

COMPLAINT INVESTIGATION REPORT

Complaint Number: 23.24.05
Complaint Investigator: REDACTED
Date Complaint Filed: July 21, 2023
Date of Report: REDACTED

Issues Investigated

1. In developing, reviewing, or revising the IEP, did the District consider the concerns of the parents for enhancing the education of their child? [92 NAC 51-007.07B1]
2. In developing, reviewing, or revising the IEP, did the District consider the academic, developmental, and functional needs of the child? [92 NAC 51-007.07B2]
3. In developing, reviewing, or revising the IEP, did the District consider whether the child needs assistive technology devices and services? [92 NAC 007.07B7]
4. In developing, reviewing, or revising the IEP, did the District include a statement of supplementary aids and services, to be provided to the child including the anticipated frequency, location, and duration of those services? [92 NAC 51-007.07A5 and 007.07A8]

Information Reviewed by Investigator

From the Complainant

- Letter of Complaint received by NDE July 21, 2023
- Seizure Action Plan from Boys Town National Research Hospital, dated August 14, 2023
- Letter from Boys Town National Research Hospital, dated August 15, 2023
- Text message correspondence between the Parent and the teacher dated May 19 & 25, 2023
- Interview by phone with the Parent, August 31, 2023

From the School District

- Letter of Response dated and received by NDE August 18, 2023
- Private Evaluation and Job Site Analysis conducted by REDACTED, Ph, OCS, and dated March 7, 2019
- MDT dated December 16, 2021
- Semester 1 and Semester 2 Documentation Sheets
- IEP dated December 6, 2022
- Daily Activity Guide dated December 19, 2022
- Injury Log dated January 11, 2023
- Email communication between the Parent and the District dated January 20-August 10, 2023

- Email correspondence between the Investigator and the District dated September 1, 2023

Introduction

This report is provided in response to a complaint filed with the Nebraska Department of Education (NDE) on behalf of the Student by the Parent.

The Individuals with Disabilities Education Act (IDEA) and the Nebraska Administrative Code give NDE jurisdiction to investigate allegations of noncompliance with special education laws that occurred not more than one year from the date the complaint is received by NDE (34 C.F.R. 300.153(c); 92 NAC 51-009.11B5).

In this case, the complaint was received on July 21, 2023, and therefore, only allegations occurring on or after July 22, 2022, were investigated.

The Student on whose behalf this complaint was filed was enrolled in the 7th grade at one of the District's middle schools during the 2022-23 school year. Outside the school day, the Student lives independently in a home owned by the family and is cared for (round the clock) by a hired staff. The Parent lives approximately 130 miles from Lincoln, where the Student resides and attends school.

In their letter of complaint, the Parent alleges that the District "has mandated excessive safety measures" for the Student while at school. Upon review of all the documents provided, there has been a long history during the Student's enrollment in the District of differing opinions on safety measures that should be used to ensure the Student's safety.

Findings of Fact

The following information was obtained through the interviews and documentation review and is relevant as far as it provides historical and immediate context to better understand the issues raised. Information prior to or since the investigatory timeline is not considered for the summary or conclusions for the issues identified.

1. According to the most recent MDT (December 17, 2021), the Student has been diagnosed with Lennox-Gastuat Syndrome, autism spectrum disorder, an unspecified intellectual disability, and stereotypic movement disorder. In addition, medical documentation notes poor impulse control and defiant behaviors. The Student has been found eligible as a student with an Other Health Impairment. This student has regular seizures, is nonverbal, and needs physical support for toileting and feeding. The Student is currently placed in the REDACTED, a program for severely disabled students housed within one of the District's middle schools.
2. According to court documentation dated September 16, 2019:
 - a. When the Student was in kindergarten (January of 2016), the Student incurred a head injury as a result of a fall while walking, assisted, in the

- school hallway. The Parent sued the District for personal damages alleging negligence.
- b. The court documents spell out the months of communication regarding the use of a helmet at school. The Parent consistently advocated for very limited if any use of the helmet, in spite of the Student repeatedly hitting their head due to falls, or intentional head banging.
 - c. The judge ruled on behalf of the District and required the Parent to reimburse legal fees.
3. In March 2019, the District contracted with a private physical therapist following injuries to several staff members in the District related to the physical demands of caring for the Student at school. The report provided outlined the many ways that the District was supporting the safety and learning of the Student. The report also outlined concerns about the orthopedic issues developing with staff members (including elbow pain reported by 2 staff members and the need for a thumb brace for another. (Private Evaluation and Job Site Analysis conducted by REDACTED, Ph., OCS and dated March 7, 2019)
 4. Since the filing of this complaint, the District and the Parent have met and addressed some of the concerns that were raised by the complaint. The Parent also provided a seizure plan and a letter both developed by the Student's doctor that request "that [the Student] be allowed to be as mobile as possible throughout [the Student's] school day to promote strength and mobility. [The Student] only needs to wear helmet while being mobile. When [the Student] is in transport chair, please remove helmet. If [the Student] falls asleep, please move [the Student] out of the chair to a safe place where [the Student] can rest." (Letter from Boys Town National Research Hospital, dated August 15, 2023)

