

COMPLAINT INVESTIGATION REPORT

Complaint Number: 23.24.12
Complaint Investigator: REDACTED
Date Complaint Filed: October 3, 2023
Date of Report: REDACTED

Introduction

On October 3, 2023, the Nebraska Department of Education received a complaint from a third-party complainant on behalf of two students who are siblings then received a second complaint by another third-party complainant the following day doing the same. The Nebraska Department of Education (NDE) provides a template to assist a complainant in filing a complaint. NDE does not require complainants to use the template; however, the template provides the following required components to file a complaint:

- 1) a statement that a public agency has violated (within the last year) an applicable requirement of Part B of the Individuals with Disabilities Education Act (IDEA) statute and implementing regulations or the state administrative regulations (92 NAC 51);
- 2) The facts on which the statement is based; and
- 3) If alleging violations with respect to a specific child—
 - a) The name and address of the residence of the child;
 - b) The name of the school the child is attending;
 - c) A description of the nature of the problem of the child, including facts relating to the problem; and
 - d) a proposed resolution to the extent known and available to the party at the time the complaint is filed.

34 C.F.R. § 300.153(b), (c).

One complainant submitted an extensive narrative and the other complainant submitted allegations not contained in the first complaint on a District complaint form, not the NDE template. Because the complaints pertained to the same students and many complaint issues overlapped, NDE combined the two complaints into one to be investigated. The complaints included many allegations that NDE informed the complainants in October 17 letters the complaint investigator would be unable to address because the issues did not allege a violation of the IDEA, its implementing regulations, or Nebraska Rule 51 and provided the complainants with information on how to address these allegations. Additionally, the complaints set forth broad allegations applicable to the IDEA and/or Rule 51 but did not provide clear statements that a public

agency had violated special education legal requirements and did not provide the facts upon which the allegations were based. NDE identified issues for investigation in its October 17 letters to the complainants, district, and parents.

NDE advised both complainants and the Students' parents, that confidential information pertaining to the Students would not be provided to the third-party complainants unless parents provided written permission. Permission was not received. NDE.

NDE advised both complainants and the Students' parents that confidential information pertaining to the Students would not be provided to the third-party complainants unless parents provided written permission to NDE. NDE did not receive permission to provide confidential information pertaining to the Students.

By October 31, 2023, NDE, Office of Special Education (NDE OSE) received requests from both third-party complainants to withdraw the complaint. The NDE OSE declined complainants' withdrawal of the complaint due to the credible allegations of noncompliance made and those allegations not yet being resolved.

The deadline for providing documents ended on October 31, 2023, in order to allow time for the investigation to be completed within the required timeline. A short grace period allowed for additional documents from Complainants and the Parents, in part, due to struggles uploading documents to the NDE. The investigator did review some additional information submitted by the parties and did not include information that was duplicative or not relevant to the current investigation, including a draft IEP for S2 dated December 7, 2023, that was provided by the Parents.

On November 14, 2023, NDE, OSE, was advised that the Parents have filed a due process petition regarding S1 and the District. 92 NAC § 51-009.11C8 requires that if NDE receives a written complaint 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, OSE must 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 petition must be resolved using the time limit and procedures described in 92 NAC § 51-009.11.

After reviewing the 23.24.12 complaint and the Parents' due process petition that pertains only to S1 and not to S2, NDE OSE determined the following issues would continue to be investigated, as they pertained to S2 or pertained to S1,

but were not included in the due process petition. NDE OSE provided this information to the District, the Parents, and the complainants on December 4.

Issues Investigated

1. Whether the district allowed parents an opportunity to participate in IEP team meetings for S1 and/or S2 by:
 - a. Providing parents with timely notice of meeting (NOM) for S1 and/or S2's IEP Team meetings during the 2023–24 school year [92 NAC 51.007.06A];
 - b. Ensuring the parents are afforded an opportunity to participate in meetings with respect to the educational placement and the provision of FAPE to S2 [92 NAC 51-009.01A].
2. Did the district properly convene S2's IEP Team, as the parent requested, to address any lack of progress toward the annual goals and in the general education curriculum, if appropriate? [92 NAC 51-007.10A]
3. Whether the district provided prior written notice concerning the parents' request for a 1:1 or 2:1 paraprofessional for S2? [91 NAC 51-009.05]
4. Whether the district protected S1 and S2's confidentiality by:
 - a. Obtaining parental consent before disclosing personally identifiable information for S1 and S2 to personnel from the District's contracted health services provider [92 NAC 51-009.03J1];
 - b. Maintaining appropriate record of access for S2's educational records? [92 NAC 51-009.03C1]
5. Did the district follow proper procedures to address the parent's request to correct alleged inaccuracies in S2's toileting and communication logs [92 NAC 51-009.03G]?
6. Did S2 receive a FAPE?
 - a. To what extent, if any, is S2's FAPE impacted based on the alleged predetermination by the District at the August 18 IEP Team Meeting? [92 NAC 51-004.01]
 - b. To what extent, if any, is S2's FAPE impacted by alleged procedural errors related to convening an IEP Team or providing a prior written notice when refusing to convene an IEP Team meeting? [92 NAC 51.004.01]

Information Reviewed by Investigator

From the Complainants and Parents

1. Letter of Complaint from C1 dated October 2, 2023; received by NDE October 3, 2023.
2. Complaint document from C2 dated October 4, 2023; received by NDE October 4, 2023.

3. Additional documents and audio recordings Complainant C1 submitted including:
- a. duplicate email from a private provider
 - b. release of information (ROI) for private provider
 - c. recordings of parent speaking to school staff accusing of wrongdoing
 - d. emails accusing District of wrongdoing
 - e. Parental input document (duplicate)
 - f. recommendations for full-time paraprofessional for S2 (duplicate)
 - g. email principal apologizes to S2
 - h. email alleging predetermination – after conferring, the District agrees to allow parents home health provider to come to school on S2's first day with a specific schedule.
 - i. Letter from parent's attorney to District outside counsel
 - j. \$112,000 dollars for family to get copy of public records
 - k. Access report and disclosures – parent accusing the District's contracted health services provider of improperly disclosing records
 - l. S2 toileting schedule
 - m. letter from outside provider to District (duplicate)
 - n. S1 IEP and notices 9/27/2023 (duplicate)
 - o. S1 medical needs, letter re: g-tube 9/26/2023
 - p. S1 needs (duplicate)
 - q. Physician 8/23/2023 (duplicate)
 - r. S2 reported hurting from being wiped incorrectly
 - s. S1 verification of disability
 - t. Complaint that the District will not use this agency to provide service for the students at school
 - u. S2 diagnosed with autism and seizures (duplicate)
 - v. email conversations between the Parent and District stating no yelling as claimed and the communication contradicts staff member's own email (duplicate)
 - w. photos of daily reports and video of someone turning pages
 - x. letter regarding the District's contracted health services provider (duplicate)
 - y. audio recording parent is calling someone out regarding eligibility for nursing services
 - z. audio recording of disagreement
 - aa. Physician 10/4/2023 (duplicate)
 - bb. audio recording of someone calling to find out if the agency provides services for the District

