

## COMPLAINT INVESTIGATION REPORT

**Complaint Number:** 23.24.10  
**Complaint Investigator:** REDACTED  
**Date Complaint Filed:** September 18, 2023  
**Date of Report:** REDACTED

### Introduction

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

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 September 18, 2023, and therefore, only allegations occurring on or after September 19, 2022, were investigated. Any reference to data or occurrences outside this timeline is for context only and is not included in the summary or conclusions for each issue.

On November 8, 2023, the Nebraska Department of Education, Office of Special Education, was advised that a Due Process Hearing was requested. According to 92 NAC 51-009.11C8, if a written complaint is received that is also the subject of a due process hearing under 92 NAC 55 or contains multiple issues of which one or more are part of that hearing, the Office of Special Education officials shall set aside any part of the state complaint that is being addressed in the due process hearing, until the conclusion of the hearing. However, any issues in the state complaint that are not part of the due process action must be resolved using the time limit and procedures described in 92 NAC 51-009.

As a result of the Due Process Petition, two of the Issues originally under investigation were set aside. The issues are as follows:

11. Did The District provide prior written notice to the parents of the child within a reasonable time before changing the provision of FAPE to the child? [92 NAC 51-009.05A]
12. Did The District revise the IEP as appropriate to address a lack of expected progress toward the annual goals? [92 NAC 51-007.10]

## Issues Investigated

1. Did the District develop, review, and revise the Student's IEPs? [92 NAC 51-007.01]
2. Did The District implement the Student's IEPs? [92 NAC 51-007.02]
3. Did The District permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency without unnecessary delay and before any meeting regarding an IEP? [92 NAC 51-009.03B]
4. Did The District provide a description of how the child's progress toward meeting the annual goals will be measured and when periodic progress reports on the progress the child is making will be provided? [92 NAC 51-007.07A4]
5. Did The District conduct a re-evaluation at least once every three years, or document that the parent and the school district or approved cooperative agree that a reevaluation is unnecessary? [92 NAC 51-006.05B2]
6. Did The District consider input provided by the parents (specifically, the results of outside evaluation) in their review of existing data? [92NAC 51-006.06A1]
7. Did The District provide supplementary aids and services as outlined by the IEP to provide nonacademic and extracurricular services and activities in the manner necessary to afford the child an equal opportunity for participation? [92 NAC 51-007.07C4]
8. Did The District inform each provider of their specific responsibilities related to implementing the child's IEP, including accommodations, modifications, and supports to be provided in accordance with the IEP? [92 NAC 51-007.02D]
9. Did The District document accommodations, modifications, and supports appropriately by including the anticipated frequency, location, and duration of those services and modifications? [92 NAC 51-007.07A8]
10. Did The District include the parents of the child in making changes to the child's IEP? [92 NAC 51-007.09E]
11. Issue set aside because of the Due Process Petition.
12. Issue set aside because of the Due Process Petition.
13. Did The District provide services in a timely manner? [92 NAC 51-009.04A3]

## Information Reviewed by Investigator

### *From the Complainant*

- Letter of Complaint dated September 11, 2023; received by NDE September 18, 2023

- Individualized Education Programs (IEPs) dated May 6 and May 22, 2022, and May 31, 2023
- Independent Educational Evaluation conducted by outside evaluator dated July 13, 2022
- Speech-Language Pathology Consultation conducted by an outside evaluator dated June 1, 2022
- Emails on various topics between the Parent and the District date range from October 26, 2022- August 17, 2023
- [The Student] BIP/IEP Concerns, not dated

*From the School District*

- Letter of Response dated October 16, 2023; received by NDE October 16, 2023
- Evaluation Report dated February 3, 2020
- Independent Educational Evaluation (IEE) conducted by Munroe Meyer Institute dated July 13, 2022
- Speech-Language Pathology Consultation conducted by an outside evaluator dated June 1, 2022
- Review of Existing Data dated May 3, 2023
- Attachment to the Review of Existing Evaluation Data dated May 3, 2023
- Individualized Education Programs (IEPs) dated September 22, 2022, & May 31, 2023
- Progress Reports dated October 7, 2022; December 16, 2022; March 10, 2023; & May 26, 2023
- Behavior Tracking Data for the 2022-23 school year
- Special Education Services Agreement for the provision of compensatory education and extended school year services, dated October 16, 2023
- Student Schedule for the 2022-23 School year and proposed schedule changes dated October 26, 2022
- Related Services schedule and progress notes for the 2022-23 school year
- 2022-23 Staff Training and School Support materials and documentation
- Documents and materials related to BIP shared with general education teachers, August 2023
- The Student's sixth-grade report cards for the 2022-23 school year
- Daily Communication Sheets for the period dated April 3, 2023- April 28, 2023 (as examples)
- Emails between the Parent and the District dated May 5- May 8, 2023, regarding the Parents' data request
- Screenshot of individuals with access to the Student's IEP and other special education documents
- Interview with the District October 30, 2023

- Email correspondence between the District and the Investigator dated October 27- November 2, 2023

Some of the documents provided by the district were also provided by the parents. Rather than repeating, all documents shared by both parents and the district are included in the list of documents provided by the district.

