principal, and Special Education Teacher on March 20, 2023.
- Affidavit of District's Special Education Director dated March 2, 2023.
- Multidisciplinary Team Report (MDT) dated March 9, 2021.
- Individualized Education Program (IEP) effective January 25, 2022.
- IEP effective January 31, 2023.
- Positive Behavior Support Plan (BIP) dated October 2022.
- Notice of Meeting dated January 23, 2023.
- Prior Written Notice (PWN) dated January 25, 2022.
- PWN dated January 31, 2023.
- PWN dated February 3, 2023.
- PWN dated February 22, 2023.
- Progress Reports dated March 9, 2022; May 23, 2022; October 14, 2022; December 21, 2022; and March 9, 2023.
- Behavior Detail Report documenting incidents between February 3, 2022, through March 7, 2023.
- Draft Functional Behavior Assessment (FBA) (no date)
- 2021–22 Daily Attendance Detail.
- 2022–23 Daily Attendance Detail.
- Notes Page dated February 6, 2023.
- Emails with Complainant between February 7, 2022, through May 12, 2022.
- Check-In, Check-Out data for the 2022–23 school year.
- Acadience reading and math scores for the 2022–23 school year.
- MAP assessment scores from Fall 2021 through Winter 2023.
- USPS Tracking data regarding February 6, 2023 delivery.

- Student-Parent Handbook for the 2022–23 school year.

### **Findings of Fact**

1. No issues raised in the complaint regarding the Student are currently subject to a due process hearing, nor have these issues been previously decided in a due process hearing.
2. The Student is currently seven (7) years old and in the second grade.
3. The Student was last evaluated on March 9, 2021. As a result of the evaluation, the Student is identified as a student with a disability under the primary category of Developmental Delay (DD).
4. There are two IEPs relevant to the period of this investigation. The first IEP is dated January 25, 2022 (the district began implementation on February 8, 2022), during the 2021–22 school year. Relevant portions of the IEP include:
  - a. The Parent indicated the Student's pediatrician stated the Student needs a specific behavior plan and one-on-one paraprofessional.
  - b. The Student's behavior impedes their learning or that of others.
    - i. When the Student exhibits the following behaviors, the Student is to be removed to an adult-supervised area to regain control:
      1. Drops to the floor
      2. Disrupts other students' learning time
      3. Raises voice at the teacher
      4. Yells and screams in the classroom or hallways
    - ii. Other positive behavior supports being used include:
      1. Access to daily visual/written schedule
      2. Ignore behavior
      3. Redirected to task
      4. Proximity
      5. Restate expectations
      6. Choices
      7. Model expected behavior
      8. Social stories
      9. Reteaching appropriate or replacement behaviors
      10. Adult-facilitated problem solving
      11. Removal to an adult-supervised area to regain self-control
      12. Assigned seating
  - c. Present Levels of Academic Achievement and Functional Performance (PLAAFP) included in part the following:
    - i. Time spent out of the classroom is limited to only the amount of time it takes the Student to regain self-control and be ready to participate.
    - ii. The Student is allowed to participate in extracurricular activities when they are exhibiting compliance, have completed work, and proved they can be safe, responsible, and respectful. The Student will not be allowed to participate in school parties and/or field trips if they demonstrate non-compliant or inappropriate behaviors less than 60% of the time the day before.
  - d. The IEP contains eight annual measurable goals to support reading, math, writing, speech-language, social-emotional, and occupational therapy (OT).
  - e. Special education and related services include:
    - i. Special instruction for 55 minutes/day in the resource room.

- ii. Speech-language therapy for 80 minutes/week.
    - iii. OT for 30 minutes/day, 32 days/year.
  - f. Accommodations include, in part:
    - i. The student would benefit from taking breaks when tired.
- 5. A prior written notice (PWN) dated January 25, 2022, was attached to the IEP. The PWN only includes language regarding changing the Student's IEP goals and duration of services.
- 6. By the end of the 2021–22 school year, the Student had made progress on all eight IEP goals, as documented in the progress reports dated March 9 and May 23, 2022.
- 7. The first day of school for the 2022–23 school year was August 11, 2022. The IEP dated January 25, 2022, was still in effect.
- 8. Between August 11 and October 19, 2022, the district documented 16 office referrals regarding the Student. Each incident is detailed below:
  - a. August 17, 2022 - the Student refused to complete the task requested of them, began yelling, and threw a pencil to the ground. The Student was able to take a break to regain control.
  - b. August 17, 2022 (second incident) - the Student refused to complete the task requested of them and began screaming in protest. The Student was able to take a break to regain control.
  - c. August 18, 2022 - the Student refused to complete the task requested of them and ran around the room screaming in protest. The student was able to take a break in the office where they continued to scream.
  - d. August 18, 2022 (second incident) – the Student was kicking the teacher after recess. Once inside, the Student yelled at the teacher that they were going to kick the teacher again. The Student was able to take a break to regain control.
  - e. September 7, 2022 - the Student refused to complete the task requested of them and began screaming in protest. The Student was able to take a break to regain control.
  - f. September 7, 2022 (second incident) - the Student refused to complete the task requested of them and lay on the floor kicking things in protest. It is unclear if the Student was given a break or if the Principal simply spoke with them about expectations.
  - g. September 9, 2022 - the Student refused to complete the task requested of them and began screaming in protest. The Student was able to take a break in the office where they continued to scream. District staff contacted the Parent to request assistance. The Parent took the Student home at 1:55 pm.
  - h. September 13, 2022 - the Student refused to complete the task requested of them and began screaming in protest. The Student took a break in the office. Later in the day, the Student refused to follow directions and complete the task requested of them. The Student screamed in protest. District staff removed the Student at least two additional times to take a break in the office.
  - i. September 16, 2022 – the Student followed the teacher around the room yelling. When asked to sit down, the Student refused, continued yelling, and hit the teacher. District staff contacted the Parent to request assistance. The Parent took the Student home at 2:15 pm.
  - j. October 3, 2022 – the Student yelled at their peer and continued screaming until the Principal took the Student to the office for a break.
  - k. October 4, 2022 - the Student refused to complete the task requested of them and began following the teacher and screaming in protest. The Student then lay