- cc. S2 progress monitoring through 10/2/2023
 - dd. Complainant charting including recording and toileting logs
 - ee. Nurse using different surnames on documents
 - ff. Pediatrics (duplicate)
 - gg. audio recordings discussing S2 toileting regiment
 - hh. duplicate of #30
 - ii. Progress monitoring date utilized for S2's progress report dated October 23, 2023 provided by both the Parents and the District.
 - jj. Email from the District to the Parents offering the next three dates available for S2's next IEP Team, currently scheduled for December 7, 2023, meeting should the Parents prefer to reschedule to accommodate attendance of Parents' legal counsel.
4. Additional documents and audio recordings Complainant C2 submitted including:
- a. Sections from the Nebraska Code Department of Health and Human Services Department of Nursing Care
 - b. email from outside provider to parent and parent's attorney reporting perceived problems pertaining to S2.
 - c. Allegation that District staff member laughed at parent's outside provider not relevant for purposes of this investigation
 - d. Clerical staff toileting log sheet
 - e. S2 - medical needs – parent angrily demanding PWN for a draft IEP and insisting upon full-time constant nursing care at school
 - f. District legal counsel may be included – email NOM with District legal counsel listed as an attendee not relevant for purposes of this investigation
 - g. 32 pages of email exchanges with release of information (ROI)(duplicate)
 - h. 62 pages of daily report sheets from parents outside home care provider not relevant for purposes of this investigation
 - i. IEP implementation failure did not use restroom 1–2 hours – school daily toileting report sheet for S2 date 9/12/2023.
 - j. Image 8844 school daily toileting report sheet
 - k. Image note from school and parent's response
 - l. Images 8847–8859
 - m. IMG 9106–9110, 9112, 9114–9117 (note duplicate), 9118, 9119, 9120 – school daily toileting report sheet for S2.
 - n. IMG 9147 not from pediatrician (duplicate)
 - o. IMG 9164 daily report
 - p. IMG 9193, 9194 S2 toileting log sheet (duplicate)

- q. IMG 9206 ROI (duplicate)
 - r. IMG 9212 autism diagnosis (duplicate)
 - s. IMG 9215–9218 (duplicates)
 - t. IMG 9732 – math timing (duplicate)
 - u. IMG 9733 2 math sheets (duplicates)
 - v. IMG 9738 English progress monitoring sheet
 - w. IMG 9739 early reading/English nonsense words progress monitoring sheet
 - x. IMG 9740 math progress monitoring report
 - y. IMG 9741 math progress monitoring report
 - z. IMG 9742–9746 math timing sheets
 - aa. IMG 9747–9751 progress monitoring sheet
 - bb. Injuries from school no explanation, no one knows anything
 - cc. considerations made by S1's IEP Team
 - dd. Letter regarding medical mental need from outside provider (duplicate)
 - ee. Mandatory attendance District is not following for S1 and S2
 - ff. email from school to parent regarding medical documentation illegible and expired
 - gg. Nebraska Nurse Practice Act
 - hh. Release of information (ROI) August 16, 2023 (duplicate)
 - ii. ROI (duplicate)
 - jj. ROI (duplicate)
 - kk. School claims Student was accidentally hit in the side of face with basketball – photo of cheek
 - ll. video of S1
 - mm. video of S1
 - nn. video of S1
 - oo. 69 - Toileting logs for S2 provided by school
5. Additional documents the Parents submitted including:
- a. 35 documents expressing perceived problems
 - b. 110 pages of medical records for S1 66 pages of medical documents for S2
 - c. communication to NDE regarding this complaint investigation
 - d. videos
 - e. S1 IEP, Notices and other correspondence
 - f. emails negotiating dates and times for S2's next IEP Team meeting after the last IEP Team meeting on August 18, 2023. Parents are objecting to the District's contracted staff providing service for the Students at school. Parent also wants to meet with a staff member

personally to discuss the staff member's absence or Parents will keep S2 home

- g. items of correspondence expressing dissatisfaction
- h. Numerous emails between the Parents and District negotiating an IEP Team meeting proposed for December 7, 2023, Parents' objection to having the District's legal counsel present at the meeting, disagreeing with S2's progress report and progress monitoring data, Parents' request to play an audio recording during the IEP team meeting. The District provided a link for the virtual IEP Team meeting scheduled for December 7, 2023, a draft IEP to be considered at the December 7, 2023, IEP Team meeting and a copy of the Parents Rights document. The District offered to reschedule the December 7, 2023, IEP Team meeting until another date to allow for participation of the Parents' legal counsel. The District offered December 20, 2023, and January 16, 23 and 24, 2024 as possible alternatives.
- i. A copy of a letter dated July 23, 2001, from the Acting Director of the Office of Special Education Programs (OSEP) to a former U.S. Senator clarifying that attorney attendance at IEP meetings is "discouraged."
- j. Email between the District and the Parents providing the Parents with the list of staff trained to assist S2 with hygiene/toileting, responding to the Parents' request for an IEP Team meeting to revise or amend the IEP to provide S2 with a full-time paraprofessional, the District's refusal to convene an IEP Team meeting and reason for the refusal, the District's agreement to convene an IEP Team meeting for S2 when more data to consider is available.
- k. Email correspondence from the Parents to the District whereby the Parents disagree with the decisions of the IEP Team on December 7, 2023.

From the School District

- 1. Documents the District submitted including:
 - a. The District's written response to the allegations and identified issues for investigation dated October 31, 2023.
 - b. Medical Health information in S2's education records
 - a) Home health certification and plan of care dated June 19, 2023, through August 17, 2023.
 - b) Behavior progress note from outside provider dated August 3, 2022.

- c) Behavior report note from outside provider dated July 20, 2022.
- d) Recommendations including requesting that S2 have a specific and identified supportive adult or teacher's aide while in the school setting to help S2 facilitate academics as well as emotional and physical needs dated August 17, 2023.
- e) Letter of Diagnosis Dated January 22, 2020
- f) Certificate to return to work or school with no restrictions letter dated October 29, 2023
- g) Certificate of eligibility for Developmentally Delayed services indicating next redetermination due at age 9.
- h) Diagnosis and treatment plan from outside therapist dated May 10, 2022.
- i) Letter of educational recommendations from outside provider with no date.
- j) Letter from physician stating that S2 requires the assistance of a para while in school, should be allowed to use the restroom immediately when needed and requires assistance using the restroom dated September 23, 2022.
- k) Note from physician indicating that an adult needs to wipe S2 after using the bathroom at school and needs supervision at all times when using the bathroom dated April 28, 2022.
- l) Letter of recommendations for toileting/hygiene protocol from physician not dated.
- m) Child and Adolescent Psychiatry Outpatient Clinic Initial Psychiatric Assessment via telemedicine dated June 19, 2023
- n) Progress note from behavioral health clinic dated July 6, 2023.
- o) Letter from physician recommending one to one para support throughout the school day dated September 18, 2023.
- p) Note from physician with instructions to wipe S2 front to back as part of the toileting/hygiene protocol dated September 18, 2023.
- q) Letter from Parent's private provider requesting that the District's contracted health services providers have no contact with the Parents or the Students, dated October 9, 2023.