### **Introduction**

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

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 September 18, 2023, and therefore, only allegations occurring on or after September 19, 2022, were investigated. Any reference to data or occurrences outside this timeline is for context only and is not included in the summary or conclusions for each issue.

### **Findings of Fact**

The following information was obtained through the interviews and documentation review and is relevant to all of the allegations.

This investigation involves a middle school student attending the District who was in the sixth grade, attending the first year of middle school during the 2022-23 school year, which is the focus of the majority of the current complaint. According to the Student's most recent IEP dated May 31, 2023, the Student is classified with an Other Health Impairment resulting from diagnoses of Prader-Willi Syndrome, autism spectrum disorder, neurofibromatosis, neuromuscular scoliosis, and fine and gross motor impairment.

### **Issue # 1**

Did the District develop, review, and revise the Student's IEPs? [92 NAC 51-007.01]

92 NAC 51-007.01 states:

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

### *Allegations/Parent Position*

According to the complaint, the Parents allege that the District failed to include language instruction or goals “directly addressing inferences, non-literal language or double-meaning,” as recommended by the IEE. Further, they also allege that this failure and the failure to include whole body breaks and reduced background noise as an accommodation denied the Student FAPE.

### *District Response*

The District has made every effort to include the Parents fully in the development of the IEP, going through the document line-by-line and discussing each accommodation from the previous IEP when developing the new IEP to ensure that the team is in agreement. The District involved a facilitator to support the development of the IEP in the spring of 2023 for this same purpose. The Parents have had every opportunity to bring up these additions to the IEP and have not.

### *Investigative Findings*

- The IEP team, including the Parents, convened on September 22, 26, and 28, 2022, for a total of 4 hours to develop the fall 2022 IEP. (Letter of Response dated October 16, 2023, and IEP dated September 22, 2022)
- The IEP team, including the Parents, convened on April 24, May 3, 9, 17, 25, and 31 for a total of 9 hours and 45 minutes to develop the spring 2023 IEP. (Response dated October 16, 2023, and IEP dated May 31, 2023)
- The IEE conducted in the summer of 2021 included a report completed by a speech-language pathologist that contained the following language in the Recommendations section: (Speech-Language Pathology Consultation conducted by Munroe-Meyer Institute dated June 1, 2022)
  - Address inferences by having [the Student] read a text or discuss a situation/event. Have [the Student] tell you the inference [the Student] drew and why. Utilize functional examples/targets. Include motivating topics when possible.
  - Continue to introduce and discuss various forms of nonliteral language (e.g., idioms, similes, metaphors, puns, and hyperboles). Activities may include identifying examples in books/movies/shows/conversations and practicing the specific nonliteral language features/targets in various contexts.
  - Reduce background noise when speaking—this not only makes it easier for the listener to understand but also prevents [the Student] from needing to strain [the Student's] voice to be heard.
  - Provide short breaks with opportunities for movement.
- The fall 2022 IEP includes the following in the Behavior Intervention Plan (IEP dated September 22, 2022):

- Under alternative strategies being taught: Ask if [the Student] can have a break first or have a break after [the Student] works for 5 minutes.
  - Under Sensory/Biological Interventions: Short (1-2 minute) walks in the hallway to increase alertness when tired (encouraging a brisk walk to reduce the amount of time out of class)
- The fall 2022 IEP includes the following goal and objective (IEP dated September 22, 2022):
  - By September 2023, given instruction and practice, [the Student] will improve [the Student's] social communication skills by demonstrating the use of target social skills (i.e. initiating conversations, nonverbal language, nonliteral language, and perspective taking) in a structured setting, increasing from an average of 50% accuracy to 80% accuracy, as measured by informal assessment and observation.
    - Given visual or verbal cues as needed, [the Student] will describe the meaning behind a variety of nonliteral language examples (e.g., sarcasm, idioms) with 80% accuracy (baseline 30%).
- The fall 2022 IEP includes 2 full pages of accommodations, modifications, and supplementary aids and services, including the following (IEP dated September 22, 2022):
  - Frequent breaks
  - Provide a fidget, break, a task, or other distraction techniques to replace picking behaviors
- The spring 2023 IEP includes the following in the Behavior Intervention Plan (IEP dated May 31, 2023):
  - [The Student] will have access to breaks in the classroom defined as "mini break" (3-5 minutes in duration)
  - [The Student] will have 6 break cards (3 before lunch/3 after lunch), provided to [the Student] each day, in which [the Student] can ask to go for a walk outside of the classroom with staff. These walks will be limited to 10 minutes, and staff will use a visual timer.
- The spring, 2023 IEP includes the following accommodation (IEP dated May 31, 2023):
  - Frequent breaks during classroom instruction and testing
- The spring, 2023 IEP includes the following objective under the second goal (IEP dated May 31, 2023):
  - Given instruction, access to accommodations, and a fiction or nonfiction passage at [the Student's] independent level 93<sup>rd</sup> grade)

[the Student] will independently read the passage and then answer literal questions (directly stated in the passage) and inferential questions (indirectly stated/ may require additional information) using explicit evidence from the passage from a 40% accuracy to 65% accuracy in 2 out of 3 opportunities.

