

COMPLAINT INVESTIGATION REPORT

Complaint Number: 21.22.18
Complaint Investigator: [Redacted].
Date Complaint Filed: January 24, 2022
Date of Report: [Redacted]

Issues Investigated

1. In developing the IEP (Individualized Education Plan), did the District consider all relevant data including the concerns of the Parents and the Student's developmental and functional needs? [92 NAC 51-007.07B]
2. Did the District develop an IEP including a statement of the special education and related services and supplementary aids and services the Student would be provided to enable the Student to be involved in and progress in the general education curriculum? [007.07A5]
3. Did the District make available a full continuum of alternative placements to meet the needs of the Student? [92 NAC 51-008.01D]
4. Is the Student being provided a free appropriate public education? [92 NAC 51-003.24]

Sources of Information Reviewed by Investigator

From the Complainant

- Letter of Complaint dated January 23, 2022; received by Nebraska Department of Education (NDE) January 24, 2022
- Time stamped video recording of December 2, 2021, IEP meeting
- Statement from District Staff Member sent by email, dated December 15, 2021.
- Possible Educational Placement Options for [the Student] attached to email, dated December 7, 2021
- Email correspondence dated March 9, 2022

From the School District

- Letter of Response dated and received by NDE February 21, 2022
- Multidisciplinary Report (MDT) dated August 26, 2020
- IEP dated August 28, 2019
- IEP dated August 26, 2020
- IEP dated April 28, 2021
- IEP dated November 18, 2021
- Supervision schedule for the Student

- Individual Safety Plan dated November 1, 2021
- Individual Safety Plan for Student #2 dated November 2, 2021
- Video recording of November 18, 2021 IEP meeting
- Video recording of December 2, 2021 IEP meeting
- Video recording of December 9, 2021 IEP meeting
- Video recording of December 16, 2021 IEP meeting
- Email correspondence dated March 14 and 15, 2022

Introduction

The Student is a 17-year old who is in 10th grade and is identified as a Student with an intellectual disability (MDT dated August 26, 2020). The Parents have shared concern with the school District that the Student could be influenced by others in the bathroom or locker room, based on past events, and requested supervision to prevent this issue from recurring. An incident occurred on October 28, 2021, in which the Student was molested by another student (Student #2) while unsupervised in a bathroom. Since that time, the Student has not returned to school, based on the recommendation of mental health providers, because the Student does not feel safe in the school setting.

Issue # 1

In developing the IEP, did the District consider all relevant data including the concerns of the Parents and the Student's developmental and functional needs? [92 NAC 51- 007.07B]

92 NAC 51- 007.07B states:

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| 007.07B | <i>In developing, reviewing or revising each child's IEP:</i> |
| 007.07B1 | <i>The IEP team shall consider the strengths of the child and the concerns of the parents for enhancing the education of the child</i> |
| 007.07B2 | <i>The IEP team shall consider the results of the initial evaluation or most recent evaluation of the child, and the academic, developmental, and functional needs of the child</i> |

Allegations

The Student was harmed by another student (Student #2) while in the bathroom, unsupervised by special education staff. This was in spite of the Parents sharing their concerns about the Student's vulnerability, based on previous incidents in the bathroom, issues that the District was aware of.

Parent Position

The Parent has brought to the attention of the school their concerns about the Student's vulnerability and has understood that any time the Student was in a general education setting (which they assumed meant any place in the school where the Student may encounter general education peers), the Student would be supervised and monitored in a 1:1 manner by a special education provider.

District Response

Since the incident, the District developed a safety plan for both the Student and Student #2 to ensure that the two would not be in contact at all. Additionally, the District amended the IEP to ensure that 1:1 supervision was provided throughout the Student's school day and that the specific concerns regarding the bathroom were made clear. Since that time, 5 IEP meetings have been held for the purposes of developing an IEP with thorough consideration of all relevant data and the concerns of the Parents.