- r) Occupational therapy evaluation and plan of care dated July 27, 2023.
 - s) Physical therapy evaluation and plan of care dated July 25, 2023.
 - t) Twenty-eight pages of medical records dating back to 2015.
 - u) Five pages of input from Parents, no date on the document.
 - v) Speech therapy evaluation dated July 26, 2023.
 - w) Email from the Parent expressing frustration, requesting a list of personnel responsible for assisting S2 with toileting/hygiene, dates trained in the protocol and by whom dated September 14, 2023
 - x) Undated letter from outside provider expressing concern that the IHP does not align with documents provided by the outside provider. The letter included ROI for the outside provider to disclose information to the District staff. The letter also included limited ROI for the District to disclose information to the outside provider.
- c. Notices of Meeting for the Students:
- a) NOM for S1 dated July 31, 2023; August 7, 2023; September 21, 2023; and September 27, 2023.
 - b) NOM for S2 dated August 7, 2023; and August 16, 2023.
- d. PWN, IEPs and IHPs (drafts and final documents) for S2
- a) Watermarked DRAFT IEP dated August 8, 2023
 - b) Draft IHP dated August 11, 2023
 - c) IHP revisions provided by the Parent on August 14, 2023, including a letter from physician with instructions for toileting/hygiene procedures with no date and a note from physician stating that an adult needs to wipe S2 after toileting and that S2 needs supervision in the restroom dated April 28, 2022
 - d) Final IEP dated August 18, 2023, including signatures of participants for meetings dated August 8 and 18, 2023.
 - e) Initial provision of services or change of placement document dated August 18, 2023, and signed by the Parent August 21, 2023
 - f) Notice of District Decision Responding to Requested Special Education Services (PWN) dated August 18, 2023.

- g) PWN dated September 14, 2023, indicating the District refusal to convene an IEP meeting for S2 or amend S2's IEP to provide full-time paraprofessional support.
- h) PWN dated October 6, 2023, responding to the Parents request for clarification on the amount of paraprofessional support S2 is receiving.
- e. Daily Communication Logs between District staff and the Parents dated August 21 through October 27, 2023
- f. Cumulative Records Access Log
- g. Toileting logs dated August 21, 2023, through October 23, 2023 (the log was revised on September 8, 2023, and again on September 21, 2023).
- h. IEP Progress report dated October 23, 2023, with supporting progress monitoring data.
- i. Documentation that Parents' outside provider for S2 provided toileting training for five district staff on August 21, 2023, the first day S2 attended school. District staff, trained by the Parents' outside provider for S2 provided toileting training for six additional District staff members on August 22, 2023.
- j. August 8, 2023, Eleven (11) District staff members participated in annual seizure training. These staff members are available to address S2's needs.
- k. August 9, 2023, Eight (8) District staff members participated in Emergency Response Team and are available to address the needs of S1 and S2.
- l. August 11, 2023, Six (6) staff members received training on Individualized Health (IHPs) and Safety plans. These staff members are all available to S1 and S2 as needed.
- m. Interviews with relevant District staff to address specific questions from the investigator on December 5 and 8, 2023.

Findings of Fact

1. S1 and S2 are Students with Disabilities eligible to receive services under the IDEA and Nebraska Rule 51.
2. S1 and S2 enrolled in the District to begin school for the 2023–24 school year.
3. The District proposed an IEP Team meeting for S1 to be held on August 4, 2023, via email. On July 29, 2023, the parents agreed to the date and time of that meeting. The District provide written notice for the meeting to the parents on July 31, 2023. Parents were present for the meeting.

4. The District proposed an IEP Team meeting for S1 to be held on August 8, 2023. The District communicated the proposed date and time for the meeting to parents via email on August 5, 2023. On August 7, parents requested virtual participation and the District agreed and provided written NOM. Later that day, the District sent a revised notice to parents due to a change in the regular education teacher who would be available for the meeting. Parents attended the meeting on August 8, 2023.
5. District and the Parents agreed that S1's IEP Team would meet for a third time on September 21, 2023. The District provided NOM on September 18, 2023. Parents were present at the meeting on September 21, 2023.
6. District and the Parents agreed to a fourth IEP Team meeting for S1 to take place on September 27, 2023. The District provided NOM on September 25, 2023. Parents were present at the meeting on September 27, 2023.
7. An IEP Team meeting for S2 was held on August 8, 2023. The District proposed the date and time for the meeting to parents on August 5, 2023, via email. The District provided NOM to the Parents on August 7, 2023. Parents attended the meeting on August 8, 2023, where a draft IEP and IHP for S2 were provided as a starting place for discussing additional requests, concerns and information with the Parents and Parents' invitees to the IEP Team meeting.
8. S2's IEP Team met on August 18, 2023. The District proposed and confirmed the meeting date and time with the Parents through a series of emails from August 11 to August 16, 2023. The District provided NOM to the Parents on August 17, 2023. The Parents attended the IEP Team meeting on August 18, 2023, where the IEP Team continued to discuss the draft IEP and IHP. The IEP Team updated the IEP and IHP and the District provided a detailed Prior Written Notice (PWN) at the conclusion of the meeting.
9. After reviewing the draft IEPs and IHPs for S1 and S2, the Parents requested that the District provide the Parents with access to the documents in a format that allowed the Parents to make changes to the documents that reflected the requests and recommendations of the Parents and their outside providers. The District refused to provide the Parents with access to edit the actual document. A document with Parents input was provided with the documents provided by the District at the investigator's request. Changes in the IEPs and IHPs reflect the requests, concerns and input received from the Parents and the Parents' outside providers via email and discussions during the IEP Team meetings.

10. An IEP Team meeting for S2 was scheduled for October 26, 2023. Parents and the District communicated via email during the first two weeks of October and the District provided NOM on October 18, 2023. After additional discussions regarding attendance of legal counsel for both parties, the District provided an updated NOM including the District legal counsel as a meeting participant. The District offered to reschedule S2's October 26, 2023, IEP Team meeting to accommodate attendance of the Parent's legal counsel.
11. On September 14, 2023, Parents requested that S2's IEP Team reconvene, or the District amend S2's IEP to provide S2 with a full-time paraprofessional. The District provided PWN of refusal to reconvene the IEP Team including the explanation that since the IEP had only been implemented for approximately 16 days and there was not enough new data to determine whether the IEP needed revision or amendment. The District offered to convene an IEP Team meeting to address S2's progress and Parent's concerns at a future date. On October 6, 2023, the District provided another PWN to provide clarification the Parents requested regarding the amount of paraprofessional support that S2 was receiving at school and again refusing to convene an IEP team at that time but reiterated that an IEP Team meeting would be convened closer to the end of the term. Subsequently, an IEP Team meeting for S2 was scheduled for October 26, 2023.
12. Complainants and Parents provided the District with a great deal of information pertaining to S2 including:
 - a. Nine (9) pages of revisions to the draft for S2's IHP dated August 11, 2023, including additions highlighted in green, additional wording in red, two letters from a pediatrician, one with no date and one dated September 23, 2022, (the previous school year when S2 did not attend school in this District) and a note stating that an adult needs to wipe S2 after using the restroom at school and S2 needs supervision when using the restroom at school, dated April 28, 2022, (the previous school year when S2 did not attend school in this District).
 - b. Behavior progress notes from outside providers
 - c. Notes and letters from outside providers including physicians
 - d. Diagnostic and Treatment plan from outside provider
 - e. Medical records (28 pages)
 - f. Additional parent input (5 pages)
 - g. S2's work product in reading and math
 - h. Audio and video recordings