### *Summary and Conclusions*

When considering both IEPs developed during the time period covered by this investigation, it is clear that the District went above and beyond to review the previous IEP and input provided by the Parents and outside providers to develop a thorough IEP that met the Student's needs. The District spent nearly 14 hours working with the Parents and their representatives to develop documents that reflected the Student's current needs. While the District is only required to consider information and recommendations from outside providers, both IEPs show evidence of inclusion of the goals and accommodations that the Parents allege are not included.

Based on the considerable time and effort taken to ensure that the Student's IEP was appropriate, the District implemented the requirements of 92 NAC 51- 51-007.01, and **no corrective action** is required.

### **Issue # 2**

Did The District implement the Student's IEPs? [92 NAC 51-007.02]

92 NAC 51-007.02 states:

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

### *Allegations/Parent Position*

According to the Complaint, the Parents allege that the District has failed to implement the IEP in the following ways:

- 1) gathering data,
- 2) failing to implement a verbal behavior program and errorless instruction,
- 3) failing to implement preferred seating, use of an iPad for writing, and receiving resources in a special education setting,
- 4) failing to supervise the Student during bathroom breaks, resulting in sexual harassment,
- 5) provision of ESY services,
- 6) allowing the Student to participate with general education peers during lunch,

- 7) failing to maintain the involvement of a BCBA in the Student's education throughout the 2022-23 school year,
- 8) allowing the use of whole-body breaks,

### *District Response*

The District has implemented the IEP, as written, at all times except with regard to the provision of ESY services, which the District acknowledges did not occur as planned. The District developed a plan before the school year started to provide compensatory services for the ESY services that were missed.

### *Investigative Findings by specific point:*

- 1) Gathering Data
  - a. The District provided the Parents with daily data on the Student's performance throughout the school year. (IEPs dated September 22, 2022, and May 31, 2023)
  - b. When data were requested in advance of the spring IEP, the District provided all data that had been collected according to IEP goals as well as the BIP (see Issue #3 for greater detail).
- 2) Failing to implement a verbal behavior program and errorless instruction.
  - a. The District provided in-person training to the school psychologist specifically on these programs and also provided coaching to the staff working with the student intensively at the start of the school year and fading as the staff became fluent with the program (See Issue #8 for greater detail).
- 3) Failing to implement preferred seating, use of an iPad for writing, and receiving resources in a special education setting.
  - a. The Student's fall 2022 IEP includes the following accommodations: Dictate hand-written assignments/ notes/ responses beyond the first two sentences or as needed to staff, use of iPad or word-processing device to type writing assignments of one paragraph or more, preferential seating at the front of the classroom with access to an adult
  - b. According to the Student's case manager, "[The Student's] aide has a keyboard with her at all times for [the Student] to use with [the Student's] iPad. [The Student] is given the option to use it whenever writing on the iPad. When using paper/pencil for an activity, the aide will scribe for [the Student] if it's more than a few words. [The Student] has requested on many occasions to write instead of typing, like [the Student's] peers. We encourage [the Student] to use the device, however. Preferential seating is provided in all classes with the aide next to [the Student]. Teachers have reached out to me when rearranging their room to see where [the Student]



would best benefit from seating and support." (Interview with the District, October 30, 2023)

- c. The District ensures that the Student has always been provided an iPad for writing activities. (Interview with the District, October 30, 2023)
- 4) Bathroom Breaks
- a. On September 29, 2022, the Student went to the bathroom, where the paraprofessional accompanied the Student and waited outside the bathroom in the hallway (Interview with the District, October 30, 2023)
  - b. While in the bathroom, another student reached a cell phone under the stall and took pictures of the Student. (Letter of Complaint dated September 11, 2023; received by NDE September 18, 2023)
  - c. The fall, 2022 IEP reads under supplementary aids and services: "[The Student] will need 1:1 adult support throughout [the Student's] school day, including during all academic subjects, specials, at lunch/snacks, and all transitions (walking to and from classes, restroom, cafeteria, etc.) [The Student] is easily distracted by peers and any mention of food and does well with adult and peer attention. This is also required to ensure [the Student's] safety so [the Student] doesn't get access to extra food and to protect [the Student] during transitions. This is also to reduce distractions, redirect [the Student] as needed to keep [the Student] engaged in learning, prevent [the Student] from getting food, provide frequent reinforcers, and facilitate social interactions. [The Student] needs an adult within 1-2 feet while also being aware of the impact on peer interactions."
- 5) Provision of ESY Services:
- a. The spring 2023 IEP indicates that the Student required 25 hours of specialized instruction in reading and math to be scheduled directly between the provider and the family and completed in June and July. (IEP dated May 31, 2023)
  - b. While a district employee agreed to provide these services, they were ultimately not delivered. (District Response dated October 16, 2023)
  - c. The District agreed to the Parents' proposal to compensate for outside private tutoring (totaling 30 hours) in lieu of the outstanding ESY services. (District Response dated October 16, 2023)
  - d. The District entered into a contract with a tutor who began providing services on September 30, 2023 (District Response dated October 16, 2023)
- 6) Allowing the Student to participate with general education peers during lunch.