Issue # 1

In developing, reviewing, or revising the IEP, did The District consider the concerns of the parents for enhancing the education of their child? [92 NAC 51-007.07B1]

92 NAC 51-007.07 states:

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

007.07B1 *The IEP team shall consider the strengths of the child and the concerns of the parents for enhancing the education of their child*

Allegations/Parent Position

As outlined in the Letter of Complaint (received by NDE July 21, 2023), and supported in the interview (held August 31, 2023), the Parent has become increasingly concerned that the Student is spending the majority of the school day

restrained in a chair that is intended for transport (such as on the school bus). The Student's constant restraint limits movement, especially ambulation, and ultimately prevents the Student from developing greater strength and mobility. From the time the Student gets off the school bus, the Student is not restrained in any kind of chair for the remainder of the day, suggesting to the Parent that this level of restraint is not necessary for the Student's safety. Further, the Parent is concerned with the constant use of a helmet that is heavy and uncomfortable for the Student.

District Response

In their Letter of Response and through the interview (conducted September 1, 2023), the District outlined their position that the Student has incurred repeated injury due to limited muscle control, limited strength, and seizure activity. Further, as the Student has grown, transferring and supporting the Student to walk independently has caused a greater risk to the safety of both the Student and staff. For this reason, the gait trainer provides the safest means of promoting the Student's mobility and the District believes supporting the Student to walk is too dangerous. The District demonstrated that the Student does not spend considerable time in the transport chair, and outlined their efforts to provide opportunities for the Student to be ambulatory to the degree that they can ensure the safety of both the Student and the staff.

Investigative Findings

- The Parent has expressed concerns on several occasions over the course of the last school year including the following:
 - In the section entitled "Parental information, including concerns for enhancing their child's education" of the Student's current IEP, the following is included, "Both [the Student's] mother and [name] grandfather agreed with the strengths shared by the team. Their main focus is [the Student's] progression with strength and mobility. (IEP dated December 6, 2022)
 - In an email from the Parent to the District dated January 24, 2023, the Parent states, "Please allow for more time in the gait trainer because we have adjusted meds. [The Student] is more alert and steady on [the Student's] feet than before. It is ordered by [the Student's] doctor to be more active on [the Student's] feet so I would be happy to provide that if you guys need it."
 - Later on January 24, 2023, in the same email thread, the Parent stated, "I just wish [the Student] could be more active while at school. We often work with [the Student] at home while [the Student] is sitting on the couch or sitting on [the Student's] bed."
- In response to the Parent's earlier concerns about these issues, the District developed a tracking document used each day. This document tracks the Student's level of alertness (which, according to a staff interview, determines what types of activities the Student can participate in), engagement in

activities, and the level and type of mobility support provided in 15-minute increments throughout the day. A key was also developed outlining the various equipment used for mobility. (Semester 1 and Semester 2 Documentation Sheets)

- Pictures and descriptions were provided of each of the pieces of equipment used (Pictures of Equipment and Interview with District staff held September 1, 2023):
 - Transport Chair- provided by the parent and used for transportation to and from school.
 - Wheelchair- Convaid Cruiser Wheelchair with a headrest extension, full torso support vest (chest harness) that was moved up higher in an effort to help keep the trunk positioned upright for learning and engagement in the educational setting and to prevent from leaning over the wheelchair frame, causing a risk of tipping.
 - Gait Trainer- used when walking, provides the student with trunk and pelvic support to increase both the distance and the time walked while providing safety both to student and staff.
 - Gait Belt- used for transfers between surfaces or equipment
- District staff described that when the Student is not adequately restrained in the chair, the Student often folds over the side of the chair or bends over the front, creating a tipping hazard. For this reason, the wheelchair with the chest harness is necessary to prevent tipping. (Interview with the District September 1, 2023)
- District staff also described that as the Student has grown in size (approximately 5 feet, 5 inches, and 130 pounds at the end of the school year), poor stability has led to more potential injuries to staff. (Interview with the District September 1, 2023)
- Data taken from the daily tracking document demonstrates that early in the school year (during the fall of 2022), the Student spent the first several days mostly in the transport chair. However, by early September, the gait trainer and chair were used more frequently. By late September, there were very few periods of time documented where the transport chair was used except for its intended purpose (to transport to and from school on the bus).
- Following the December IEP meeting, and in response to the Parent's stated concern, the District developed a Daily Activity Guide that outlines appropriate activities and staff responses based on the Student's level of alertness. This document also outlined the activities that the Student would participate in throughout the school day when the Student was awake and alert. (Activity Guide dated December 19, 2023)
- In response to concerns shared by the Parent by email, the District offered the following dates for the IEP team to convene and discuss these concerns. Dates offered during the second semester of 2023 included February 22,

