

## COMPLAINT INVESTIGATION REPORT

**Complaint Number:** 24.25.01  
**Complaint Investigator:** REDACTED  
**Date Complaint Filed:** July 12, 2024  
**Date of Report:** REDACTED

### Introduction

This complaint was filed on behalf of an eight-year-old, third-grade student who has been classified as a student with Autism. The complaint is in regard to one incident that occurred on December 7, 2023, involving discipline procedures that the Parent believes did not follow the Student's behavior and safety plan that was developed by the IEP team and documented in the Student's IEP.

### Issues Investigated

1. Did the District consider the use of positive behavioral interventions and supports and other strategies to address the behavior? [92 NAC 51-007.07B3]
2. Did the District provide special education and related services to the Student in accordance with the IEP? [92 NAC 51-007.02; 007.07A5; and 007.07A8]
3. Did the District provide the Student FAPE? [92 NAC 004.01]

### Information Reviewed by Investigator

#### *From the Complainant*

- Letter of Complaint dated and received by NDE July 12, 2024
- Interview with the Parent on July 30, 2024

#### *From the School District*

- Letter of Response dated and received by NDE July 26, 2024
- Interview with District staff August 7, 2024

Issue #	Information Requested	Information Received (Citation)
Issues #2 & 3	The Student's most recent MDT	Review of Existing Data dated May 10, 2024
Issues #1 & 2	Individualized Education Programs (IEPs) developed for the Student during the 2023-24 school year.	IEPs dated September 14, 2023, amended March 19, 2024, and May 10, 2024
Issue #1	The most recent functional behavior assessment completed with the Student	Included in the IEPs listed above
Issues #1 & 2	Behavior Intervention Plans developed and implemented during the 2023-24 school year	Included in the IEPs listed above

<b>Issue #</b>	<b>Information Requested</b>	<b>Information Received (Citation)</b>
Issues #1, 2, & 3	Progress Reports for the 2023-24 school year	Progress Reports dated October 6 and December 21, 2023, and March 8, 2024
Issues #1, 2, & 3	The District's Policy regarding the use of restraint	Policy 5421- Use of Restraints and Seclusion, Adopted January 8, 2018; Updated January 5, 2023
Issues #2 & 3	Documentation of restraint used with the Student during the 2023-24 school year	Behavior Detail Reports covering the dates August 18- December 7, 2023, at one school and January 26– May 16, 2024, at another school.
Issues #2 & 3	Behavior Detail Reports for the 2023-24 school year	Included in the Behavior Detail Reports listed above

### **Findings of Fact**

1. The Student has a history of self-injurious behavior as documented in the Functional Behavior Assessment and Behavior Plan which targeted the following behaviors (IEP dated September 14, 2023):
  - a. Unsafe body (hitting the head, kicking chairs, throwing objects)
  - b. Off-task (refusal, walking around, out of area)
2. The Student's Behavior Intervention Plan includes the following Antecedent Interventions and this list is repeated for Consequence Interventions:
  - a. [The Student] is given pre-teaching on having a safe body as well as social skill instruction. [The Student] is given visuals such as, "I am working towards" chart to earn breaks. [The Student] has a reward system, visual schedule, and visual timer. [The Student] is given visual(s) for communication when [the Student] is upset.
3. Further, the Behavior Intervention Plan adds under Consequence Interventions:
  - a. Staff respond to problem behavior using "If 9student behavior), then (staff response)" statements: If off task, then staff will set a two-minute timer for [the Student} to get back on task.
  - b. If [the Student] demonstrates an unsafe body, then staff will prompt [the Student] to use visuals for communication.
  - c. If [the Student] is hitting [the Student's] head, then [the Student] will be removed from the area and be taken to PAC. After [the Student] is calm, the student will be escorted to visit the school health office to be checked out.
4. On December 7, 2023, according to the Behavior Detail Report, the Student "became frustrated with an ELA assignment on iPad and became

disruptive in class, would not comply with teacher's instructions- security called to the classroom." (Behavior Detail Report dated December 7, 2023)