in the hallway screaming. It is unclear if District staff gave the Student a break or if the Principal simply spoke with them about expectations.

- l. October 7, 2022 – the Student was screaming in the hallway. District staff allowed the Student to take a break in the office where they continued to scream. District staff contacted the Parent to request assistance. The Parent took the Student home at 9:40 a.m.
  - m. October 11, 2022 - the Student refused to complete the task requested of them and yelled at the teacher. As the morning continued, the Student hit the teacher, continued to refuse to complete the task requested of them, and screamed until they went for a walk with the special education teacher. Once back in the classroom, the Student continued to scream and hit the teacher so District staff removed the Student from the classroom. Once in the office, the Student threatened the Principal and kicked them. As a result, District staff required the Student to work in the special education classroom for the remainder of the day.
  - n. October 13, 2022 – the Student screamed at staff throughout the day, tipped over chairs, and hit the Principal. As a result, District staff did not allow the Student to attend recess and sent the Student to lunch detention.
  - o. October 18, 2022 – the Student yelled at the teacher. District staff permitted the Student to take a break in the office to regain control.
  - p. October 19, 2022 – the Student hit the teacher multiple times, refused to complete the task requested of them, and yelled in protest. The Student sat in the hallway from 9:30 to 9:55 a.m. where they continued to scream until the Principal was able to leave their meeting and take the Student to the office.
9. A progress report dated October 14, 2022, indicates the Student made progress on all of their IEP goals. The progress report also indicated that the Student was able to return to class after taking a break after an average of 13 minutes.
10. On October 20, 2022, a positive behavior support plan (BIP) was developed for the Student. Relevant portions of the BIP include:
- a. Preventative Strategies:
    - i. The teacher will address and handle the Student in a calm, neutral tone and manner.
    - ii. The teacher will give the Student forewarning regarding changes in routine and schedule.
    - iii. The teacher will frequently check in with the Student to see if they need help or are stuck.
    - iv. Proximity control.
    - v. The Student will have choices.
    - vi. The teacher will reduce assignments or the number of items to be completed.
    - vii. The Student will have extra time to complete tasks.
    - viii. The teacher will send the Student to take a break through an adult-facilitated activity.
    - ix. The Student can take a break after completing an undesired task.
    - x. The student's team members meet weekly to discuss what is working and where adjustments can be made.
  - b. Consequences for Noncompliance
    - i. Tier I
      1. When becoming upset, the Student will be shown visual cues for lowering their voice.

2. The Student will be asked to take the task to the special education room to regain control, complete the task, and then return to class.
  - ii. Tier II
    1. If the Student has been asked to leave a second time before lunch, the Student will spend the rest of the [morning] listening to instruction via Zoom in the special education classroom. After lunch/recess, the Student will return to class and the tiers will start over.
  - iii. Tier III
    1. If the Student is unable to regain emotional control throughout the afternoon, the Parents will be called to pick up the Student for the day.
11. The first office referral that occurred after District staff implemented the BIP was on November 28, 2022. On that day, the Student screamed at the teacher. The Student then lay down in the hallway and continued to scream until they went on a walk with the Principal. Once able to return to class, the Student refused to complete the requested task and so District staff required the Student to take a break in the office where they continued to scream. District staff required the Student to eat lunch in the office. After lunch, the Student continued to scream and District staff prevented the Student to return to class for an unknown amount of time.
  12. No other incidents led to a referral to the office that occurred between November 28, 2022, and the end of the 2022 calendar year.
  13. A progress report dated December 21, 2022, indicates the Student made progress on all of their IEP goals except for one of the social-emotional goals where they made little to no progress demonstrating a calm body, calm voice, and success in following directions. The progress report indicated the Student made progress on the second social-emotional goal despite the average amount of time it took the Student to return to class following an incident of escalation where District staff removed the Student from the classroom increasing from a 13-minute to 26-minute average.
  14. Following the winter break, school resumed on January 4, 2023.
  15. Between January 4 and January 10, 2023, District staff documented four office referrals regarding the Student. Each incident is detailed below:
    - a. On January 4, 2023, the Student began screaming when asked to line up at recess to go inside. Once inside, the Student started tipping over chairs and screaming more. The Principal asked the Student to leave the room, but the Student refused. The Principal then tried to escort other students out of the room, but the Student blocked the doorway. Eventually, the Student agreed to leave the room to regain control.
    - b. On January 6, 2023, the Student began tipping over chairs and screaming when told to stop. The teacher asked the Student to leave and they refused. The teacher attempted to escort other students out of the room, but the Student blocked the doorway. Eventually, the Student went into the hallway where they continued to scream until they agreed to go to the office for a break. Later, the Student returned to the classroom and became disruptive again by screaming, tipping over chairs, and refusing to leave. District staff escorted other students out of the classroom until the Student left the room.
    - c. On January 9, 2023, the Student began screaming and throwing chairs across the room. District staff escorted other students out of the classroom until the Student

agreed to go to the office. While in the office, the Student continued to scream and hit the Principal.