- i. Photo images and screenshots
- 13. Parents and their invited attendees attended each of the IEP Team meetings for the Students.
- 14. The Record of Access form for S2 shows that one individual accessed S2's education records five times.
- 15. The District provided the Parents with clarification regarding the Parents' perceived inaccuracies in S2's toileting and communication logs. The District corrected at least one mistake and modified the process for documenting toileting data and providing information to the Parents through communication logs to streamline communication and understanding.
- 16. The District reported S2's progress on October 23, 2023. Progress on IEP goals was reported as sufficient.
- 17. S2's Fastbridge Learning Progress Monitoring Reports for
 - a. CBMmath
 - i. Baseline of 4 problems correct in 10 minutes;
 - ii. Data Point #2 Score showing 5.3 problems correct in 10 minutes; and
 - iii. Data Point #3 showing 4 problems correct in 10 minutes.
 - b. CBMmath automaticity Level 2 GOM;
 - i. Baseline of 8 problems correct in 10 minutes;
 - ii. Data Point #2 showing 8 problems correct in 10 minutes; and
 - iii. Data Point #3 showing 10 problems correct in 10 minutes.
 - c. CBMreading
 - i. Baseline Score 18 words per minute;
 - ii. Data Point #2 Score 29 words per minute;
 - iii. Data Point #3 Score 36 words per minute;
 - iv. Data Point #4 Score 24 words per minute; and
 - v. Data Point #5 Score 27 words per minute

CBMMath shows inconsistent progress however math automaticity shows slight growth between baseline and last data point with a significant jump in reading from 18 words per minute to an average of 29 words per minute.

- 18. The District provided documentation of specific District staff trained by the Parents' outside provider on the first day S2 attended school. The District's contracted health services providers trained specific additional staff the on the second day that S2 attended school to ensure that S2's toileting plan would be properly implemented irrespective of staffing issues.
- 19. Whether the District's legal counsel may legally attend S2's IEP Team meeting is not an issue for this complaint investigation.

20. S2's IEP Team convened on December 7, 2023, and developed a new IEP for S2. Whether S2's IEP developed on December 7, 2023, is appropriate is not an issue for this complaint investigation.

Issue # 1

Whether the district allowed parents an opportunity to participate in IEP Team meetings for S1 and/or S2 by:

- a. Providing parents with timely notice of meeting (NOM) for S1 and/or S2's IEP Team meetings during the 2023–24 school year. [92 NAC 51.007.06A]
- b. Ensuring the parents are afforded an opportunity to participate in meetings with respect to the educational placement and the provision of FAPE to S2 [92 NAC 51-009.01A]

92 NAC 51-007.06A states:

007.06 *Parent Participation*

007.06A *The school district or approved cooperative shall take steps to ensure that one or both of the parents of the child with a disability are present at the IEP conference or are afforded the opportunity to participate, including:*

007.06A1 *Notifying parents of the IEP conference early enough to ensure that they will have an opportunity to attend;*

92 NAC 51-009.01A states:

009.01 *Parent Participation in Meetings*

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

Allegations/Complainants Position

In the initial complaint, third party complainants allege that the District:

- a) failed to provide the Parents with timely notice for IEP Team meetings for S1 and S2 and refused to convene an IEP Team meeting for S2 at the Parents' request; and
- b) the District failed to ensure that parents were afforded an opportunity to participate in meetings with respect to the educational placement and the provision of FAPE to S2

- c) District staff were disrespectful of the Parents and their invited attendees.
- d) The District made final decisions on S2's IEP and IHP that are inconsistent with the requests, recommendations and other information provided by Parents and Parents' outside providers. (Letters of Complaint dated October 2, 2023, and October 4, 2023)

District Response

S1 Issues 1a.

During the 2023–24 school year, four (4) IEP Team meetings have been held for S1. The first IEP Team meeting was held on August 4, 2023. Notice of meeting was provided to parents on July 28, 2023, via email. On July 29, 2023, parents agreed to the date and time of the meeting. The district provided written NOM, including IEP Team meeting participants, to the parents and participants on Monday, July 31, 2023. The parents were present and District staff indicate Parents were meaningful participants at the meeting. [District response to initial complaint dated October 31, 2023, and supporting documentation].

Because S1's IEP Team was unable to complete its work at the August 4 meeting, the District proposed a second meeting to be held on August 8, 2023. The District communicated the date and time for the meeting to the parents on August 5, 2023. On August 7, the parents asked if the District could facilitate virtual participation for the meeting. The District replied in the affirmative and the parents agreed to the date and time of the second meeting. The District initially provided formal written notice to the parents of the meeting and its participants on Monday, August 7, 2023. A revised NOM was sent the same day to account for a change in the regular education teacher that would be available for the meeting. The parents were present for and were meaningful participants in the meeting held on August 8, 2023. [Id.].

At the conclusion of the August 8, 2023, meeting, the District and parents agreed that the team would meet for a third time on September 21, 2023. On September 18, 2023, the District provided notice to the parents with formal, written notice of the meeting. The parents were present for and were meaningful participants in the meeting held on September 21, 2023. [Id.].

At the conclusion of the September 21, 2023, meeting, the District and parents agreed that the team would meet for a fourth time on September 27, 2023. Formal, written notice of this meeting was provided on September 25, 2023, and parents were present for and were meaningful participants in the meeting held on September 27, 2023. [Id.].

S2 Issue 1a. and b.

At the request of the investigator, the District clarified that no unilateral meetings of District staff were held during which any decisions regarding educational placement and the provision of FAPE were made. Rather, existing information was reviewed and preparatory activities included developing a draft IEP to be presented at the IEP Team meeting, including Parents. [92 NAC 51-009.01C]

During the 2023–24 school year, there have been two (2) IEP Team meetings held for S2: August 8, 2023, and August 18, 2023. There was an additional IEP Team meeting scheduled for S2's team on October 26, but that meeting was rescheduled at the parent's request to facilitate the participation of their legal counsel. On August 5, 2023, the District proposed the meeting date and time to the parents via email. The District provided written notice of the meeting to the parents and IEP Team participants on August 7, 2023. The parents were present in the August 8, 2023, meeting and District staff indicate parents were meaningful participants. [District response to complaint dated October 31, 2023, and supporting documents].