- a. The fall 2022 IEP includes the following accommodations:  
 Preferential seating in the cafeteria away from the food serving entrance, and 1:1 supervision at lunch/snack time to encourage [the Student] to eat slowly and take drinks often between bites. (IEP dated September 22, 2022)
  - b. Other students were choosing to sit closer to the food service. Students were asked to join the Student from August 16- August 23 (one week)
  - c. On August 31, the Parent sent an email raising this concern (Interview with the District, October 30, 2023)
  - d. Emails were exchanged between the Parent and the District and the Parent consented to the Student to sit with peers, even though it was closer to the food service. This has continued since September 1, 2022. (Interview with the District, October 30, 2023)
- 7) Failing to maintain the involvement of a BCBA in the Student's education throughout the 2022-23 school year,
- a. Several BCBA's have participated in the development of the Student's IEP and BIP, including BCBA's contracted by the Parents and the District's own BCBA. The role of these individuals has always been consultative. (Interview with the District, October 30, 2023)
  - b. The District's BCBA participated throughout the school year in a consultative role, though support became less frequent as the team became more familiar with the BIP. (See Issue #8 for greater detail)
- 8) Allowing the use of whole-body breaks
- a. Addressed in Issue #1

### *Summary and Conclusions*

When all the above are considered, 2 issues stand out. First, the Student's supervision when using the restroom. It is true that while the Student is in the restroom, a staff member is not within 2 feet. For a student who is toilet trained, it would be inappropriate and would put both the Student and staff at risk for a staff member to accompany that student inside the bathroom. Further, the reasons listed for the need for 1:1 supervision (distractibility, food safety, provision of reinforcement, facilitating social interactions) are not relevant while toileting. If the team believes that the Student is unsafe in the student bathroom, then a private bathroom should be used for all toileting needs.

The second issue is the provision of ESY services. It is clear that the District did not implement the IEP as written in this area, and promptly corrected the failure in implementation.

All other issues included above are in compliance with 92 NAC 51-007.02.

Based on the failure to provide ESY services as described in the IEP, the District failed to fully implement the requirements of 92 NAC 51-007.02. However, the District has already provided the compensatory services that would be required through corrective action. The following evidence of corrective action is required:

1. The District shall provide evidence of payment for the agreed hours of compensatory education and logs of the dates the services were provided to NDE no later than January 31, 2024.

### **Issue # 3**

Did The District permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency without unnecessary delay and before any meeting regarding an IEP? [92 NAC 51-009.03B]

92 NAC 51-009.03B states:

009.03B *Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained or used by the participating agency. The participating agency shall comply with such a request without unnecessary delay and before any meeting regarding an individualized education program or hearing pursuant to 92 NAC 55 or resolution session and in no case more than 45 days after the request has been made.*

#### *Allegations/Parent Position*

The complaint alleges that the District did not invite the Parents to attend monthly team meetings and failed to provide the Parents with an opportunity to review team monthly meeting records.

#### *District Response*

The District included the words “the team” referring to the school team, not considering that the Parents would want to participate in these meetings. However, when the Parents raised this concern during the development of the spring, 2023 IEP, they were invited to all subsequent meetings. Further, the District provided all data that they had been keeping to the Parents in advance of the IEP meeting.

#### *Investigative Findings*

- The fall, 2022 IEP reads: “The team will meet monthly to review progress toward the goal of completing work and requesting ways to simplify the

work. The school psychologist and/or a behavior coach will meet with the team to assist in adjusting the interventions as needed.”

- An email was sent from the Parent to the District on May 4, 2023, requesting the data and information outlined below. The District replied on May 5, 2023, with responses (in italics) (Email exchanges between the Parent and the District dated May 4 and 5, 2023):
  - A copy of each/all the data sheets used to track behavior over the past 6 months. *The only sheets that exist are the daily sheets that go home. I believe you said these have already been provided but let me know if you need them again.*
  - An explanation of what parts of the BIP are being implemented currently. *The BIP is being implemented as written.*
  - An explanation of what behaviors/topographies are currently being tracked. *Off-track behavior which could include picking, on-task duration, # of prompts, non-compliance, sleeping, and breaks.*
  - A quantitative and qualitative summary of the data for the behaviors being tracked (past three quarters\_ and graphs if available. *The behavior data that is available is attached in an Excel spreadsheet.*
  - Documents from the monthly behavior review meetings (attendees and any changes made as a result of the meetings). *Consultation and meetings have occurred with [Special education case manager, second special education teacher, speech pathologist, the family's outside behavior consultants, and District's special education administrator], the only change was the daily communication sheet created by [family's outside behavior consultant] who observed and consulted with [school] staff. No formal documents were completed—dates are documented on the attached [outside evaluator's] log.*
  - A summary of the frequency and severity of the behaviors that have been anecdotally reported (aggression, elopement, picking, refusal, etc.) *The behavior data we have is attached.*
  - Any integrity data for the implementation of the interventions and procedures that have been in place since January of 2023. *We do not have formal integrity data; however, implementation of the plan is monitored by the special education staff, special education administrators, and school administrators*
  - A summary of who has been trained on the Verbal Behavior Curriculum the IEP refers to and how it has been implemented over the past 3 quarters. *[speech pathologist, school psychologist,*

