Frank Edelblut
Commissioner

Christine M. Brennan
Deputy Commissioner

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION
25 Hall Street
Concord, NH 03301
TEL. (603) 271-3495

Re: Special Education Complaint # 24-23

Dear :

The New Hampshire Department of Education, Bureau of Special Education Support, has concluded its investigation of complaint # 24-23. Based on the findings of fact in the investigation, I am issuing my written decision as well as providing a copy of the investigator's report.

Below is a description of the allegation, as well as a summary of the investigator's findings of facts based on the evidence submitted by all parties to this matter. If an allegation is substantiated, a finding of noncompliance with special education law, then there may be a corrective action required of the district to remedy any violations of special education law. The corrective action is intended to ensure compliance with IDEA by addressing the needs of the child and the appropriate future provision of services for all children with disabilities.

By way of relevant information, the child is a resident within the but was enrolled in located in , through school year. sent a letter to the parent on , indicating receipt of a special education referral letter, and a subsequent disposition of referral meeting took place on

Thus began a discourse between the two school districts— and School District—pertaining to which was the responsible party for special education. This is an essential point of contention within this complaint that requires clarification. It is the Department's understanding that at some point during this discourse over responsibility, it was clarified that is a for-profit private school. It is the Department's understanding that was shown technical assistance in the form of a question-and-answer document published in 2011 by the Office of Special Education and

Rehabilitative Services, an office within the U.S. Department of Education. This document, within the answer to Question O-1, which pertains to children enrolled in for-profit schools, states:

> However, under 34 CFR §300.111, the State must ensure that all children with disabilities, including children with disabilities attending private schools, who are in need of special education and related services, are identified, located, and evaluated. This includes children with disabilities attending for-profit schools. A State determines which public agency is responsible for conducting child find under 34 CFR §300.111 for children suspected of having a disability attending for-profit private schools. Generally, this agency is the LEA in which the child resides.

It is essential to understand here that federal law allows for states to determine which public agency has responsibility for child find. New Hampshire does so in administrative rule Ed 1115.01(d), which states, "The child find system shall include children who are placed unilaterally in private schools within the geographic boundaries of the local school district by their parents without involving the LEA." The school's status as for-profit or non-profit does not impact responsibility for child find in accordance with NH administrative rules. The Department believes that the [redacted] may have taken the statement, "Generally, this agency is the LEA in which the child resides," at face value without seeking clarification within NH administrative rules. It was incorrect of the [redacted] to assume responsibility for child find, which consists of the referral and evaluation for the child, especially since the child was not registered with the [redacted] until [redacted]. In sum, since the child was enrolled in a private school in [redacted], the [redacted] School District was the party responsible for child find.

The parent signed a consent to evaluate on [redacted], for the following evaluations: academic performance, communication, health, motor/sensory, and social/emotional. The IEP team met on [redacted] and [redacted], to review the evaluation reports and determine eligibility for special education. The outcome of those meetings was that the student was determined ineligible for special education by the IEP team. The parent disagreed with that determination. In an email to the [redacted] on [redacted], the parent requested an independent educational evaluation in the areas of psychological, occupational therapy, and speech therapy, which the [redacted] agreed to. Those evaluations were conducted in [redacted] and [redacted], and the IEP team reconvened on [redacted], to discuss the results of these additional evaluations. The outcome of this meeting was that the child qualified for special education services with a disability of Other Health Impairment [redacted].

The student was then registered with the [redacted] on [redacted] after having been found eligible for special education services. Subsequently, the IEP team convened for an IEP preparation/review meeting on [redacted]. The proposed initial IEP was dated [redacted], to [redacted] but was not consented to by the parent with comments on [redacted] The IEP team reconvened on [redacted], but at the time the Department received the submitted complaint on [redacted] there was still no initial IEP signed in consent.

This complaint can be distilled into the following facts: the [redacted] School District was the party responsible for child find and the referral and evaluation processes. The [redacted] incorrectly assumed responsibility for these roles. The parents and the [redacted] have numerous disagreements over the provisions within the child's IEP, including educational placement, which may require the parties to utilize local or state dispute resolution procedures to resolve, as that dispute would fall outside of the scope of the special education complaint resolution process.