The District proposed and confirmed a second IEP Team meeting for S2 through a series of emails from August 11 to August 16, 2023. The District provided written notice of the meeting to the parents and IEP Team participants on August 17, 2023. The parents were present at the August 18, 2023, meeting and District staff indicate parents were meaningful participants. With respect to the meeting for S2 scheduled for October 26, 2023, the District worked with the parents to find a mutually agreeable time and date for the meeting through a series of emails during the first two weeks of October 2023. The District did not include its attorney as one of the attendees on the first meeting notice. However, the District was aware that the parents were represented by legal counsel, who had communicated with the District's regular legal counsel about the parents' disagreements with the District related to services for S2. Since the parents were represented by counsel, the District arranged to have its attorney attend the October 26 IEP Team meeting. Therefore, the District updated the meeting notice to reflect the fact that the District's attorney would attend the IEP Team meeting. The District provided the updated meeting notice to the family on October 24, 2023. After the parents received the updated notice, the students' father sent an email to the District indicating that the family did not arrange for the attendance of their legal counsel at the meeting, which based on previous communication from both the family and their counsel, the District had assumed was already arranged. Therefore, the students' father requested that the District inform him whether the District would "reschedule or proceed without the District counsel's presence." The District subsequently confirmed via email that the

meeting would be rescheduled to facilitate the attendance of parent's legal counsel. The District has not refused to hold this meeting and is instead working with all appropriate parties and participants to find a mutually agreeable time and date to meet. Indeed, the District has since proposed three additional meeting date options for the parents' consideration. [District response to complaint dated October 31, 2023, and supporting documentation].

Investigative Findings

Districts must take steps to ensure that students' parents are able to participate in each IEP Team meeting or are afforded the opportunity to participate. [34 C.F.R. 300.322(a)].

a) Notice of Meeting

Neither the IDEA nor Nebraska Rule 51 impose specific timelines regarding the notice requirements for IEP Team meetings. Instead, districts are required to notify parents of the meeting early enough to ensure that they will have an opportunity to attend. [34 C.F.R. 300.322(a)(1)]. The District provided notice of meeting (NOM) for all IEP Team meetings held for S1 and S1. Parents attended all IEP Team meetings held for S1 and S2. (Findings of Fact 3–8, and 13).

Districts, as well as parents, have the right to invite others with knowledge or special expertise to attend the meeting and to determine whether those invitees meet that criterion. [34 C.F.R. 300.321(a)(6)] and [34 C.F.R. 300.321(c)]. NOM provided by the district must reflect the attendance of those discretionary attendees on behalf of the district. [Letter to Anonymous, 50 IDELR 250 (OSEP 2008)] If a district invites its attorney to participate as an individual with knowledge or special expertise about the student, NOM must disclose that the attorney will be present. [Id at Letter to Anonymous, 50 IDELR 250 (OSEP 2008)] If the district's notice does not include all discretionary attendees invited on behalf of the district, the parent may ask the district to reschedule the meeting and provide appropriate NOM. [Id.] Parents did not allege that the Parents or any of Parents' invited attendees were unable to attend the meeting due to a lack of notice.

Here, based on previous communication from the parents and their legal counsel, the District anticipated the attendance of the parents' attorney but forgot to include the District's legal counsel as a District-invited member of the IEP Team that would attend a meeting planned for October 26, 2023. A second NOM, correcting the oversight, was provided to parents on October 25, 2023. When the parents informed the District that they had not invited their attorney to attend the meeting and wanted to know if the District planned to proceed and exclude the District's attorney. The District informed the parents that the

meeting would be rescheduled to allow legal counsel for both parents and the District to attend. [Findings of Fact 10].

b) Participation

Complainants allege that the District did not provide Parents with an opportunity for meaningful participation and accuses the District of predetermination because the final IEP did not include everything the Parent wanted. [Initial complaint documents and additional information provided by the Complainants and the Parents]. The IDEA envisions cooperative educational planning for eligible students with disabilities. [Buser v. Corpus Christi Indep. Sch. Dist. 51 F.3rd. 490 (5th Circuit 1995), cert. Denied 516 U.S. 916 (U.S. S. Ct. October 10, 1995)]. The Complainants argue that the District made decisions that are inconsistent with the requests, recommendations and other information provided by the Parents and Parents' outside providers. IEP decisions are made by consensus not by a vote of team members and participants in the IEP Team meeting. [Buser v. Corpus Christi Indep. Sch. Dist. 51 F.3rd. 490 (5th Circuit 1995), cert. Denied 516 U.S. 916 (U.S. S. Ct. October 10, 1995)]. In the end, the District is obligated to offer an IEP and provide parents with PWN including the elements required by the IDEA and Rule 51. [Id., 92 NAC 51.009.05B, See also Letter to Richards, 55 IDELR 107 (OSEP 2010)].

The District prepared draft IEPs and IHPs as a starting point for S2's IEP Team meetings. Since the District has ultimate responsibility for implementing the IEP, it makes sense that the District did not allow the Parents to write on the actual draft documents as requested. [Findings of Fact 12]. However, the changes between the draft IEP and IHP and final IEP and IHP shows that the IEP team considered the information parents and their invited attendees provided and updated the documents based on the IEP Team's consideration of additional information and discussion. [Findings of Fact 7, 8, 11, and 12].

Complainants and the parent submitted many documents to the investigator, including NOM, audio and video recordings, photo images and screenshots, draft IEPs and IHPs, emails and letters from outside providers, PWNs received from the District as well as regular and ongoing communication between the parents and the District. [Findings of Fact 11, 12, and 15]. The District submitted evidence, including notices of meetings, draft IEPs and IHPs, PWN of proposals and refusals explaining possibilities considered, which proposals the District accepted, which proposals the District rejected and detailed explanation of why these decisions were made. [Findings of Fact 8, 10, and 18]. Contrary to allegations of predetermination, the evidence submitted by both parties clearly shows that parents had many opportunities to participate, and that the IEP Team considered information parents, their outside providers, and invited IEP

Team attendees presented to the District. The fact that the District did not acquiesce to the demands of parents, their outside providers and discretionary IEP Team members does not mean that parents were denied participation.

Summary and Conclusions

The District provided parents with timely notice for all IEP Team meetings for S1 and S2 and parents were provided opportunities to participate in all meetings with respect to the educational placement and the provision of FAPE for S2.

Based on the results of the investigation, the District implemented the requirements of 92 NAC 51-007.06A and 92 NAC 51-009.01A. **No corrective action is required.**

Issue # 2

Did the District properly convene S2's IEP Team, as the parent requested, to address any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate? [92 NAC 51-007.10A]

92 NAC 51-007.10 states:

007.10 *The IEP team shall revise the IEP as appropriate to address:*

007.10A *Any lack of expected progress toward the annual goals described in 92 NAC 51-007.07 and in the general education curriculum, if appropriate.*

Allegations/Complainants Position

In the initial complaint, Complainant alleges that S2 is not making expected progress toward annual goals and the District has been unresponsive to parent's concerns. Complainant also provided some examples of S2's work product as evidence of their concern. [Initial letters of complaint dated October 3, 2023, and October 4, 2023, and additional documents submitted by C2].

District Response

The District provided a response with supporting documents indicating that, in addition to two (2) IEP Team meetings held for S2 during the 2023–24 school year, the District scheduled a meeting of S2's IEP Team for October 26, 2023, to address S2's progress and the parents' ongoing concerns. The District's intent to hold this meeting to review progress and resulting data was evident in written documentation as early as the PWN dated August 18, 2023, and is discussed repeatedly in email correspondence with the family. The meeting was postponed to facilitate participation of each parties' legal counsel and is in the process of being scheduled. [Findings of Fact 7, 8, and 9].