Investigative Findings

- The Student's IEP at the time of the incident reads: When [the Student] is in a general education classroom a 1:1 para educator/teacher will accompany [the Student] to help [the Student] be successful in this setting. IEP dated April 28, 2021
- During the December 2, 2021 IEP meeting, the special education teacher (who serves as the Student's case manager) stated, referring to a previous IEP meeting, "My memory on that meeting, we expressed concern about [the Student] being in a bathroom with other people and being manipulated or asked to do things that were not appropriate and so that was put in there as a concern but I don't remember a desire to make an accommodation that a single stall bathroom was a requirement."
- Additionally during the December 2, 2021 IEP meeting, the special education teacher reported: "The team was aware that there was a concern that [the Student] would be manipulated or [the Student has] been asked in the past to do things in the bathroom so what I was doing was walking to the bathroom, standing outside because I can't go in, [the Student] was using the bathroom, and then [the Student] would come out."
- The Student's current IEP reads: **Need 1:1 assistance for bathrooming needs (e.g., an adult familiar with [the Student's] needs will be present to clear the bathroom and prevent others from entry. **Adult supervision at all times when walking through the halls, staff should have [the Student] in their line of vision and remain within eyesight. IEP dated November 18, 2021.

Summary and Conclusions

The statements made by the Student's case manager at the December 2nd IEP meeting make clear that the District was aware of the Parent's concern, based on previous incidents, that the bathroom posed a specific safety threat for the Student, and this information was not thoroughly considered in the development of the April 28, 2021 IEP. Basic safety in the school environment underlies the most critical of developmental needs that should be considered in IEP development. While it is clear that the District has made efforts to consider input from the Parents as well as the Student's developmental needs since the incident occurred, the April, 2021 IEP did not. Based on these findings, the District failed to fully implement the requirements of 92 NAC 51-007.07B and **corrective action is required** and specified at the end of the report.

Issue # 2

Did the District develop an IEP including a statement of the special education and related services and supplementary aids and services the Student would be provided to enable the Student to be involved in and progress in the general education curriculum? [007.07A5]

92 NAC 51-007.07A5 states:

- 007.07A *The IEP shall include:*
 - 007.07A5 *A statement of the special education and related services and supplementary aids and services based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child:*
 - 007.07A5a *To advance appropriately toward attaining the annual goals*
 - 007.07A5b *To be involved in and progress in the general education curriculum and to participate in*

extracurricular and other nonacademic activities; and

007.07A5c *To be educated and participate with other children with disabilities and nondisabled children in the activities described in 92 NAC 51-007.07A5*

Allegations

Special education supervision and/or the specific needs in the bathroom were not made clear in the April, 2021 IEP, resulting in the Student being the victim of molestation.

Parent Position

The April, 2021 IEP was not clearly written explaining that supervision was only being provided to the Student while inside the confines of a general education classroom. As a result, the Student was not supervised by any special education providers in the lunchroom at the time of the incident.

District Response

The District included all these sections in an IEP developed November 18, 2021 (which was after the incident).

Investigative Findings

- The April, 2021 IEP includes the following:
 - Special Education Services: Special Education (Resource) 168 min/day, 5 days/week
 - Additional Special Education Services: Physical Therapy 30 min/day, 1 day/month
 - Occupational Therapy 30 min/day, 1 day/ month
 - Speech-language therapy 15 min/day, 2 days/week
 - Program Modifications and Accommodations: [The Student will complete 9th grade via meeting IEP goals. [The Student] will graduate via meeting IEP goals or reaching the age of majority, rather than the District required credits.
 - Supports for School Personnel: [The Student] will participate in general education classes with supports from a para/teacher. Consultative and collaborative services with the IEP team members will be provided by the Speech-Language Pathologist

when requested by parents, classroom teachers, Special education staff (including paraeducators) and other IEP team members.