*special education case manager, and paraprofessional] have completed a 1-day training.*

- *Any proposals for revisions to the BIP concerning behavior. Our proposals are in the draft or will be discussed at the IEP meeting.*
- *An explanation of who has been aggregating [the Student's] data into qualitative and quantitative reports and who has been analyzing them. The special education team collects data and aggregates the data for the IEP progress reports.*
- The District responded by email on May 5, 2023, with the following:
  - Graphs of data
  - A log of the consultations with the family's outside behavior consultants
  - Review of Existing Data
  - A Lexile level chart
  - Data from the Student's reading course
  - A Draft of the proposed IEP
- Progress reports were provided at the required intervals and included narrative information about each of the IEP goals. (Progress Reports dated October 7, 2022; December 16, 2022; March 10, 2023; & May 26, 2023)

#### *Summary and Conclusions*

The Parents' not being invited to participate in the monthly review of the Student's data appears to have been a misunderstanding between the Parents' and the school team. These meetings did not address changes to the IEP or the provision of FAPE, but instead, functioned as informal meetings to review progress monitoring data. Such meetings are not considered formal IEP meetings, and therefore the requirements for a fully-constituted IEP team do not apply. Further, when asked to participate in these reviews, the Parents' were immediately invited. With regard to the data requested, the District provided all data records being kept on the Student.

Based on email correspondence and the inclusion of all data being kept on the Student's BIP, the District implemented the requirements of 92 NAC 51- 009.03B, and **no corrective action** is required.

#### **Issue #4**

Did The District provide a description of how the child's progress toward meeting the annual goals will be measured and when periodic progress reports on the progress the child is making will be provided? [92 NAC 51-007.07A4]

92 NAC 51-007.07A states:

007.07A      *The IEP shall include:*

007.07A4      *A description of how the child's progress toward meeting the annual goals described in 92 NAC 51-007.07A2 will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;*

#### *Allegations/Parent Position*

The complaint alleges that the District repeatedly provided inaccurate and false information to the Parents about the Student's progress and learning levels in progress notes and in the District's statements about the Student's present levels of academic and functional performance in the IEP.

#### *District Response*

Both IEPs developed during the 2022-23 school year include all required information about how progress will be reported to the Parents.

#### *Investigative Findings*

- On page 14 of the fall, 2022 IEP, and page 21 of the spring, 2023 IEP, the section entitled "Communication of Progress" states that the District will report progress to parents through quarterly progress reports and daily data sheets. (IEPs dated September 22, 2022, and May 31, 2023)
- The spring, 2023 IEP also includes, under the section entitled "Student's Educational Needs," that a daily communication sheet would be emailed to parents and that progress reports would include the type of probe, the date, and the Student's performance. (IEP dated May 31, 2023)
- Quarterly progress reports were provided and included detailed data on not just each goal, but each benchmark included in the IEP. The majority of goals reflect progress, and in 3 of 9 goals in the March progress report, the progress report was marked "Insufficient Progress."

#### *Summary and Conclusions*

There is no evidence in any of the documentation provided that the District provided false or inaccurate data regarding the Student's progress. Progress data is thorough and explanations are provided within the progress reports.

Based on the provision of thorough and detailed progress reports provided at the same frequency that report cards were provided to general education students, the District implemented the requirements of 92 NAC 51- 007.07A4, and **no corrective action** is required.

### **Issue # 5**

Did The District conduct a re-evaluation at least once every three years, or document that the parent and the school district or approved cooperative agree that a reevaluation is unnecessary? [92 NAC 51-006.05B2]

92 NAC 51-006.05 states:

- 006.05A     *A school district or approved cooperative shall ensure that a reevaluation of each child with a disability is conducted in accordance with the verification procedures in Section 006 of this Chapter:*
- 006.05B     *A reevaluation conducted under subsection 006.05 of this Chapter:*
  - 006.05B2     *Must occur at least once every three years unless the parent and the school district or approved cooperative agree that a reevaluation is unnecessary*

#### *Allegations/Parent Position*

The complaint argues that the District failed to re-evaluate the student according to procedural timelines.