The District also reported that the Parents requested, in an email on September 14, 2023, that the IEP Team reconvene or agree to amend the IEP to provide S2 with a “full time paraprofessional.” The District rejected this request and the reasons for the rejection were fully explained in the September 14, 2023, prior written notice. The notice explained that the District, at that time, refused to immediately convene the IEP Team or amend the IEP because there was limited new or additional data or information that had not been previously contemplated at length by the IEP Team and the District had already agreed to reconvene S2’s IEP Team at a mutually agreeable time in the near future during the first semester of the school year. [Findings of Fact 10].

On October 6, 2023, the District provided another PWN to the Parents after Parents requested additional clarification. The October 6 PWN stated that it appeared that S2 was making progress but the team would review data and consider the Parents’ concerns at an IEP Team meeting closer to the end of the term. [Findings of Fact 14].

Subsequently, S2’s progress was reported on October 23, 2023, utilizing the following progress monitoring data. S2’s Fastbridge Learning Progress Monitoring Reports for 1) CBMmath; 2) CBMmath automaticity Level 2 GOM; 3) CBMreading English; CBM early reading nonsense words all show upward trajectory representing progress reported on S2’s progress report dated October 23, 2023. [Findings of Fact 16, and 17]. The IEP Team meeting scheduled for October 26, 2023, was cancelled because the District’s legal counsel would be attending the meeting and the Parents’ legal counsel was unable to attend.

Investigative Findings

Complainants allege that S2 is not making sufficient progress toward annual goals and that S2 requires a full-time paraprofessional. [Initial complaint, Findings of Fact 10, 11 and 12]. The District responded to the allegations in detail and provided supporting documentation including email correspondence with the Parents and PWN responding to the concerns. [Findings of Fact 10–12]. The parties agree that, on September 14, 2023, and again on October 6, 2023, the District declined the parents’ request to convene an IEP Team meeting to revise or amend S2’s IEP to provide full-time paraprofessional support. The PWN clearly explains that that, because the IEP had only been implemented for six (6) weeks, there was not sufficient new information and data to consider, and that the IEP Team would reconvene toward the end of the term to discuss progress monitoring data and other information to determine whether the IEP should be revised or amended. [Findings of Fact 10]. S2’s progress was reported as sufficient on October 23, 2023. The District and Complainants provided the

investigator with progress monitoring data supporting the October 23, 2023, progress report. [Findings of Fact 16 and 17].

Summary and Conclusions

Documentation from the District to the Parents sufficiently describes the District's willingness to review S2's progress and address the Parents' ongoing concerns in a reasonable time following IEP implementation. S2's IEP Team developed S2's IEP on August 18, 2023, the District began to implement S2's IEP on August 21, 2023, the District reported sufficient progress for S2 to the Parents on October 23, 2023. [Findings of Fact 16 and 17]. The IEP Team meeting scheduled for October 26 was cancelled to allow for attendance of legal counsel for both the Parents and the District.

Based on the results of the investigation, the District implemented the requirements of 92 NAC 51- 007.10A and **no corrective action is required.**

Issue # 3

Whether the District provided PWN concerning the Parents' request for a 1:1 or 2:1 paraprofessional for S2. [92 NAC 51.009.05]

92 NAC 51-009.05 states:

009.05 *Prior Written Notice*

009.05A *Prior written notice shall be given shall be given to the parents of a child with a disability a reasonable time before a school district or approved cooperative:*

009.05A1 *Proposes or refuses to initiate or change the identification, evaluation, or educational placement of a child or the provision of a FAPE.*

Allegations/Complainants Position

In the initial complaint document, Complainants allege that the District did not provide proper PWN responding to the Parents' request for a paraprofessional for S2. (Letters of Complaint dated October 3, 2023, and October 4, 2023)

District Response

The District responded to the allegation, explaining that the District had, in fact, provided a PWN on September 14 and October 6, 2023, responding to Parents' request for an IEP Team meeting to provide S2 with a full-time paraprofessional. [Findings of Fact 8 and 11].

Investigative Findings

Both the District and the Parent submitted documentation of a detailed PWN addressing Parents' request to have a full-time paraprofessional assigned to S2. [Findings of Fact 11]. Since the Complainants are third party complainants and not the Parents of S2, neither would have received PWN from the District.

Summary and Conclusions

Based on the results of the investigation, the District implemented the requirements of 92 NAC 51-009.05 and **no corrective action is required.**

Issue #4

Whether the district protected S1 and/or S2's confidentiality by:

- a. Obtaining parental consent before disclosing personally identifiable information for S1 and S2 to personnel from the District's contracted health services provider? [92 NAC 51-009.03J1]; and
- b. Maintaining appropriate record of access for S2's educational records? [92 NAC 51.009.03C1]

92 NAC 51-009.03 states:

009.03 *Opportunity to Examine Records*

 009.03C *Record of Access*

 009.03C1 *Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used (except access by parents and authorized employees of the participating service agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.*

 009.03J *Consent for Release of Records*

 009.03J1 *Parental consent must be obtained before personally identifiable information is disclosed to parties other than officials of participating agencies in accordance with 92 NAC 51-009.03H1 unless the information is contained in education records and*

the disclosure is authorized without parental consent under 34 CFR Part 99.

Allegations/Complainants Position

In the initial complaint document, Complainants allege:

- a) that the District failed to protect S1 and S2's confidentiality by permitting unauthorized individuals (particularly professionals and providers with the District's contracted health services provider) to view or discuss the Students' personally identifiable information without obtaining written parental consent; and
- b) that the District did not maintain appropriate record of access for S2's educational records because, Complainant asserts, at least five (5) individuals were not listed on the records access form and provided a screenshot of individuals who have accessed the file that was provided to the Parents by the District. Complainants and Parents provided emails and photo images or screenshots with names of S2's service providers in answer to the Parents' request for a list of everyone who had access to S2's educational records in addition to the individual documented on the Record of Access. Initial letters of complaint and documents provided].

District Response

The District's response to this allegation states that:

- a) The District has designated its contracted health services providers as District school officials and therefore parental consent is not required. The District elaborated by providing the following language from the regulations implementing the Family Educational Rights and Privacy Act (FERPA):

An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions . . . [a] contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party-

- (1) Performs an institutional service or function for which the agency or institution would otherwise use employees;
 - (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records;
- and

(3) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.

34 C.F.R. § 99.31(a)(1)(i)(B).

The District asserts that any disclosure of information to the District's contracted health services provider was consistent with the requirements of 34 CFR 99.31(a) and thereby complies with the requirements of 92 NAC 51-009.02J1.

b) The District's response states that an appropriate record of access for S2's educational records was and continues to be maintained. A copy of the Record of Access was provided with documents requested by the investigator.

Investigative Findings

a) Confidentiality Disclosing Personally Identifiable Information

FERPA is a federal law that protects the privacy of student education records. This law applies to all schools that receive funds under an applicable program of the U.S. Department of Education. [20 U.S.C. § 1232g; 34 CFR Part 99]. FERPA's confidentiality requirements are applied through the IDEA and Rule 51 and referenced in 92 NAC 51-009.03J1. Generally, in order to protect student's confidentiality, schools must have written permission from the parent or eligible student to release any personally identifiable information from a student's education record. [92 NAC 51-009.03J]. However, this Rule references the regulations implementing FERPA provide an exception allowing schools to disclose personally identifiable information from a student's education records to school officials with legitimate educational interest without consent. [34 C.F.R. c(a)(1)(I)(A), (B)].