- d. On January 10, 2023, the Student began screaming and throwing chairs. District staff escorted other students out of the classroom. District staff asked the Parent to come to the school to de-escalate the Student.
16. At the end of the school day on January 10, 2023, the Parent and the Principal had a conversation outside of the school building about the Student's recent behavior incident. The Parent indicates the Principal said the Student would be in the special education room for the rest of the week – to which the Parent agreed. However, the Parent said they were unaware the Student would be receiving instruction via Zoom. The Principal indicates they informed the Parent there were many options the IEP Team could consider in response to the behavior incidents. One option was to pace the Student in the special education classroom and receive instruction via Zoom. At that time, the Parent said that sounded like a good option and they should try that. The Principal states they told the Parent they would need to have an IEP Team meeting.
  17. The Student received all instruction via Zoom in the special education classroom starting on January 11, 2023.
  18. The IEP Team met on January 31, 2023, and revised the Student's IEP. Relevant portions of the IEP include:
    - a. The same parent has concerns regarding a paraprofessional.
    - b. The same positive behavioral interventions and supports from the previous IEP with the addition of providing an alternate placement for learning to limit distractions.
    - c. The same provision regarding field trips and class parties.
    - d. The IEP contains eight revised, annual measurable goals to support reading, math, writing, speech-language, social-emotional skills, and OT.
    - e. A note is included that indicates the Student benefits from a more restrictive environment. Specifically, the location of the Student's general education class will be in the special education room with instruction from the general education teacher via an online platform for six weeks. The Student will attend specials, lunch, and recess with their peers. After six weeks, the IEP Team will review the data collected to determine if the Student can return for portions of the day in the general education classroom. If unaccepted classroom behaviors return or persist, the Student will return to the alternate location for two weeks.
    - f. Special instruction services in the resource room increased from 55 minutes/per day to 90 minutes/per day.
    - g. Speech services decreased from 80 minutes/per week to 60 minutes/per week.
    - h. OT services remained the same.
    - i. The Student's accommodations remained the same with the addition of the following:
      - i. A change in the location of regular education instruction (i.e., the special education classroom with the instruction received via Zoom) to avoid drawing negative attention from peers.
      - ii. A room (special education room, Principal's office, or another adult-supervised area) is available for the Student to take a break to regain emotional control with adult supervision before returning to class.
  19. A PWN dated January 31, 2023, is attached to the revised IEP. The PWN includes the following, in part:
    - a. The District informed the Parent of the change in "location" on January 10, 2023.

- b. The change in “location” will take place from January 11 through February 22 with the goal to reintegrate the Student into the general education classroom. After six weeks, if successful, the District will reintegrate the Student into the general education classroom during times in which the Student has previously been successful (e.g., story read-aloud and whole group reading).
  - c. Leaving the Student in the general education classroom was rejected due to a decrease in academic performance.
  - d. The Parent provided a letter from an attorney and disagreed with the time frame for reviewing a reintegration plan. The Parent views this new location as a disciplinary removal and requests a functional behavior assessment (FBA).
20. A PWN dated February 3, 2023, indicates, in part, the District agrees to complete an FBA.
21. A PWN dated February 21, 2023, indicates, in part, the District proposes to increase the Student's time in the general education classroom by 30 minutes, due to the Student's increased ability to self-regulate and not disrupt the learning environment.
22. The Student-Parent Handbook for the 2022–23 school year states the following, in part, regarding classroom parties and field trips:
- a. Classroom parties/field trips are a privilege. If a student demonstrates inappropriate behaviors, they may not be able to attend the classroom party/field trip.

**Issue # 1**

Should the District have and/or did the District conduct a manifestation determination review before changing the Student's placement because of disciplinary removals? [92 NAC § 51-016.02E]

92 NAC § 51-016 states:

|     |   |  |
|-----|---|--|
| 016 | <i>Disciplinary Removal of Children with Disabilities</i> |  |
|     | 016.01A   | <i>For the purpose of removals of a child with a disability from the child's current educational placement under Section 016, a change of placement occurs if:</i> |
|     | 016.01A1  | <i>The removal is for more than 10 consecutive school days; or</i>   |
|     | 016.01A2  | <i>The child is subjected to a series of removals that constitute a pattern:</i>   |
|     | 016.01A2a   | <i>Because the series of removals total more than 10 school days in a school year;</i>   |
|     | 016.01A2b   | <i>Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and</i>            |
|     | 016.01A2c   | <i>Because of such additional factors as the length of each removal, the total amount of</i>   |

time the child has been removed, and the proximity of the removals to one another.