#### *District Response*

The Parents requested an independent educational evaluation because they disagreed with the academic scores presented by the school team. The District granted this request, which was completed in July of 2022. This evaluation was reviewed at the April and May 2023 IEP meetings.

#### *Investigative Findings*

- An evaluation report was completed in February 2020, finding the student eligible with another health impairment (Evaluation Report dated February 3, 2020)
- An independent educational evaluation was conducted in July of 2022 and provided to the District. (Independent Educational Evaluation conducted by outside evaluator dated July 13, 2022)
- The team conducted a Review of Existing Data on May 3, 2023, and considered the results of the IEE. After considering other eligibility

categories, the Student was again found eligible with an other health impairment. (Review of Existing Data dated May 3, 2023)

### *Summary and Conclusions*

There is some misunderstanding of the word “re-evaluation” according to the District’s response. When the rule uses this word, it is not referring to assessment procedures alone, but instead, to re-evaluating whether a student continues to meet eligibility criteria for special education and to determine that student’s needs that will be the focus of the IEP. In that case, the time period between February 2020, and May 2023, exceeds the procedural requirement of “at least once every three years.”

Further, 92 NAC 51-007.10 requires that the IEP shall be amended to address the results of any re-evaluation as well as information provided by the parents. Given that the District did not comprise an IEP team to review the new evaluation data and consider whether any amendments to the IEP were warranted for 9 months does not meet the standards of timeliness and this rule has also been violated.

Based on the fact that the 3-year requirement was exceeded between reevaluation procedures under the IDEA, the District failed to fully implement the requirements of 92 NAC 51-006.05. Additionally, their failure to review new evaluation data in a timely manner to consider if any changes to the IEP were warranted suggests that the District also failed to fully implement the requirements of 92 NAC 51-007.10. Thus, the following **corrective action is required**.

### *Corrective Action*

1. The District will provide training to all certified special education staff with regard to the “evaluation” required every 3 years and how that re-evaluation is properly documented within the required timelines by January 31, 2024.
2. This training will also address the requirements for reviewing information provided by parents in a timely manner to determine whether amendments to the IEP are warranted.
3. Materials used for training must be approved by NDE two weeks prior to the implementation of the training.
4. Evidence that all certified special education staff have participated must be provided to NDE no later than February 15, 2024. This training must occur before school recess for the winter break.
5. By March 15, 2024, NDE will request a list of students who have had re-evaluations during the month of February 2024.



- a. NDE will review the current MDT and previous MDT for students re-evaluated during February 2024 to ensure re-evaluation timelines are completed as required.

### **Issue # 6**

Did The District consider input provided by the parents (specifically, the results of outside evaluation) in their review of existing data? [92NAC 51- 006.06A1]

92 NAC 51-006.06 states:

006.06A      *As part of an initial evaluation (if appropriate) and as part of any reevaluation, the IEP team and other qualified professionals as appropriate shall:*

006.06A1      *Review existing evaluation data on the child, including evaluations and information provided by the parents of the child, current classroom-based local or state assessments and classroom-based observations, and observations by teachers and related services providers*

#### *Allegations/Parent Position*

According to the Complaint, the District failed to consider the report completed as part of the Independent Educational Evaluation (IEE) during the summer of 2022.

#### *District Response*

The District reviewed the report and all the data and included it in the Review of Existing Data documentation in the spring of 2023, including an “Attachment to the Notice of Review of Existing Evaluation Data and Parental Right to Request Additional Assessment for Determination of Continued Eligibility for Special Education Services,” which was conducted on May 3, 2023.

#### *Investigative Findings*

- The IEE included a Speech-language consultation and a psychoeducational evaluation, dated June 1 and July 13, respectively. These dates reflect the date of service, not the date that the report was provided to the Parent or the District. (Speech-Language Pathology Consultation conducted by an outside evaluator dated June 1, 2022, and Independent Educational Evaluation conducted by an outside evaluator dated July 13, 2022 )

- The District conducted a Review of Existing Data, including the Parents, in a meeting held on May 3, 2023, where the evaluation was reviewed as part of the existing data. (Review of Existing Data dated May 3, 2023)
- The Student was found eligible as a result of this review as a student with an Other Health Impairment as the primary disability. (IEP dated May 31, 2023)

*Summary and Conclusions*

Evidence is clear that while the review of existing data was overdue (addressed in Issue #5), the District thoroughly considered the results of the IEE in their review of existing data and eligibility determination. As a result, the District implemented the requirements of 92 NAC 51- 006.06A1, and **no corrective action** is required.

**Issue # 7**

Did The District provide supplementary aids and services as outlined by the IEP to provide nonacademic and extracurricular services and activities in the manner necessary to afford the child an equal opportunity for participation? [92 NAC 51-007.07C4]

92 NAC 51-007.07 states:

007.07C4	<i>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.</i>
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*Allegations/Parent Position*

The Parents allege in their complaint that the District failed to provide nonacademic and extracurricular services and activities during the 2022-23 school year that would have allowed the student to participate with the basketball team after school hours.