- The November 18, 2021 IEP includes the following:
 - Special Education Services: Special Education (Resource) 45 min/day, 5 days/week
 - Additional Special Education Services: Physical Therapy 30 min/day, 1 day/quarter
 - Speech-language therapy 30 min/day, 8 days/month
 - Vision Services 30 min/day, 1 day/month
 - Program Modifications and Accommodations: In addition to the accommodations and modifications checklist, [the Student] will be provided:
 - Bathrooming accommodations: [the Student] will ask permission from staff familiar with needs before using the restroom. [the Student] will also access a family restroom when available in the community and at school. If a multi-stall bathroom is the only option, staff will make sure that the restrooms are empty before [the Student] enters the restroom. Staff will stand outside of the multi-stall restroom while [the Student] is using the restroom. If [the Student] is by the cafeteria and staff will stand outside of the door while [the Student] uses the restroom to prevent entry of others.
 - An adult will encourage proper hygiene before/after eating and using the restroom.
 - The case manager will ensure that the IEP and the supervision needs are in compliance.
 - Supports for School Personnel: **Need 1:1 assistance for bathrooming needs (e.g., an adult familiar with [the Student's] needs will be present to clear the bathroom and prevent others from entry). ***Adult supervision at all times (Paras/teachers/other staff members) when walking through the halls, staff should have [the Student] in their line of vision and remain within eyesight.

Summary and Conclusions

As noted in Issue #1, the special education and supplementary aids and services that were needed to maintain the Student's safety were unclear, resulting in inadequate supervision and an incident that caused the Student harm. While the District has modified the unclear language regarding supervision since the incident occurred, the failure in the April, 2021 IEP resulted in inadequate supervision to ensure the Student's safety. Based on these findings, the District failed to fully implement the requirements of 92 NAC 51-

007.07A5 and **corrective action is required** and specified at the end of the report.

Issue # 3

Did the District make available a full continuum of alternative placements to meet the needs of the Student? [92 NAC 51-008.01D]

92 NAC 51-008.01D states:

008.01D *Each school district or approved cooperative must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.*

008.01D1 *The continuum must:*

008.01D1a *Include instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions; and*

880.01D1b *Make provision for supplementary services (such as resource or itinerant instruction) to be provided in conjunction with regular class placement.*

Allegations

The District refused homebound instruction as part of a continuum of alternative placements.

Parent Position

The Parents sought evaluation from a Doctor. In December a Doctor recommended that [the Student] not return to school due to [the Student's] mental health. The Parents proposed homebound instruction as a more effective model to deliver the Student's academic instruction, but the District has only been willing to provide instruction through Zoom while the Student is placed at home.

District Response

The District made a full continuum of alternative placements available to the Student on November 18, 2021, and again December 7, 2021.

Investigative Findings

- Statement from a Doctor, who evaluated the Student following the incident states, "I do not recommend that [the Student] return to school at this time, due to [the Student's] mental well-being, until we are assured that [the Student] is not going to be afraid of any students hurting, [the Student] and also until this family is completely confident that their child and other children are safe."
- The District offered the following placement options for the Student in the December 9, 2021 IEP meeting:
 1. Full time high school attendance and education supported by the IEP and safety plan.
 2. Part-time at an alternate location (the elementary school) with special education provider support.
 3. Remote Learning attendance and education through Zoom.
 4. Hybrid model- part time high school attendance and part time remote learning with the Student served in a small, supervised setting of the building, ensuring [the Student] would not encounter Student #2.
- The Parents rejected all these placement options.
- The District offered the following placement options for the Student in the February, 2022 IEP meeting:
 1. Full-time high school attendance & education- [The Student] attends school all day in the high school supported by [the Student's] safety plan and IEP
 2. Part-time at AC Facilities Attendance & Education- Services provided in the elementary school supported by [the Student's] safety plan an IEP for part of the day (afternoon) after attending classes at the high school in the morning.
 3. Hybrid Model (Part time at the District & part-time at ESU- The Student would attend the high school and remain in a small, supervised part of the building supported by safety plan and IEP and after lunch, [the Student] would attend ESU location (the post high school transition program).
 4. Full time attendance at the post-high school transition program.
 5. Alternative educational setting- the District will provide 6 hours of education in an alternative educational setting (such as the home) through Zoom with the support of a paraprofessional. Related

services also offered in the home and job skills instruction/ job coaching provided at job site or through individualized instruction at home.