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 relevant members of the child's IEP team (as determined by the parent and the school district or approved cooperative) 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 was the direct result of the school district's or approved cooperative's failure to implement the IEP.*

*Allegations/Parent Position*

The Parent alleges the Student's educational placement changed on January 11, 2023 due to disciplinary infractions. As a result, the Student receives all general education instruction via Zoom in the special education classroom away from their peers. The only integration with the Student's peers is during electives (i.e., music, art, and physical education), lunch, and recess. Before the Student is allowed to reintegrate with their peers in the general education classroom, the Student must earn their way back. *Per Letter of Complaint.*

*District Response*

The District asserts a manifestation determination review was not necessary because there was no disciplinary change in placement. Rather, the District appropriately responded to the Student's needs and changed the location in which the Student receives instruction.

Specifically, the Student's location of their general education class changed to the special education classroom with instruction provided via Zoom. The Student has the same opportunities to interact with their peers in nonacademic activities and is able to see and interact with their peers via Zoom.

As the physical location of the Student's class was the only thing that changed, the District had no obligation to hold an IEP Team meeting, provide a prior written notice, or conduct a



manifestation determination review prior to the change in location. *Per the Letter of Response dated March 3, 2023.*

### *Investigative Findings*

The question here is whether the instances when the District removed the Student from their educational environment during the 2022–23 school year constituted disciplinary removals and/or a change in placement. Both are discussed below.

#### *What is removal?*

The Student's "removal" from the general education classroom is not the type of removal that is often present when determining whether there has been a disciplinary removal for ten consecutive school days or a pattern of removals that would require a manifestation determination review (MDR). Thus, there is a question if the "removal" is a removal at all.

In a *Dear Colleague Letter*, the U.S. Education Department's Office of Special Education and Rehabilitative Services (OSERS) stated that exclusionary disciplinary measures (e.g., the use of study carrels, time outs, and restrictions in privileges), are not considered disciplinary removals from the current placement, so long as the student is "afforded the opportunity to continue to be involved in and make progress in the general education curriculum, receive the instruction and services specified on their IEPs, and participate with nondisabled children to the extent they would have in their current placement." 116 LRP 33108 (OSERS 08/01/16). However, OSERS also stated exclusionary discipline measures could rise to the level of a disciplinary removal if used repeatedly. *Id.* For example, OSERS stated a "pattern of office referrals, extended time excluded from instruction (e.g., time out), or extended restrictions in privileges," could be a disciplinary removal. *Id.*

While the Student's breaks in the office are not labeled as "time outs," it is a period of time that the Student is excluded from instruction so that they may regain their composure. The breaks also frequently occur in the office and the District documents them as office referrals. Thus, the incidents that the District documented from August 17, 2022, through January 10, 2023, will be discussed below to determine if they rise to the level of disciplinary removal.

It is also important to note, the behavior records the District provided were only records of office referrals. During the District interview on March 20, 2023, the District indicated other incidents have occurred during this school year. However, the District determined the incidents were not severe enough to require an office referral. That said, there are other incidents that may or may not have resulted in the Student being outside of the classroom in order to regain self-control. The District did not provide details on the other incidents.

#### *August 17, 2022, through January 10, 2023 Incidents*

For purposes of determining whether there was a pattern of removals, this investigator examined each of the 21 incidents that occurred between August 17 and January 10, 2022, to determine if a pattern of office referrals, extended time excluded from instruction (e.g., time out), or extended restrictions in privileges occurred.

The 21 incidents span over 18 school days. In each of the 21 incidents, there were two noted events that would lead to an office referral – (1) Student's refusal to do their work/follow directions or (2) Student engaging in disruptive behaviors with no indication it was the result of work refusal. Specifically, the Student refused to do their work/follow directions a total of eleven times, the Student became disruptive six times, and the Student did both four times. In 20 of the 21 incidents, the Student engaged in yelling/screaming – clearly signifying that the Student's

behavior is substantially similar in each instance. Thus, only the 20 incidents will be discussed further.

In each of the 20 incidents, District staff gave the Student a break to regain their composure. The break could consist of a cool-down period in the office or a walk around the building. However, the incident report is not always clear what the break consisted of or for how long the Student was given a break.

When District staff was asked how long the Student's breaks or walks were, they indicated it often only took a "few minutes" for the Student to calm down, with the goal being no more than ten minutes. *Per District Interview on March 20, 2023.* However, the progress report noted that between the start of the school year and October 13, 2022, the Student was able to return to class after an average of 13 minutes. Between October 14, 2022, and the end of the calendar year, the progress report indicates the Student was able to return to class after an average of 26 minutes. As the progress report establishes an average and, presumably, the average was determined with data the District kept, the averages noted in the progress reports will be considered factual.

It is unclear how long the Student's breaks were during the four January 2023 incidents. Presumably, the breaks were more similar in nature to the 26-minute average breaks as the District eventually changed the Student's location as a result of the incidents. Thus, the 26-minute average will be utilized in the analysis of the four January 2023 incidents.