5. The District further explained that the Student was "punching and hitting [them]self in the face/head, which was a safety concern... and disruption for the class." (Interview with District Staff August 7, 2024)
6. In response, the School Safety Officer was called and proceeded to escort the Student to the PAC room, pulling the Student by the arm in a manner contrary to District policies and training. (Letter of Response dated July 26, 2024)
7. The incident was referred to Human Resources by the school principal and Human Resources took disciplinary action including a written reprimand, suspension without pay for five days, and a mandatory referral to the Employee Assistance Program. (Interview with District Staff August 7, 2024)
8. In response to the question, "Which staff members need to be informed about the student's safety plan?" the IEP reads, "Special education staff, security officer, administration, nurse, general education teachers including specialist teachers." (IEP dated September 14, 2023)
9. The District has a policy regarding the use of physical restraint which describes physical restraint as "using a physical hold to restrict a student's freedom of movement as a response to student behavior." (Policy 5421- Use of Restraints and Seclusion, Adopted January 8, 2018, Updated January 5, 2023)
10. This policy reads, "Physical restraint may be used only in situations in which the student's behavior poses an imminent danger of physical harm to the student or others," and includes the following caveats (Policy 5421- Use of Restraints and Seclusion, Adopted January 8, 2018, Updated January 5, 2023):
  - a. "Physical restraint should be reasonable in light of the age, gender, and strength of the student and known medical or physical conditions;" and
  - b. "Physical restraint should be discontinued as soon as imminent danger of physical harm to the student or others has dissipated. Physical restraint may not be used as a form of punishment.
11. Annually, the District's School Safety Office trains Security officers on (Interview with District Staff August 7, 2024):
  - a. Mandt- Chapters 1-3 which focus on verbal de-escalation
  - b. Disruptive Student Management for physical de-escalation
  - c. CPR

12. This particular employee has evidence in his employment file of the above training annually for 13 of the last 14 years (not 2018). (Interview with District Staff August 7, 2024)
13. Subsequent to this incident, the Student moved schools within the District and enrolled at a different elementary school for the second semester (Interview with the Parent on July 30, 2024, and with District Staff on August 7, 2024)
14. The Student's behavior intervention plan was amended on March 19, 2024, and again on May 10, 2024. (IEP dated March 19 and May 10, 2024)
15. Progress Reports were provided for the first, second, and third quarters of the school year, all reflecting "adequate progress" on the goals listed on the IEP. (Progress Reports dated October 6 and December 21, 2023, and March 8, 2024)

### **Issue # 1**

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

92 NAC 51-007.07 states:

007.07B3	<i>In the case of a child whose behavior impedes his or her learning or that of others, the IEP team shall consider the use of positive behavioral interventions, and supports and other strategies to address that behavior.</i>
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#### *Allegations/Parent Position*

In the Letter of Complaint dated July 12, 2024, the Parent describes the events of December 7, 2023, as an excess of restraint and force in front of staff, parents, and other students. The Parent alleges that the event was traumatic for the Student and has led to subsequent behavior problems in school as well as physical pain in the days after the incident.

#### *District Response*

In their Letter of Response, dated July 26, 2024, the District points to the Behavior Intervention Plan, which includes a number of positive behavior supports as well as a Safety Plan to address unsafe behaviors.

#### *Investigative Findings*

In spite of the incident that occurred, there is ample evidence that the Student's IEP team thoroughly considered the specific behaviors and their respective functions (Finding of Fact #1), and developed a Behavior Intervention Plan that

includes positive interventions to be used as both antecedents, preventing problem behavior and consequence strategies to reinforce and support the development of the replacement behavior (Finding of Fact #6)

### *Summary and Conclusions*

Based on the evidence included in the Student's IEP, the District implemented the requirements of 92 NAC 51- 51-007.07B3, and **no corrective action** is required.

### **Issue # 2**

Did the District provide special education and related services to the Student in accordance with the IEP? [92 NAC 51-007.02; 007.07A5; and 007.07A8]

92 NAC 51-007.07 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.*

007.07A       *The IEP shall include:*

007.07A5       *A statement of the special education and related services and supplementary aids and services based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child:*

007.07A5a       *To advance appropriately toward attaining the annual goals;*

007.07A5b       *To be involved in and progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and*

007.07A5c      *To be educated and participate with other children with disabilities and nondisabled children*

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*

In the Letter of Complaint, dated and received by NDE on July 12, 2024, the Parent alleges that the incident that occurred on December 7, 2023, constitutes a failure on the part of the District to implement the Student's IEP.