6. A combination of the above options mutually agreed upon by the Parents and the school District.

Summary and Conclusions

The requirement of the District is to provide a full continuum of educational placements that will meet the needs of the Student. The District is also required to ensure that students with disabilities have equal access to the same educational opportunities afforded general education students. During the COVID-19 pandemic, distance learning opportunities have been made available to all students within a school while they are homebound. While face-to-face instruction in the home is one option, this option is not required if the Student can benefit from a virtual model. Further, face-to-face in-home instruction does not provide any access to general education or other special education peers, making it a more restrictive environment. Since a number of face-to-face options were offered by the District in other locations, a virtual option in the home represents an adequate means of instruction in this location. Based on these findings, the District fully implemented the requirements of 92 NAC 51-008.01D and **no corrective action** is required:

Issue #4

Is the Student being provided a free appropriate public education? [92 NAC 51-003.24]

92 NAC 51-003.24 states:

003.24 *Free appropriate public education or FAPE means special education and related services that are provided at public expense, under public supervision, and direction, and without charge; meet the standards of the state including the requirements of this Chapter; include and appropriate preschool, elementary school, or secondary school education in Nebraska and are provided in conformity with an individualized education program (IEPO that meets the requirements of 92 NAC 51- 007.*

Parent Position

The Student has not been able to attend school as a result of the trauma of the event that occurred in October of 2021. The in-home virtual model has not been adequate to meet the Student's needs, and the Parent being required to pick up materials at the school has been inconvenient for the Parents.

District Response

The District has developed a comprehensive IEP with input from the entire team, specifically addressing all the Student's needs. The District has offered to implement this IEP in a variety of locations and although the District believes that the Student's least restrictive environment is at school, the Parents have elected to keep the Student home. The District is providing services virtually, during the homebound period.

Investigative Findings

- The District developed a safety plan for both the Student and Student #2 to ensure full supervision throughout the school day, with the alleged perpetrator being limited to the front office (Safety Plans dated November 1 and November 2, 2021).
- The District has held 5 IEP meetings since the incident to develop an appropriate IEP to meet the Student's needs (November 18, December 2, December 9, December 16, 2021, and January 13, 2022).
- A variety of placement options have been offered to meet the Student's needs.

While the District clearly failed to provide the Student with the supervision required to ensure the Student's safety prior to the incident that occurred on October 28, 2021, since that time, the District has made ongoing attempts to work with the Parents to provide the Student with a FAPE. It has been the decision of the Parents to reject these options and to keep the Student at home. Based on these findings, the District implemented the requirements of 92 NAC 51-003.24 and **no corrective action** is required.

Corrective Action for Issues #1 and #2

1. The District will provide a minimum of 52 hours of compensatory education to the Student for the special education that the Student did not receive between October 28 and December 9, 2021, when the District provided an amended IEP and a continuum of placement options for the Parents to consider.
 - a. An IEP team, including the Parent, shall determine what services will be provided during the compensatory education as well as a mutually agreed upon schedule to allow the Student to be at the skill level the Student would have been had services been provided between October 28 and December 9, 2021. The IEP should be held within 30 days of the date of this report.
 - b. Compensatory services shall be completed by December 1, 2022. Student absence or refusal of the parent to make the student available shall result in a waiver of service scheduled for

that day. Staff absences must be rescheduled. Any recovery services declined or not utilized by December 1, 2022, shall be deemed waived (assuming the District has made a good faith effort to timely commence and provide all compensatory services).

- c. The schedule for compensatory services shall be provided to NDE within 10 days from the date of the IEP meeting, but no later than May 6, 2022.
 - d. Service provider logs verifying the completion of all compensatory services must be submitted to NDE monthly until the service is complete and all service has been verified.
2. The District will provide comprehensive training to all certified special education staff on the IEP process, including the use of evaluation data, curriculum based data, and information from Parents on the formation of goals, the determination of appropriate services, related services, and supplementary aids and services. The training will focus on clear and specific language in IEPs as it relates to goals, modifications, accommodations, supplementary aids, and services.
- a. Presentation materials must be approved by the Nebraska Department of Education two week prior to the training.
 - b. The District must provide NDE with copies of the sign-in sheets, or other verification of those who attended, at the conclusion of the training.
 - c. The corrective actions must be completed within 60 calendar days of the date of this Letter of Finding.

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:

Brenda Tantow, Complaint Specialist
nde.speddr@nebraska.gov