Education Records for S1 and S2 were only shared, absent parent consent, with school officials with legitimate educational interest, meeting the requirements of FERPA, the IDEA and Rule 51. A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official if the following conditions are met. 1) The contractor performs an institutional service or function for which the agency or institution would otherwise use employees. [34 C.F.R. § 99.31(a)(1)(i)(B)(1)]. The District contracts with an outside agency to provide health related services which the District would otherwise employ. 2) The contractor is under the direct control of the agency or institution with respect to the use and maintenance of education records. [34 C.F.R. § 99.31(a)(1)(i)(B)(2)]. The health services providers are under the direct control of the District. [92 NAC 51-013.01] 3)

The contractor is subject to the requirements of 34 C.F.R. § 99.33(a) governing the use and redisclosure of personally identifiable information from education records. The District requires that contractors may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student. [Letter of Response dated October 31, 2023]

b) Record of Access

Rule 51 requires districts to keep a record of parties obtaining access to student's education records including the name of the party, the date access was given, and the purpose for which the party authorized to use the records. [92 NAC 51.009.03C]. Districts are not required to maintain a record of access for parents and authorized employees of the participating service agency's access of a student's record. The record of access on S2's educational file shows that one particular individual accessed S2's education record five times. [Findings of Fact 14]. The record of access provides the date, name of the individual requesting to review the records, the type of records released to the individual for review and the reason for the request. [Findings of Fact 14]. The Parent requested that the District provide a list of everyone with access to S2's educational record. The Complainant submitted a screenshot showing an incomplete picture of a letter containing a list of individuals and later the entire response to the request sent by the District in response to the request. The response included the names and titles of the same individuals in the screenshot initially provided. Each individual, followed by title, listed is an employee or agent authorized to access the Students' records and excepted from the recordkeeping requirement. [Complainant and Parent documents].

Complainants have not presented any factual evidence indicating that record of access was missing for any particular individuals. Therefore, the investigation concludes that the Record of Access for S2's educational records reflect appropriate access.

Summary and Conclusions

The District has appropriately maintained Students' confidentiality.

Based on the investigation, the District implemented the requirements of 92 NAC 51-009.03J1 and 009.03C1. **No corrective action is required.**

Issue # 5

Did the District follow proper procedures to address the Parent's request to correct alleged inaccuracies in S2's toileting and communication logs. [92 NAC 51-009.03G].

92 NAC 51-009.03 states

009.03 *Opportunity to Examine Records:*

009.03G *Amendment of Records at Parent's Request*

009.03G1 *A parent who believes that information in education records collected, maintained or used is inaccurate or misleading, or violates the privacy or other rights of the child may request the participating agency which maintains the information to amend the information.*

Allegations/Complainants Position

In the initial complaint documents, Complainants allege that the District misrepresented S2's toileting and communication logs and has refused to correct the records per parent request (Letter of Complaint dated October 3, 2023; Letter of Complaint dated October 4, 2023). More specifically, Complainants assert that the initials on the toileting log do not match the signature on the daily home note and also that two entries were made for the same date.

District Response

On September 19, 2023, the District received an email from the Parent that included the following request: "Regarding the communication log dated 8/24/23, it appears to have been completed twice with different information. Could you please confirm which log accurately represents the events of 8/24/2023?" The District followed up with the Parent to clarify that the special education teacher had inadvertently written the wrong date ("8/24" instead of "8/25") on the August 25, 2023, communication log. The teacher corrected the log to reflect the correct date. [District Letter of Response dated October 31, 2023, and supporting documents]

Investigative Findings

A parent who believes that information in education records collected, maintained, or used is inaccurate or misleading, or violates the privacy or other rights of the child may request the participating agency which maintains the information to amend the information. In this situation, the Parents requested clarification which led to the discovery of a mistake. [Findings of Fact 15]. Once the clerical error was discovered, it was promptly corrected on the record in question. [Findings of Fact 15]. Complainant also raised concerns about details

of documentation, particularly initials and names on the toileting log and daily home notes and the name the nurse signed on logs. [Initial complaint document and email correspondence between the Parents and District staff].

Communication, especially email communication is multifaceted and sometimes results in misunderstanding. In this instance, communication between the District and the Parents appears to have led to a misunderstanding or a mistake easily explained and corrected. S2's IEP including the toileting plan was completed on August 18, 2023, with implementation beginning on August 21, 2023. [Findings of Fact 8, toileting log and daily home notes submitted by the District and Complainants/Parents]. The toileting plan, toileting log, and daily home note were in the initial stages of implementation. School staff and the Parents were corresponding extensively to streamline the plan's implementation and develop effective communication. [Email correspondence between the District and Parents submitted by the parties]. S2's special education teacher explained that a trained assistant initialed each entry on the toileting log. The log is kept in a secure location in the restroom for easy access. [Email correspondence, information provided by District staff, and corrections and modifications to the toileting log and daily note]. At the end of the day, the special education teacher, or assignee, completed the daily note to send home for parents' review. On at least one occasion, the teacher collected information from the toileting log and made an error in transcribing the information to the daily home note sent home to the Parents. It also became known that there was a misunderstanding regarding who would sign the daily home note. When the District became aware of the miscommunication, the log and daily note were reworked to incorporate Parents' requests for how data is collected and reported and to streamline communication going forward. [Email correspondence, information provided by District staff, and corrections and modifications to the toileting log and daily note].

In the complaint document, Complainant pointed out that individual(s) with two different surnames were signing as the school nurse. This discrepancy caused confusion for the Parents. In the initial complaint dated October 3, 2023, it was apparent that the Complainant already understood that the school nurse had signed two different surnames with the same first name on documents pertaining to S2. The nurse had a recent change of surname.

Summary and Conclusions

Parents brought this concerns on discrepancies between S2's toileting log and S2's daily home notes to District staff. District staff investigated, corrected the mistakes, and adjusted its recording procedures to avoid additional miscommunication.

Based on the results of the investigation, the requirements of 92 NAC 51-009.03G are not applicable and **no corrective action is required.**

Issue #6

Did S2 receive a FAPE.