Between August 17 and October 13, 2022, there were 13 incidents in 11 days. For three of the incidents, the Parent took the Student home early, on their own accord, according to the District. (*Note: The Parent did not recall taking the Student home early. However, the Parent did indicate they had not been asked to take the Student home early this school year.*) As the Parent elected to remove the Student, those days will not be counted as disciplinary removals.

Four of the incidents occurred on two different days. Each of these days District staff removed the Student from the classroom at least twice. Those two days will be counted as disciplinary removals given the frequency of office referrals and the time the Student was excluded from instruction. Similarly, another incident resulted in at least three removals from the classroom. That day will also be counted as a disciplinary removal given the amount of time the Student was excluded from instruction.

An incident on October 11, 2022, resulted in the District placing the Student in the special education classroom for the remainder of the day; another incident on October 13, 2022, resulted in the District removing the Student from recess and sending the Student to lunch detention. Both incidents will be counted as disciplinary removals given the frequency of office referrals, the removal from the general education classroom, and the loss of privileges.

The other three incidents resulted in an average of a 13-minute "break" from instruction – totaling 39 minutes over three days. Those three incidents will not be counted as disciplinary removals given the short amount of instruction that was missed. Thus far, there are five days in which the Student was removed.

Between October 14, 2022, and January 10, 2023, there were seven documented incidents. On October 19, 2022, District staff required the Student to sit in the hallway for 25 minutes. After the Student continued to misbehave, District staff escorted the Student to the office for a break. Given the length of time, the Student was excluded from instruction, this will be counted as a day of disciplinary removal. Another incident occurred on November 28, 2022. During this

incident, District staff prevented the Student from returning to class for a significant period of time. This day will be counted as a disciplinary removal given the extended period of time the Student was excluded from instruction. On January 6, 2023, District staff removed the Student from the classroom at least twice. This day will also be counted as a disciplinary removal given the extended period of time the Student was excluded from instruction.

Of the four other incidents, the 26-minute break average will be utilized for a total of 104 minutes of missed instruction. During the incidents, there is an indication that some of the supports identified in the Student's IEP were utilized to aid the Student in self-regulation (e.g., re-teaching of appropriate or replacement behaviors, removal to an adult-supervised area). Those four incidents will not be counted as disciplinary removals given the short amount of instruction that was missed.

In total, between the start of the school year and January 10, 2023, there are only eight days that are considered disciplinary removals. The regulations require a total of 10 days of disciplinary removals before the District is required to conduct an MDR. Thus, at this point in time, the District was not required to conduct an MDR.

#### Change in "Location" – January 11, 2023

On January 11, 2022, the District began providing the Student with their general education instruction via Zoom in the special education classroom. The District asserts that the Student's level of interaction with their nondisabled peers did not change as the Student could still see and interact with their peers.

Online learning or virtual instruction gained popularity as a response to Covid-19. Prior to 2020, the use of virtual instruction was much more limited and used for different reasons than today. Subsequently, virtual instruction is used more often, however, it is generally utilized in a setting other than the school building (e.g., at the student's home, in a hospital, etc.). Here, the Student is able to physically attend school, does physically attend school, but receives their general instruction via Zoom. Given the unique circumstances, there are no regulations or case law that address this issue directly.

A change in location is not always a change in placement. However, a change in location may be a change in placement if the change substantially alters the student's educational programming. See *Letter to Tymeson*, 81 IDELR 23 (OSEP 2022). In *Letter to Tymeson*, the Office of Special Education Programs (OSEP) states the following factors should be considered in determining if the change in a location substantially alters the educational programming: (1) whether the educational program in the IEP has been revised; (2) whether the student is able to be educated with their nondisabled peers to the same extent; (3) whether the student has the same opportunities to participate in nonacademic and extracurriculars; and (4) whether the new placement is the same on the continuum of alternative placements. *Id.*

Here, the Student's educational programming in the IEP was not revised as a result of the change in location, nor did their opportunities to participate in nonacademic and extracurriculars change. However, the placement is different on the continuum of alternative placements. Specifically, the Student is no longer in the general education classroom. Instead, the Student receives instruction in the special education classroom where only other students with a disability can be educated. So, the question that will determine if there was a change in location or a change in placement is the analysis of the second factor listed above.

The District was asked how the Student is able to interact with their peers while on Zoom. The District stated, during small group reading, a computer that is connected to Zoom is placed at the table with the Student's peers in the general education classroom allowing the Student to see and speak with their peers. All other activities the District mentioned had very little peer interaction or involved independent work. Additionally, when instruction is being provided, the computer that is connected to Zoom is facing the teacher or presentation materials; the Student is not able to see their peers in the classroom.

The Student exhibits behavioral issues and has two social-emotional-related goals. Their ability to interact with peers is essential to gain social and emotional skills. While the new classroom arrangement allows the Student to attend lunch, recess, and electives with their peers, their interactions with their peers during general education instruction are far more limited than they would be if the Student was in the general education classroom, contrary to what the District asserts. Given the more limited opportunities to interact with their peers, the change to the special education classroom with instruction delivered via Zoom is not a change in location but a change in placement.