March 2, 3, or the week of March 6, March 20, or March 24. (Emails from the District to the Parent dated February 15, 17, March 8, 10, and 11)

- Email correspondence from the Parent to the District dated January 24, 2023, reads, “[The Student] has been a lot better since the break as far as alertness and stability are concerned.”
- Email correspondence from the District to the Parent dated January 26, 2023, reads, “[The Student] is out of [the Student’s] chair and in the gait trainer a minimum of 40 minutes each day. We are working to have [the Student] out of [the Student’s] chair more during the school day; our goal is to have [the Student] in the gait trainer at least two times a day. Recently, we transferred [the Student] to the gait trainer before PE which gave [the Student] more time to walk and be on [the Student’s] feet. Based on what we are seeing, [the Student] is more active and alert in the morning, so we will make a consistent effort to add a regular time in the morning for [the Student] to be out of [the Student’s] chair. As you noted, we observe [the Student] has been more alert since the winter break; prior to that [the Student] was more lethargic and sleepier.”
- During the second semester, as the Student’s level of alertness had increased, the gait trainer use increased significantly to somewhere between 1 and 3 hours total most days, across 2-3 different periods throughout the day.
- The Student’s IEP identifies the Student’s helmet as a supplementary aid/service and reads as follows: “[The Student] benefits from and wears [the Student’s] parent provided helmet throughout the school day. [The Student] will get helmet breaks as possible throughout the day such as during lunch/snack times or when [the Student] is in a transport chair.”
- The District provided documentation of the following emails, including pictures of various bruises or marks indicating an injury that occurred outside of the school day (Email correspondence between the District and the Parent on the following dates):
 - February 15, 2023: A bruise on the Student’s arm near the elbow
 - March 9, 2023: Large red mark on the Student’s left knee and right wrist
 - March 27, 2023: blackened right eye, swollen lip, scratch beneath left eye
 - March 29: Both eyes blackened
 - May 10, 2023: Bruise on eye
- The District reported the above to Child Protective Services in Nebraska (Interview with the District held September 1, 2023)

Summary and Conclusions

The two competing goals of **safety** and **independence** have clearly been in conflict in this Student’s case for many years. While providing opportunities for physical movement is a clear priority for the Student’s continued development and independence, ensuring the Student’s safety is also the District’s responsibility.

Given the Student's history of injury both on school grounds and outside of school (as evidenced by significant bruising), it is reasonable that the District take consistent efforts to prevent the Student from falling and to protect the Student's head any time there is the risk of fall or tipping.

There is ample evidence in this case of the District considering and incorporating the concerns of the Parent in the Student's daily programming. As the Parent raised concerns, the District made repeated efforts to have face-to-face conversations through IEP meetings to address these concerns, though the Parent did not agree to meet until August 2023. Further, as the Student's level of alertness increased in the second half of the school year, the use of the gait trainer was measurably increased.

It is also clear that there has been some misunderstanding about the various pieces of equipment that are being used as the Parent believed that the transport chair was being used excessively, but in fact, the Student has spent the majority of time in a more comfortable wheelchair, appropriate for instructional purposes. The Parent and District are encouraged to continue to communicate openly about the tension between these two goals, discussing openly how the Student can have maximum mobility while ensuring safety and what specific activities are appropriate for the helmet to be removed.

Based on the District's ongoing efforts to consider the wishes and concerns of the parent and to provide documentation and communication around these issues, the District implemented the requirements of 92 NAC 51-007.07B1, and **no corrective action** is required.

Issue # 2

In developing, reviewing, or revising the IEP, did The District consider the academic, developmental, and functional needs of the child? [92 NAC 51-007.07B2]

92 NAC 51-007.07 states:

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

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

Allegations/Parent Position

As referenced above, the Parent is concerned that excessive restraint in a chair limits the Student's ability for adequate movement to promote strength and mobility.