- a. To what extent, if any, is S2's FAPE impacted based on the alleged predetermination by the District at the August 18, IEP Team meeting? [92 NAC 51-004.01]
- b. To what extent, if any, is S2's FAPE impacted by alleged procedural errors related to convening an IEP or providing a PWN when refusing to convene an IEP meeting? [92 NAC 51-004.01]

92 NAC 51-004.01 states:

004.01 *All providers of special education services shall be under the general supervision of the Nebraska Department of Education for the purpose of meeting the standards of this Chapter. School districts and approved cooperatives shall ensure that all children with verified disabilities, from birth through the school year in which the child reaches age twenty-one, including children who have been suspended or expelled from school, have available to them a free appropriate public education (FAPE) which includes special education and related services to meet their unique needs. School districts and approved cooperatives responsibility to ensure the availability of FAPE includes ensuring the availability of FAPE for resident children in detention facilities, correctional facilities, jails and prisons.*

Allegations/Complainants Position

a) Complainant repeatedly alleges that the District engaged in predetermination by providing emails and other correspondence from Parents and outside providers, photos and screenshots and medical records and insisting that the District did not allow the Parents to make changes to the draft IEP prepared by the District and did not follow the requests and recommendations in the correspondence provided and discussions in the IEP Team meeting. The Complainants and the Parents argue that S2 requires a full-time paraprofessional at all times while attending school and that the District's contracted health care provider should not be allowed to provide service to S2. Complainants also argue that District staff members implementing S2's toileting program have not been approved by the Parents and that the program was not implemented properly. [Initial Complaint dated October 3, 2023, and

additional documents submitted to the investigator on November 10 through November 17, 2023].

b) Complainants allege that the District refused to convene an IEP Team meeting at the Parents' request and failed to provide PWN of refusal for this request. Complainants also argue that the District staff implementing S2's toileting program have not been approved by the Parents and that District's legal counsel is barred from attending S2's IEP Team meetings because the Parents are represented by counsel who is not available to attend the IEP Team meeting.

District Response

The District asserts that no predetermination or procedural errors have occurred, that parents' meaningful input and participation through correspondence and information provided by parents and others was considered. The District maintains that this information was utilized to make informed decisions about S2's educational needs and services, to draft proposals in preparation for IEP Team meetings and to finalize S2's IEP and IHP. The District also stated that Complainant's allegations of predetermination and procedural errors center around the District's refusal to agree to the Parents' demand that no providers affiliated or associated with the District's contracted health services provider would be assigned to provide the services or supports determined appropriate by the IEP Team and that the Parents have not approved staff members who are implementing S2's toileting program. The District maintains that, while obligated to determine the appropriate level and type of services through the IEP process, the District has the authority to unilaterally assign qualified professionals and providers responsible for fulfilling those services and meeting the Student's identified needs. Two IEP meetings were held for S2 during the current school year. Parents requested an additional IEP meeting on September 14, 2023. The District refused to this request and provided PWN on September 14 and October 6, 2023. [District response dated October 31, 2023, and documents]

Investigative Findings

a) Effects of alleged Predetermination on FAPE for S2

The IDEA and Rule 51 require districts to ensure that parents have an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE. [92 NAC 51-009.01]. Parents must also be a member of a group making decisions regarding the educational placement of their child. [92 NAC 51-009.02].

Predetermination occurs when members of the IEP Team make decisions about the student's special education prior to the IEP Team meeting including parents and refuse to consider alternatives. The failure to allow parents to provide meaningful input may deny FAPE. [See *Deal v. Hamilton County Bd. Of Educ.*, 42 IDELR 109 (6th Cir. 2004) cert. denied, 546 U.S. 936 (2005)]. In this case, S2 was new to the District. Parents did not send S2 to school during the time a new IEP was being developed.

Two lengthy IEP Team meetings were held in to develop S2's IEP and IHP. At the first IEP Team meeting on August 8, 2023, the District provided a draft IEP including existing information. The District also prepared a draft IHP Health and Safety Plan addressing Parents' concerns regarding toileting, seizures, and elopement. While the Procedural Safeguards require Parents to be afforded an opportunity to participate in meetings with respect to educational placement and FAPE, a meeting does not include preparatory activities that the district personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. [92 NAC 51-009.01C]. Required members of the IEP Team, including the Parents, attended the two IEP Team meetings as did additional discretionary attendees invited by the Parents and the District. These additional discretionary attendees included at least one private provider for S2 in the home environment, providers for all related services being considered for S2, and legal counsel for the Parents and the District. [Findings of Fact 7 and 8]. S2's IEP Team finalized S2's IEP on August 18, 2023, including the IHP and PWN. Parent signed consent for provision of initial services on August 21, 2023. [Findings of Fact 7 and 8].

The IDEA and Rule 51 require that parents have an opportunity for meaningful participation. However, meaningful participation does not mean that the District must acquiesce to parent's demands. [*Blackmon v. Springfield R-XII Sch. Dist.*, 31 IDELR 132 (8th Cir. 1999)]. The parties and S2's parent provided an extraordinary amount of information including emails, notes, audio recordings, letters provided to the District by Parents, other family members, and private providers; all showing that the Parents had ample participation. [Documents submitted by C1, C2, Parents and the District]. The final IEP and IHP include changes that are evidence that the Team considered Parent's input based on the vast amount of communication and information discussed by the team. [Findings of Fact 8]. Finally, the District provided PWN on August 18, 2023, that clearly articulates the options discussed, selected, rejected and why. [Findings of Fact 8]. There is no evidence that shows predetermination on the part of the District.

b) Effects of Alleged Procedural Errors on FAPE for S2.

The District is obligated to provide PWN to the parents of a child with a disability a reasonable time before a school district or approved cooperative proposes or refuses to initiate or change the identification, evaluation, or educational placement of a child or the provision of a FAPE to the child. [92 NAC 51-009.05A]. Following S2's IEP Team meeting on August 18, 2023, the District provided the Parents with explicit PWN. [FOF 8]. On September 14, 2023, the District provided Parents with PWN rejecting Parents' request to convene another IEP Team meeting or amend the IEP to add additional paraprofessional support. [Findings of Fact 10]. Notice provided great detail stating that, since the IEP had only been implemented for approximately sixteen days, there was limited new or additional data or information that was not contemplated at length by the IEP Team and the District had already agreed to reconvene S2's IEP Team at a mutually agreeable time in the near future during the first semester of the school year. [Findings of Fact 9, 10, 11].

Again, on October 6, the District issued another PWN to address the Parents' request for clarification regarding the amount of paraprofessional support S2 is receiving at school. [Findings of Fact 10]. With very specific details, the District refused the Parent's request to add full-time paraprofessional support for S2 finishing with the following reminder: "The District has already committed to convening an IEP Team meeting for S2 at or around Parent-Teacher Conferences for the purpose of reviewing current performance data and proposing/discussing any needed amendments to the August 18, 2023, IEP. [Findings of Fact 9 and 10]. The topic of EA support will be revisited at that time if new or different information is available for the IEP Team to consider." At the same time, the District and the Parents were engaged in discussions to find a date for an IEP Team meeting. [Findings of Fact 9 and 10]. Ultimately, S2's sufficient progress toward IEP goals was reported to the Parents on October 23, 2023. [Findings of Fact 16 and 17]. An IEP Team meeting for S2 was scheduled for October 26, 2023, but cancelled to be rescheduled so that both Parents' and District's legal counsel could attend. No procedural errors have occurred related to convening an IEP Team meeting or providing PWN when refusing to convene an IEP Team meeting.

Summary and Conclusions

Based on the results of the investigation, S2 was not denied a FAPE because: a) predetermination did not occur; and b) no procedural errors occurred related to convening an IEP Team meeting or the provision of PWN when refusing to convene an IEP Team meeting. The District implemented the requirements of 92 NAC 51-004.01, 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.