### *District Response*

The basketball team is an extracurricular activity offered to 7<sup>th</sup> graders at the Student's middle school. During the 2022-23 school year, the Student was a 6<sup>th</sup> grader. Nevertheless, the District offered the Student a role as the basketball manager, with the job of offering snacks and drinks to the coaches and staff working on the scoreboard and to the players. The District provided a 1:1 aide to the Student so that the Student could participate with the basketball team. Because the Student's participation was sporadic due to outside-of-school commitments, the District requested advanced notice from the family if the Student would be in attendance so that the appropriate support would be available.

### *Investigative Findings*

- In the section entitled Supplementary aids and services, the IEP reads, “[the Student] will need 1:1 adult support throughout [the Student's] school day, during all academic, electives, lunch/snack, extra-curricular activities, and all transitions. [The Student is easily distracted by peers and mentions of food... Adult support helps reduce distractions, easy assistance with redirection to keep [the Student] engaged, prevents [the Student] from getting food, provides reinforcers, and facilitates social interactions. [The Student] needs an adult within close proximity to assist in peer interactions and to be aware of conversations.” (IEP dated May 31, 2023)
- The basketball team had 5 games between October 27 and December 8, 2022. (Email from the basketball coach to the Parent dated October 26, 2022)
- The school principal reported that the Student acted as the manager for the basketball team 4-6 times during the fall of 2022 and that each time, a 1:1 adult supervisor was provided to support the Student. (Email between the District and the Investigator dated October 31, 2023)

### *Summary and Conclusions*

The IEP addresses the Student's supervision needs so that the Student could participate in extra-curricular activities. Further, the team made clear efforts to implement the necessary supplementary aid when the Student was interested in participating in outside-of-school activities.

Based on the review of the IEP and its implementation, the District implemented the requirements of 92 NAC 51- 007.07C4, and **no corrective action** is required.

## **Issue # 8**

Did The District inform each provider of their specific responsibilities related to implementing the child's IEP, including accommodations, modifications, and supports to be provided in accordance with the IEP? [92 NAC 51-007.02D]

92 NAC 51-007.02 states:

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

### *Allegations/Parent Position*

In their complaint, the Parents allege that the District failed to appropriately train the Student's 1:1 aide and that the aide failed to remain within 1-2 feet of the Student while also being aware of the impact of peer interactions as required by the IEP.

### *District Response*

During the summer of 2022, the District's school psychologist attended verbal behavior training and then returned to the school and trained the rest of the special education staff with the support of the District's BCBA. The case manager created resources that were shared with both special education and general education staff. Additionally, the Student's case manager met with the 6<sup>th</sup>-grade team of general education teachers, the paraprofessional, and the parents twice during the fall of 2022 to review the IEP and the responsibilities of each staff member. The case manager provided daily consultation to support staff with regard to the implementation of the Student's IEP. When there was a paraprofessional change due to a leave of absence in early 2023, the new paraprofessional was trained by the case manager on their specific roles and responsibilities.

### *Investigative Findings*

Prior to the current investigation timeline:

- During the summer of 2022, (prior to the time period of this investigation), many hours of training are documented to prepare staff to implement the BIP. (2022-23 Staff Training and School Support materials and documentation)

- Specifically, the school psychologist attended a 4-day Verbal Behavior training in July 2022, in order to act as a resource for the school staff. (2022-23 Staff Training and School Support materials and documentation)
- On August 9, 2022, a PowerPoint presentation was provided to teachers about the Student's specific disability and needs and the major components of the Student's IEP. 24 teachers signed in as in attendance. (2022-23 Staff Training and School Support materials and documentation)
- During the first month of school, a special education/verbal behavior coach (the BCBA referenced in Issue #2) spent the entire first day and 6 partial days with the Student modeling and providing feedback to teachers and paraprofessionals. (2022-23 Staff Training and School Support materials and documentation)

During the current investigation timeline:

- The District's BCBA returned 9 times throughout the remainder of the school year to provide coaching and training to teachers and paraprofessionals. (2022-23 Staff Training and School Support materials and documentation)
- A "cheat sheet" for the BIP was developed and shared with general education teachers and special education staff to support the fidelity of implementation. (2022-23 Staff Training and School Support materials and documentation)
- When a new paraprofessional was assigned to the Student in the early part of 2023, the materials above were used along with regular communication with the case manager and the continued support of the District's BCBA to train the new paraprofessional (Interview with the District October 30, 2023)

### *Summary and Conclusions*

The District demonstrated thorough and continuous efforts to train all staff working with the Student on the Student's specific needs, and their role with regard to IEP implementation.

Based on the evidence provided, the District implemented the requirements of 92 NAC 51- 007.02D, and **no corrective action** is required.

### **Issue # 9**

Did The District document accommodations, modifications, and supports appropriately by including the anticipated frequency, location, and duration of those services and modifications? [92 NAC 51-007.07A8]

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*

While the Parents did not bring up this issue directly, it is related to the allegation that certain accommodations (use of the iPad for writing activities, preferential seating) were not consistently followed. This issue was added by the investigator to bring clarity to the use of such a lengthy list of accommodations and program modifications.