District Response

As outlined in Issue #1, the District is making every effort to balance the developmental needs with regard to mobility with the safety of the Student.

Investigative Findings

- The Investigative Findings from Issue #1 are pertinent to this issue as well and will be considered in the Summary and Conclusions.
- The following 2 goals are listed on the Student's current IEP:
 1. Given increased opportunities throughout the school day while in a supported position with adaptations/accommodations as needed for full accessibility, [the Student] will increase [the Student's] independence by completing early learning activities of "Put on," "Match," "Close," "Open," "Give" within 3 seconds or less improving from a baseline average of 28% to 50% as measured by daily instructional tracking logs by 12/05/2023"
 2. Given increased opportunities throughout the school day while in a supported position with adaptations/accommodations as needed for full accessibility, [the Student] will increase intentional communication skills using a variety of modes (e.g., facial expressions, eye gaze, oral movements, vocalizations, reach, reach, and grab, head turn towards and/or away, assistive technology, etc.) from a baseline of 4 modes (i.e., eye gaze, head toward, reach and grab, push) to using 7 modes consistently as measured by teacher created data form by December 5th, 2023."

Summary and Conclusions

The Student's current IEP clearly targets the very basic needs for attending behavior and basic communication that are important for the Student to master. Further, the District has taken steps to develop appropriate programming that is based on the Student's varying level of alertness and prioritized learning activities and opportunities for mobility during these periods.

Based on the above, the District implemented the requirements of 92 NAC 51-007.07B2, and **no corrective action** is required.

Issue # 3

In developing, reviewing, or revising the IEP, did The District consider whether the child needs assistive technology devices and services? [92 NAC 51-007.07B7]

92 NAC 51-007.07 states:

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

007.07B7 *The IEP team shall consider whether the child needs assistive technology devices and services.*

Allegations/Parent Position

One important part of the Student's assistive equipment is the gait trainer, which allows the Student to be in a standing position. The gait trainer was unavailable for a portion of time at the end of the school year because it was broken. The Parent believes that the gait trainer is a critical part of the Student's programming.

District Response

The District agrees that the gait trainer was not functional for a period of time during the spring of 2023, and they made multiple and consistent efforts to repair the equipment and tried an alternative in the meantime. The gait trainer has been repaired and is again in use.

Investigative Findings

- Under the section entitled Consideration of the Child's Needs for Assistive Technology Service or Devices, the IEP reads "This was considered by the IEP team and was deemed necessary. Due to the nature of [the Student's] disability, assistive technology supports are necessary. (IEP dated December 6, 2022)
- The Student's IEP includes a number of supplementary aids and services including the gait belt for transfers, the Columbia Toilet seatback, adapted utensils, wheelchair-based transportation including a lift system, the gait trainer, helmet, transport chair, and sippy cups. (IEP dated December 6, 2022)

Specifically related to the use of the gait trainer, the following is a chronology of events related to this issue (Interview and email correspondence with the District dated September 1, 2023):

- April 12, 2023, a bolt on the gait trainer was found to be stripped. The District called the manufacturer and was told to call back when techs were available (on Friday)
- On April 14, 2023, the physical therapist took the device to the manufacturer and the stripped bolt was removed and a new one was provided.
- On April 18, 2023, the new bolt was installed and the Student used the device.
- On May 9, 2023, staff informed the physical therapist that the bolt wasn't working well and the gait trainer's use was again temporarily discontinued.
- On May 10, 2023, the physical therapist inspected the device, determined what part was needed and the part was ordered.
- On May 18, 2023, the District trialed a different gait trainer available in the district, though it was deemed unsafe.
- On August 22, 2023, a technician came to fix the gait trainer.
- On August 29, 2023, the staff in the program were trained on the use of the gait trainer with the Student, and the gait trainer was again put in use.

Summary and Conclusions

The IEP demonstrates clear evidence of a range of tools and equipment being used to allow the Student greater access to the educational environment. Related to the Parent's specific concern about the gait trainer, it is true that the equipment was not available for the Student's use for a total of 18 school days (5 days- April 12-18, 13 days- May 9-25). However, the District made repeated efforts to get the equipment repaired or to find an alternative while waiting for the parts to be shipped.

Based on the contents of the IEP and the District's continued efforts to find a solution for the broken equipment, the District implemented the requirements of 92 NAC 51-007.07B7, and **no corrective action** is required.