Allegation 1—Unsubstantiated

The first allegation in this matter is that the [redacted] failed to comply with Ed 1115.01(c), which, in relevant part provides that:

> The local education agency (LEA) must find, identify, and evaluate all children ages 2.5 to 21 suspected to be children with disabilities who may need special education and/or related services.

Specifically, the complainant asserts that failed to implement "child find" to locate and identify the child to receive a free appropriate public education (FAPE).

As previously stated, Ed 1115.01(d) establishes the school district in which the private school is geographically located in is responsible for child find. At the time, the child was enrolled in , located in New Hampshire. As such, the School District was the district responsible for conducting child find. Within the scope of the complaint process, the Department can only accept the allegations of the complaint against the . If the parent would like to file a new state special education complaint in accordance with Ed 1121, then the School District would be the district of liability.

Allegation 2—Unsubstantiated

The second allegation in this matter is that the failed to comply with Ed 1106.01(e), which, in relevant part provides that:

> The LEA shall within 15 business days of receiving a referral, give the parent written notice of its disposition of referral, including any individual evaluations needed to determine the child's disabilities.

Specifically, the complainant asserts that the did not complete the disposition of referral with comprehensive list of evaluations within the 15-business day deadline.

For the reasons previously mentioned, the School District was the responsible party to complete a disposition of referral with comprehensive list of evaluations within the 15-business day deadline. It appears to the Department that the met the spirit of the law by holding a disposition of referral meeting 13 calendar days after receiving a referral for special education and was therefore in compliance. Still, the Department will take this opportunity to encourage the to review its internal policies and procedures related to child find to ensure compliance with state and federal regulations.

Allegation 3—Unsubstantiated

The third allegation in this matter is that the failed to comply with 34 CFR 300.304(c)(4), which, in relevant part provides that:

> The child must be assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

Specifically, the complainant asserts that the did not assess the child in all areas related to the suspected disability of .

As previously established, the student was not enrolled in the during this time and the School District would have been the responsible party to both determine the areas of assessment and to conduct needed evaluations. Nonetheless, the parent did consent to evaluations in the areas of academic performance, communication, health, motor/sensory, and social/emotional status, without an objection

that such evaluations being incomplete. If there were outstanding disagreements about the evaluation, then local dispute resolution procedures or state procedures like neutral conference, mediation, or due process hearing would be the appropriate avenue to settle those disputes, in accordance with Ed 1106.01(f)[1].

Allegation 4—Unsubstantiated

The fourth allegation in this matter is that the failed to comply with 34 CFR 300.321, which, in relevant part provides that:

> The LEA must ensure that the IEP team for each child with a disability includes at least—the parents of the child, a regular education teacher, a special education teacher, a LEA representative, an individual who can interpret the instructional implications of evaluation results, other individuals who have knowledge or special expertise regarding the child at the discretion of the parent or LEA, and, when appropriate the child with a disability. A member of the IEP team may be excused from attending with written parental consent and if the member submits input into the IEP development prior to the meeting.

Specifically, the complainant asserts that the did not have all the required IEP team members, or, if the member was excused from attendance, they did not provide written input to the IEP team.

In reviewing the attendance lists from both the and meetings, all the personnel that were required members of the IEP team were present for both meetings. At the meeting, the school psychologist was not present due to illness; however, the psychologist who conducted the independent evaluation was present to discuss the results. The child, who did not attend the meeting, is of so attendance may not have been appropriate in this instance.

Allegation 5—Unsubstantiated

The fifth allegation in this matter is that the failed to comply with 34 CFR 300.323(c), which, in relevant part provides that:

> The LEA must conduct the meeting to develop the IEP within 30 days of the eligibility determination and thereby provide special education and related services as soon as possible.

Specifically, the complainant asserts that the did not hold a meeting to develop the IEP within 30 days of the child being found eligible for services.