When a parent and district agree on the change of placement for a student in response to a violation of a school's code of conduct, the change in placement is not considered a disciplinary removal. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 122 LRP 24161 (OSERS 07/19/22). The placement requirements of 34 C.F.R. § 300.116 and the prior written notice requirements in 34 C.F.R. § 300.503 still apply. *Id.*

Here, the Parent stated they agreed to the change in placement on January 10, 2023. The Parent was under the impression the change of placement would only be for the remainder of the week (January 13, 2023). On approximately January 20, 2023, the Parent realized that the Student was still in the special education classroom.

The District contends that there was always a six-week time period in which the Student would remain in the special education classroom. However, there is no documentation of such and it cannot be confirmed that the timeframe was specifically discussed with the Parent prior to January 31, 2023.

It is clear that the Parent agreed to the change of placement and for the Student to receive instruction in the special education classroom. However, it is not clear whether the Parent knew how long the Student would remain in the special education classroom. After the change of placement occurred, at no point in time did the Parent object to the Student's continued placement in the special education room prior to January 31, 2023, even after the Parent claims they learned of the continued placement a week after they were under the impression the placement would cease. As the Parent initially agreed with the placement and did not object to the placement prior to the January 31, 2023, IEP Team meeting, there is no finding that the change in placement is a disciplinary removal.

While the Parent agreed to the change in placement, the District failed to convene an IEP Team meeting regarding the change in placement, nor was a written document developed outside of an IEP Team meeting regarding the agreement to modify placement outside of an IEP Team meeting, in violation of 34 C.F.R. § 300.116. The District also failed to issue a prior written notice regarding the change in placement, in violation of 34 C.F.R. § 300.503.

*Summary and Conclusions*

During the 2022–23 school year, the District subjected the Student to eight disciplinary removals before a change in placement occurred. The Parent agreed to the change in placement, therefore, the change of placement does not constitute a disciplinary removal. The District implemented the requirements of 92 NAC § 51-016.02E and no corrective action is required on this.

However, even though the Parent agreed to the change in placement on January 10, 2023, the requirements of 34 C.F.R. § 300.116 and 34 C.F.R. § 300.503 still applied. The District failed to convene an IEP Team meeting regarding the change in placement and issue a PWN. Thus, the following corrective action is required.

*Corrective Action*

1. The District must train all special education staff in the District regarding placement decisions within 60 calendar days of the date of this Letter of Finding. Specifically, who must be involved in placement decisions and the forum required.
  - a. The District must obtain approval from NDE at least 14 days prior to the training of the training content and trainer(s).
  - b. The District must provide NDE with participant sign-in sheets at the conclusion of the training(s).
2. The District must train all special education staff in the District regarding Prior Written Notice requirements for District changes to a Student's IEP, particularly changes in placement, within 60 calendar days of the date of this Letter of Finding.
  - a. The District must obtain approval from NDE at least 14 days prior to the training of the training content and trainer(s).
  - b. The District must provide NDE with participant sign-in sheets at the conclusion of the training(s).
3. The District must provide upon request the current IEP and prior written notice for 3 students to verify PWNs document changes to a Students IEPs including change in placement. NDE will send a request for which Student's documents are requested on or before December 1, 2023.

**Issue # 2**

Did the District properly determine Student's placement based on their least restrictive environment (LRE)? [92 NAC § 51-008.01]

92 NAC § 51-008.01states:

|          |  |
|----------|--|
| 008.01   | <i>Least Restrictive Environment (LRE) Requirements</i>  |
| 008.01C  | <i>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:</i>              |
| 008.01C1 | <i>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</i> |
| 008.01C2 | <i>The placement decision is made in conformity with the least restrictive environment</i>   |

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 Parent is concerned that the Student's placement in the special education classroom, away from their peers, is detrimental to the Student's social growth. The placement in the special education classroom was prompted by wrongful disciplinary action. *Per Letter of Complaint.*

#### *District Response*

The District asserts that the Student is placed in their least restrictive environment and educated to the maximum extent appropriate with their non-disabled peers. The temporary change in location was made by the IEP Team and made in conformity with 92 NAC § 51-008.01. *Per the Letter of Response dated March 3, 2023.*

#### *Investigative Findings*

##### *January 11, 2023 Placement*

Pursuant to the findings of Issue #1, prior to moving the Student to the special education classroom the District did not ensure that a group of people knowledgeable about the child, including the Parent, determined the Student's placement. Further, the District and the Parent did not agree not to convene an IEP Team meeting to amend the Student's IEP without an IEP Team meeting. Thus, the change in placement between January 11 and January 31, 2023, violated 92 NAC § 51-008.01C1.

##### *February 1, 2023 Placement*

The IEP Team, at its January 31, 2023, meeting, determined that the Student's placement in the special education room was appropriate.

The IDEA requires that a student with a disability receive their education in the general education environment with their nondisabled peers to the maximum extent appropriate. 34 CFR §300.114 and 92 NAC § 51-008.01A. Removal of a student with a disability from the general education environment only occurs "if the nature or severity of the disability is such that education in a regular class with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR §300.114.

There are several factors a district may consider in determining whether a student should not be placed in the general education classroom, including, in part:

1. A student threatens the safety of other students or poses a danger to themselves. See *Clyde K. v. Puyallup Sch. Dist.*, 21 IDELR 664 (9th Cir. 1994).
2. A student engages in significantly disruptive behavior that interferes with the education of classmates. See *School Bd. of Indep. Sch. Dist. No. 11, Anoka-Hennepin v. Renollett*, 45 IDELR 117 (8th Cir. 2006).