Issue #4

In developing, reviewing, or revising the IEP, did The District include a statement of supplementary aids and services, to be provided to the child including the anticipated frequency, location, and duration of those services? [92 NAC 51-007.07A5 and 007.07A8]

92 NAC 51-007.07 states:

- 007.07A *The IEP shall include*
- 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*

Allegations/Parent Position

According to the contents of the complaint and email correspondence from the Parent to the District (dated January 26, 2023), the Parent was unclear as to how much time the Student was spending on each of the pieces of assistive equipment, most noteworthy, the gait trainer.

District Response

The District made every effort to take appropriate data and make that data available to the Parent with regard to the amount of time each day the Student was using various equipment. Because the Student's level of alertness and seizure activity drives engagement in various activities, there is no way for the District to ensure a consistent amount of time each day.

Investigative Findings

The Student's IEP includes the following supplementary aids and services with location, time, and frequency. The duration for all are from December 6, 2022-December 5, 2023 (IEP dated December 6, 2023):

| Description | Anticipated Location | Time | Frequency |
|--|---|-------------|------------------|
| Equipment to access the learning environment | Any location within the educational setting | | Daily |
| Motivational toys throughout the school day as deemed necessary by school staff | Public school | 10 min | As needed |
| Adapted utensils when eating | Public School | 10 min | As needed |
| Exploration of AAC to communicate and interact within the environment | Public School | 30 min | Daily |
| Adult assistance (2 adults) for bath rooming | Public School | 360 min | Daily |
| Parent provided helmet throughout the school day. Helmet breaks as possible throughout the day such as during lunch/snack times or when in a transport chair | Public School | | As needed |
| Gait belt to assist adults in transfers and during gait | Public School | 30 min | Daily |
| Columbia Toilet Seatback | Public School | 10 min | Daily |
| Staff from home and school will interact with student to maintain and build relationships | Public School | 10 min | 2x per month |

Additionally, the following are included related to Supports for School Personnel. The duration for all are from December 6, 2022-December 5, 2023 (IEP dated December 6, 2023):

| Description | Time | Frequency |
|--|-------------|------------------|
| The SLP will provide training and guidance to teachers and staff for implementation of communication activities | 10 min | 2x/month |
| Occupational therapist will be available for consultation regarding self-help skills as requested by the team | | As needed |
| Physical therapist will be available for consultation for accessibility and adaptations for participation in the educational setting. | | As needed |
| Psychotherapy services will be available for staff consultation as they continue to implement early learning instruction and social-emotional objectives | | As needed |
| Nurse will provide VNS and Health Action Plan training to staff | | As needed |

- As a supplement to the IEP, the District created a daily guide of activities that are based on the Student's current level of alertness. (Daily Activity Guide dated December 19, 2022)

- The District has also provided a quiet space with a mat where the Student is transferred when sleeping. (Interview with the District held on September 1, 2023, and supported by Semester 1 and Semester 2 Documentation Sheets)
- The data in the documentation sheets outlining the Student's entire day and use of equipment has been made available to the Parent, though the Parent requested a "weekly summary," which has been provided by email to the Parent at the end of each week.
- The District sent the following email in response to the Parent's question on January 26, 2023: "[The student] is not in [the Student's] chair for the full school day. As [teacher] reported, we have prioritized time in the gait trainer when [the Student] is awake and alert. For example, today [the Student] arrived awake and alert and maintained this level of alertness throughout the school day, so [the Student] was in the gait trainer from 8:55 AM until 9:55 AM; a bit before and through PE from 10:45 AM to 11:30 AM; and again this afternoon from 1:00 PM to 1:20 PM. To better communicate this, we have updated our documentation to include the duration [the Student] is in the gait trainer each day, and this summary will be included in the weekly summary same as the sleep log. Also, I attached the Daily Activities emailed before winter break. We are using this document for staff to consistently engage [the Student] in activities throughout the school day based on [the Student's] level of alertness as well as know the goal for each activity."

Summary and Conclusions

The Parent's specific concern involves the amount of time the Student is restrained in assistive equipment during the school day. The IEP references just "equipment" and does not differentiate between the types of equipment being used. Because the statement is broad, the frequency is listed as simply "Daily."

It is important to recognize that the type of equipment being used is dependent on the Student's current cognitive state of alertness. For this reason, the District could not come up with a predictable daily schedule of different equipment use, and instead, has developed a guide of activities based on the Student's level of alertness. The data being collected provides rich information on the frequency, location, and duration of the use of these supports each day.

Finally, the District has made clear its willingness to meet and discuss the IEP and/or the plan being implemented at any time.

Based on the development of a thorough plan and data collection on the use of various types of assistive equipment, the District implemented the requirements of 92 NAC 51-007.07A8, and **no corrective action** is required.

Notice to District

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.