The student was found eligible for services on . However, the child became a registered student in the on . The original date for the initial IEP preparation/review meeting was , but this meeting, for reasons unknown from the record, was rescheduled to 6 days later on . From the time the child became a registered student to the time the IEP was developed was within the 30-day window and therefore compliant with the law. Furthermore, it appears to the Department that the attempted to honor the spirit of the law because the original meeting date of is within the 30-day window of the original eligibility meeting date of

[1] Ed 1106.01(f): "The parent may, if the child's parent disagrees with the IEP team's disposition of the referral, request alternative dispute resolution as described in Ed 1122 or a due process hearing as described in Ed 1123…"

Allegation 6—Unsubstantiated

The sixth allegation in this matter is that the failed to comply with 34 CFR 300.503(b), which, in relevant part provides that:

> The LEA must produce written prior notice (WPN) that describes actions that were proposed/refused, description of other options the IEP considered/rejected, and/or a description of other factors that are relevant to the agency's proposal or refusal.

Specifically, the complainant asserts the WPN dated , was inaccurate in the various proposals, actions, and/or factors that were enacted and/or rejected.

The WPN date , was a revision made at the parent's request to the WPN dated . The attempted to honor the suggestions and requests of the parent. The purpose of a WPN is to ensure that parents are included in and aware of the major proposals that impact the child's education. This allegation seems rooted in disagreements over language used by the to communicate the proposals rather than there being a significant error in the proposals documented within the WPN. Therefore, if the parent disagrees with the proposals, the parent can consider state dispute resolution procedures like neutral conference, mediation, or due process hearing to resolve the disagreement.

Allegation 7—Unsubstantiated

The seventh allegation in this matter is that the failed to comply with 34 CFR 300.116, which, in relevant part provides that:

> The LEA must ensure that the educational placement for the child be decided:
> - By a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options,
> - In conformity with the child's least restrictive environment, and
> - Based on the child's IEP

Specifically, the complainant asserts that the made pre-determined decisions on the child's educational placement without considering the other persons who were knowledgeable of the child and without respect to the child's least restrictive environment.

The found the child eligible for special education services based on the additional information provided by the results of the child's independent educational evaluation (IEE). Additionally, members of the IEP team attended and participated in subsequent initial IEP development meetings, including the child's private providers and the evaluator who completed the IEE. Additionally, the parent has been present at and contribute to every IEP team meeting for the child. This demonstrates that the is willing to consider the input from people knowledgeable of the child. Moreover, the child has not attended school within the , so it is difficult to determine what the least restrictive environment is for the child.

The submitted complaint makes clear that access to the outdoors is paramount to the child's ability to regulate. However, access to the outdoors should not be conflated with a child's "least restrictive environment" (LRE). The spirit and intent of the law behind LRE is to ensure that students with disabilities are educated with children without disabilities to the maximum extent possible. This is further

detailed in the continuum of alternative education environments as outlined in Ed 1111.03(d)[2], which structures the continuum based on the extent a child with a disability is accessing the "regular education setting". In essence, a child's educational placement in the LRE is entirely separate from the child's access to the outdoors. If the parent asserts that access to the outdoors must be included within the IEP because it is required for the child to access education, this may be accomplished through a placement but may also be accomplished through accommodations or modifications written to support the child's needs. If the parties within the IEP team cannot agree on this issue, then local dispute resolution procedures or state procedures like neutral conference, mediation, or due process hearing would be the appropriate avenue to settle those disputes.

Allegation 8—Unsubstantiated

The eighth allegation in this matter is that the [redacted] failed to comply with Ed 1109.03(a), which, in relevant part provides that:

> The LEA shall provide special education, related services, supplementary aids and services, accommodations, and modifications, to a child with a disability in accordance with the child's IEP.

Specifically, the complainant asserts that the [redacted] has not provided services in accordance with the child's IEP.

The parent refused to consent to the proposed initial IEP developed in late [redacted]. As such, the [redacted] could not provide special education or related services without parental consent. Federal law states that if a parent refuses consent to the initial provision of special education and related services that the public agency will not be in violation of the requirements to make FAPE available to the child.[3] However, it is possible for the parent to consent to those services to which they agree – a partial consent to the IEP– and continue to work with the [redacted] relative to the services for which agreement has not been reached, including using other dispute resolution procedures to reach agreement.