Although a student need not fail in the general education environment before moving to a more restrictive setting, more restrictive settings should only be considered after the IEP team contemplates placement in general education, including the supplementary aids and services required to make that setting successful. *Letter to Cohen*, 25 IDELR 516 (OSEP 1996).

The PWN regarding the January 31, 2023, IEP meeting indicates the IEP Team considered leaving the Student in the general education classroom. However, the data collected showed the Student's academic performance was decreasing while in the general education classroom.

The records provided by the District show that the Student's disruptive classroom behavior prevented them from learning and the supplementary aids and services the IEP Team determined to enable the Student to continue to be educated in the general education classroom were not working with success.

Moreover, there are plenty of supporting documents that indicate the Student can be disruptive and interfere with the learning environment. Additionally, on a few occasions, the Student has become destructive in the classroom requiring District staff to evacuate other students.

Given the Student's behaviors, it was appropriate for the IEP Team to change the Student's placement to the special education classroom, as of February 1, 2023.

While the IEP Team appropriately determined the Student's placement in the LRE, the IEP and/or PWN failed to adequately explain why the Student required removal from the general education classroom and why additional supplementary aids and services would not make that setting successful, including a discussion about offering paraprofessional support (see Issue #3, Investigative Findings).

#### *Summary and Conclusions*

The change in placement on January 11, 2023, was not made in conformity with the requirements of 92 NAC § 51-008.01.

#### *Corrective Action*

The corrective action required under Issue #1 encompasses part of the corrective action required related to this violation. The following additional corrective action is required:

1. The District must train all special education staff in the District regarding the analysis the IEP Team must go through each time the IEP Team determines placement and how to document the analysis appropriately within the IEP and/or PWN within 60 calendar days of the date of this Letter of Finding.
  - a. The District must obtain approval from NDE at least 14 days prior to the training of the training content and trainer(s).
  - b. The District must provide NDE with participant sign-in sheets at the conclusion of the training(s).
2. The District shall convene an IEP Team meeting within 30 calendar days of the date of this Letter of Finding. At the IEP Team meeting, the IEP Team must discuss and appropriately document missing LRE requirements.

#### **Issue # 3**

Is the Student's IEP tailored to their unique needs and reasonably calculated to enable the Student to make progress appropriate in light of their circumstances? [92 NAC §§ 51-007.07 and 007.07C4]

92 NAC § 51-007.07 states:

007.07            *IEP Development*

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; and
  - 007.07A5c To be educated and participate with other children with disabilities and nondisabled children in the activities described in 92 NAC 51-007.07A5
- 007.07A8 The projected date for the beginning of the services and modifications described in 92 NAC 51-007.07A5 and the anticipated frequency, location, and duration of those services and modifications;
- 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, supports, and other strategies to address that behavior.
- 007.07C Services
- 007.07C4 The school district or approved cooperative shall take steps including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP team to provide nonacademic and extracurricular services and activities in the manner necessary to afford each school-age child with a verified disability an equal opportunity for participation in those services and activities

*Allegations/Parent Position*

The Parent expressed concern with the field trip/class party provision in the Student's IEP. Specifically, due to the Student's disability, they are unable to control their behaviors at times.



Thus, an exclusionary policy on attending field trips/class parties is inappropriate. *Per Letter of Complaint.*

The Parent also asserts the Student is in need of one-on-one assistance which the District has repeatedly rejected. *Per Letter of Complaint.*

#### *District Response*

The District asserts the IEPs are tailored to the Student's unique needs and reasonably calculated to enable the Student to make progress appropriate in light of their circumstances. The IEP includes positive behavioral interventions and supports to address the Student's behaviors that impede their learning or that of others.

The IEP Team considered special education and supplementary aids and services to enable the Student to participate in programs and activities alongside their peers. The Student's ability to participate in field trips/class parties is an individualized decision based on the Student's behavior the previous day and is supported by the positive behavioral interventions and supports in the IEPs. *Per the Letter of Response dated March 3, 2023.*

#### *Investigative Findings*

##### *Field Trips/Class Parties*

The District policy states that attendance at field trips and class parties is a privilege. All students, regardless of their special education status, may be prohibited from participating if they exhibit inappropriate behaviors. The provision in the Student's IEP is consistent with District policy and is permissible as it is neutrally applied to all students. See *Washington Township Schools, 75 IDELR 145 (SEA IN 2019)*. Moreover, the Student has never been excluded from attending a field trip or class party.

##### *One-on-One Aide*

The January 2022 and January 2023 IEPs state under parent concerns that the Student's pediatrician recommended a one-on-one paraprofessional. Neither IEP includes the support of a paraprofessional nor does either PWN address the matter.

The District stated during the interview that the Parent requested a paraprofessional "last year," but the District denied that request because data shows the Student's behavior escalates when a paraprofessional assists the Student. The District did not provide the data to support this assertion. The District also stated the Parent made a comment about the District providing the Student a paraprofessional at the most recent IEP Team meeting but did not elaborate on whether the IEP Team discussed providing a paraprofessional or not.