#### *District Response*

In their Letter of Response, dated July 26, 2024, the District admits that during the specific incident in question, one staff member did not implement the Behavior Intervention Plan as written, an issue that was immediately addressed through Human Resources. Otherwise, the Student received all services, accommodations, and curricular modifications determined needed by the IEP team and outlined in the IEP and Behavior Intervention Plan.

#### *Investigative Findings*

The only problem raised by the Complainant had to do with the implementation of the Behavior Intervention Plan (specifically the Safety Plan) during one particular incident. No concerns were raised with regard to the implementation of the Behavior Intervention Plan outside this one incident, nor were concerns raised with regard to the services, accommodations, or modifications provided to the Student.

It is true that the incident in question represents a failure on the part of the District to implement the Student's Behavior Intervention Plan as written. However, the District took swift action to address the unethical behavior of its staff (Findings of Fact #2 & #3) in an effort to correct the situation and ensure that it would not be repeated. Brief lapses in implementation do not constitute a violation of the IDEA so long as a district can demonstrate continued efforts to implement the IEP and the child's access to a free appropriate public education (FAPE) is not jeopardized. This incident seems to reflect an ethical

issue more than it does a violation of the IDEA and is better addressed as a part of an Ethics complaint than a special education complaint.

Of note, the law requires that any supplementary aids and services included in the IEP (including a behavior intervention plan), include the frequency, location, and duration of the services (92 NAC 51- 007.07A8), in an effort to make clear when and how these services are used. Findings of Fact #2 & #3 demonstrate that the interventions being implemented do not meet this requirement.

### *Summary and Conclusions*

Since the Student's IEP and Behavior Intervention Plan were consistently implemented except for this one staff error, and the District took quick action to correct the Human Resources violation, the District implemented the requirements when it comes to IEP implementation. However, the IEP does not meet the requirements of 92 NAC 51- 007.07A8; therefore, the following **corrective action is required**.

### *Corrective Action Plan*

1. Within 10 calendar days of the date of this Investigation Report, the District must reconvene the Student's IEP Team and ensure that the Student's Behavior Intervention Plan and any other accommodations, modifications, and supplementary aids and services include a description of the frequency, location, and duration of these services as outlined in 92 NAC 51-007.07A8.
2. The amended IEP must be sent to NDE no later than 2 days after the IEP Team meeting.
3. NDE will request 3 student files on or before May 10, 2024, to verify each student's IEP including frequency, location, and duration of supplementary aids and services.

### **Issue # 3**

Did the District provide the Student FAPE? [92 NAC 51-004.01]

92 NAC 51-004.01 states:

004.01      *School districts and approved cooperatives shall ensure that all children with verified disabilities, from birth thorough 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.*

### *Allegations/Parent Position*

In their Letter of Complaint, dated July 12, 2024, the Parent outlines all the ways that the incident in question has impacted the Student and has resulted in increased problem behavior and academic underperformance.

### *District Response*

While the incident in question was serious and was addressed in a serious manner, the Student was provided all services listed in the IEP.

### *Investigative Findings*

Similar to Issue #2, while the incident raised in the complaint involves a serious failure on the part of a District employee to follow District policy and training that had been provided (Findings of Fact #6 & #8-12), it does not constitute a larger failure on the part of the District to provide the Student with FAPE. The Student had an appropriately designed IEP which was amended twice following the incident of concern (Finding of Fact #14), and which has been consistently implemented in both school settings. The setbacks the Student has experienced, while significant and painful, do not constitute a denial of FAPE.

### *Summary and Conclusions*

Based on the consistent implementation of the Student's IEP throughout the school year, the District implemented the requirements of 92 NAC 51-004.01, and no corrective action is required.

### **Notice to District**

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

Abbey Cron, Complaint Specialist  
Jordyn Brummund, Complaint Specialist  
NDE Office of Special Education  
[nde.speddr@nebraska.gov](mailto:nde.speddr@nebraska.gov)