*Investigative Findings*

- The Student's fall, 2022 IEP includes 60 accommodations/program modifications and 20 Supports for School Personnel. (IEP dated September 22, 2022)
- The spring, 2023 IEP is similar and formatted in the same way. (IEP dated May 31, 2023)
- While the majority of what is listed applies across settings and throughout the Student's school day, that is not true for all accommodations. (IEPs dated September 22, 2022, and May 31, 2023)

*Summary and Conclusions*

Because this IEP includes such a long list of accommodations and modifications, it is difficult to track the use of each accommodation. The frequency, location, and duration of these accommodations and modifications will provide greater clarity as to what is being provided.

Based on the fact that frequency, location, and duration information is not provided on each accommodation and/or modification, the District failed to fully implement the requirements of 92 NAC 51- 007.07A8. Thus, the following **corrective action is required.**

*Corrective Action*

1. The IEP team must reconvene the IEP within 10 business days of the date of this report and indicate the frequency, location, and duration of each accommodation listed. A draft could be generated in advance for the purpose of efficiency.

2. A copy of the revised IEP and the accompanying prior written notice should be provided to NDE within 2 business days of the IEP meeting for verification of each accommodation listed containing frequency, location, and duration.
3. As part of the training referenced in Issue #5, the District will also provide training on the requirements of documenting accommodations, modifications, and supplementary aides and services.
4. Materials used for training must be approved by NDE two weeks prior to the implementation of the training.
5. Evidence that all certified special education staff have participated must be provided to NDE no later than January 31, 2024.

### **Issue # 10**

Did The District include the parents of the child in making changes to the child's IEP? [92 NAC 51-007.09E]

92 NAC 51-007.09 states:

007.09E      *In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the school district or approved cooperative may agree not to convene an IEP meeting for the purposes of making those changes and instead may develop a written document to amend or modify the child's current IEP.*

#### *Allegations/Parent Position*

In their complaint, the Parents allege that the District made 2 changes to the IEP without involving them. First, the Parents allege that the District unilaterally altered the Student's reading instruction without an IEP meeting. Second, they allege that the District created and implemented an entirely new communication goal called "social detective" without informing the Parents and without calling an IEP meeting.

#### *District Response*

In both cases, the resources used by the District reflect the specific curriculum that the District chose to address specific IEP goals.

#### *Investigative Findings*

- The Student was enrolled in the Read 180 reading curriculum throughout the 2022-23 school year, a placement that was determined based on the Student's reading proficiency at the end of elementary school. Read 180

is a reading intervention curriculum. (Interview with the District October 30, 2023)

- The Student's fall, 2022 IEP includes a goal specifically addressing reading comprehension, a component of the Read 180 curriculum.
- The "Social Detective" is a storybook that is part of the Superflex Social Skills Curriculum that teaches perspective-taking and reading context clues. This curriculum was chosen specifically to address the IEP goal that states that "Given direct instruction and practice in social situations, [the Student] will use "social detective" skills to describe how others are reacting to [the Student] and make an adjustment to [the Student's] behavior if needed in 80% of opportunities." (Interview with the District, October 30, 2023)

### *Summary and Conclusions*

The choices that the Parents allege as IEP team decisions that they were not involved in do not represent decisions made by the IEP team, but rather curricular decisions that are within the purview of the educators within the District to make. As educators, the District reserves the right to use the curriculum they choose to demonstrate progress on IEP goals.

Based on the above, the District implemented the requirements of 92 NAC 51-007.09E, and **no corrective action** is required.

### **Issue #11**

This issue was set aside because of the due process petition filed.

### **Issue #12**

This issue was set aside because of the due process petition filed.

### **Issue # 13**

Did The District provide services in a timely manner? [92 NAC 51-009.04A3]

92 NAC 51-009.04A states:

009.04A      *Each of the procedural steps necessary to provide a free appropriate public education shall be carried out within the specified time periods.*

009.04A3      *As soon as possible following development of the IEP, special education and related services must be made available to the child in accordance with the child's IEP.*



### *Allegations/Parent Position*

The complaint alleges that the District did not provide ESY services in a timely manner and additionally that the District failed to provide ABA services in a timely manner. Because the second of these issues has been raised as part of a Due Process filing, it is not addressed below.

### *District Response*

The District agrees that it failed to provide ESY services as scheduled and has subsequently agreed to pay for private outside tutoring as compensatory education (addressed in issue #2).

### *Investigative Findings*

Findings for Issue #2 apply.

### *Summary and Conclusions*

Because the services referenced were never included in the IEP, they are relevant under this rule. Further, the failure to provide ESY services was addressed in Issue #2 and has been resolved.

Based on the resolution of the relevant issue, the District implemented the requirements of 92 NAC 51- 09.04A, and **no corrective action** is required.

### **Notice to District (If FINDINGS)**

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:

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