Inevitably, it is the IEP Team's decision if a paraprofessional is appropriate for the Student. However, when a parent makes this request, the District has a duty to respond. 92 NAC § 51-009.05. There is no documentation of the IEP Team's discussion or decision regarding providing a paraprofessional for the Student.

##### *Positive Behavioral Interventions and Supports*

The Student's January 2022 IEP, BIP, and January 2023 IEP all include a number of positive behavioral interventions and supports. Unfortunately, even with the inclusion of numerous interventions and supports, the Student continues to struggle with self-regulation.

The District acted appropriately when it implemented a BIP following the increasing number of office referrals. However, the District stated even after it implemented the BIP, in October 2022, while not receiving many office referrals, the Student continued to act out in the classroom. The District did not modify the BIP prior to the end of the calendar year or in January before placing the Student in the special education classroom. In fact, at the time of this writing, the District still has not modified the BIP even though it has been proven to not be effective for the Student in the general education classroom.

Specifically, despite developing new positive behavioral interventions and supports in October 2022, the Student continued to receive office referrals, continued to act out in class, and, subsequently had to be moved to a more restrictive setting. All of which is evidence that the positive behavioral interventions and supports were not appropriate. Moreover, OSERS stated that short-term disciplinary removals, while permitted, may indicate that a student's IEP needs to be reviewed or revised to address behavioral needs. *Dear Colleague Letter*, 116 LRP 33108 (OSERS 08/01/16).

Rule 51 requires an IEP Team to revise an IEP, when necessary, including to address (1) a lack of expected progress; (2) the child's anticipated needs; or (3) other matters. 92 NAC § 51-007.10. The District should have convened an IEP Team meeting to revise the Student's IEP and BIP to determine what positive behavioral interventions and supports would be appropriate for the Student. Instead, the District continued to implement an ineffective BIP and changed the Student's placement without convening an IEP Team meeting.

#### Frequency, Location, and Duration

The special education services and accommodations in both the January 2022 and January 2023 IEPs lack the required detail for frequency, location, and duration. 34 C.F.R. § 300.320(a)(7); 92 NAC § 51-007.07A8. An IEP must include enough specificity about the amount of services that will be provided "so that the level of the [district]'s commitment of resources will be clear to the parents and other IEP team members." See 71 Fed. Reg. 46,540, 46,667 (Aug. 14, 2006) (codified at C.F.R. pts. 300 and 301).

The frequency of service or accommodation should detail how often the service/accommodation is provided (e.g., five times per week). In the two IEPs, the frequency of special education services is clear, to an extent. Problematically, the IEP indicates the Student is to receive "special instruction." It is not clear what special instruction entails. Presumably, special instruction is instruction on reading, math, writing, and social-emotional skills. However, the four areas of instruction should not be lumped together nor described in vague terms. Additionally, the frequency of the accommodations listed is not clear. In fact, the column dedicated to describing the frequency of an accommodation is left blank.

The duration of services or accommodations is the amount of time the service or accommodation is provided (e.g., 30 minutes per session). The two IEPs indicate the amount of time special education and related services will be provided. However, the duration of any given accommodation is not clear. For example, the Student is permitted to take a break but it is not clear what would trigger a break, who provides permission for the break, or how long the Student may take a break.

The location of the service means the type of environment where the service will be provided (e.g., general education classroom, special education classroom, etc.). In both IEPs, the location

is a “public school.” Describing the location as a “public school” does not provide enough detail. A person reading the IEP needs to know if the Student is to receive a given service or accommodation in the general education classroom, special education classroom, hallway, recess, etc. to ensure the IEP can be implemented correctly.

#### *Summary and Conclusions*

There is no documentation regarding whether the IEP Team discussed the Parent's request for a paraprofessional and whether the District responded to the Parent's request with a Prior Written Notice, in violation of 92 NAC §§ 51-007.07 and 009.05.

The District did not convene an IEP Team meeting to adjust the Student's IEP to address the Student's behavior and determine what positive behavioral interventions and supports were appropriate, in violation of 92 NAC §§ 51-007.07 and 007.10.

The IEPs do not include the required detail regarding frequency, duration, and location of services and accommodations, in violation of 92 NAC § 51-007.07A8.

Thus, the following **corrective action is required**.

#### *Corrective Action*

1. The District shall convene an IEP Team meeting within 10 calendar days of the date of this Investigation Report. At the IEP Team meeting, the IEP Team must determine (1) whether paraprofessional support is necessary and (2) what the appropriate positive behavioral interventions and supports are for the Student and update the IEP accordingly.
  - a. In addition, the IEP must include the required detail regarding the frequency, duration, and location of all special education and related services and supplementary aids and services.
  - b. The IEP may not include a service of “special instruction.” Instead, the IEP must state with specificity how much instruction will be provided for reading, math, writing, and social-emotional skills individually.
  - c. The PWN shall detail, in part, whether the District accepts or rejects providing the Student with a paraprofessional.
2. The IEP and PWN shall be provided to NDE within 5 calendar days of the date the IEP is convened.

#### **Notice to District**

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

Mary Lensor, Complaint Specialist  
Theresa Hayes, Complaint Specialist  
NDE Office of Special Education  
[nde.speddr@nebraska.gov](mailto:nde.speddr@nebraska.gov)