Allegation 9—Unsubstantiated

The ninth and final allegation in this matter is that the [redacted] failed to comply with 34 CFR 300.320(a)(4), which, in relevant part provides that:

> The IEP shall contain a statement of the special education, related services, supplementary aids and services, accommodations, and modifications of supports that will be provided to enable the child to be involved in and make progress in the general education curriculum and enable the child to be educated and participated with other children both with and without disabilities.

Specifically, the complainant asserts that the IEP lacked a "transition plan" to help the child transition from prekindergarten to kindergarten.

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[2] Ed 1111.03(d) identifies possible educational environments as the following: regular education setting, resource room, self-contained special education class, separate approved special education program/school, residential placement, home instruction, and hospital or institution.
[3] 34 CFR 300.300(b)(3): "If the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services, the public agency— (ii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent."

While it is educational best practices to consider how best to support children with disabilities during any transition, a "transition plan" as outlined in Ed 1109.01(a)(10)[4] and 34 CFR 300.320(b)[5] are designed to consider post-secondary plans for the child. In this case, the child was transitioning from preschool to kindergarten, so certainly younger than the legal intent of the statutes. That said, if the IEP team is recommending a placement at the [redacted] and the student would be transitioning to this educational setting from a setting that incorporated substantive outdoor opportunities for the child's success, the IEP team and parent should discuss if it would be appropriate and how to provide transitional supports for a student adjusting from an outdoors-based pre-k program to school-based kindergarten. If the parent disagreed with the district representatives of the IEP team over whether a "transition plan" should be included in the child's IEP, then local dispute resolution procedures or state procedures like neutral conference, mediation, or due process hearing would be the appropriate avenue to settle those disputes.

Conclusion

The Department takes this opportunity to encourage the IEP team to convene to discuss how to provide FAPE to the child, recognizing that this student has had apparent success in an outdoor-based pre-K program and that success should not be interrupted. The unique and individualized needs of the child may require the IEP team to think unconventionally and collaboratively for ways to best provide support. If the parties cannot agree on the IEP or educational placement of the child, then local dispute resolution procedures or state procedures like neutral conference, mediation, or due process hearing should be utilized to settle any outstanding disagreements.

Furthermore, the Department encourages the [redacted] to share the portions of this decision related to child find responsibility, including relevant federal and state statutes, with the [redacted] School District so that all children may have access to a free appropriate public education.

We hope that in the future the district and parent will work together to resolve any differences that may arise.

Frank Edelblut
Commissioner of Education
NH Department of Education

[4] Ed 1109.01(a)(10): "Each IEP shall include: (10) A statement of transition services that meets the requirements of 34 CFR 300.43 and 34 CFR 300.320(b), with the exception that a plan for each student with a disability beginning at age 14 or younger, if determined appropriate by the IEP team, shall include a statement of the transition service needs of the student under the applicable components of the student's IEP that focuses on the student's courses of study such as participation in advanced-placement courses, vocational education, or career and technical education."
[5] 34 CFR 300.320(b): "Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include— (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and (2) The transition services (including courses of study) needed to assist the child in reaching those goals."

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Commissioner

Christine M. Brennan
Deputy Commissioner

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION
25 Hall Street
Concord, NH 03301
TEL. (603) 271-3495

Re: Special Education Complaint # 24-23

The New Hampshire Department of Education, Bureau of Special Education Support ("the Department"), would like to issue this addendum to its decision letter for special education complaint # 24-23, originally dated . This addendum is necessary to correct inaccuracies in the legal basis for allegations relative to the School District's (") obligation pursuant to child find for students enrolled in a for-profit private school such as .

In the original decision letter, the Department cited guidance from the Office of Special Education Programs, within the Office of Special Education Rehabilitative Services, which states, "A State determines which public agency is responsible for conducting child find under 34 CFR §300.111 for children suspected of having a disability attending for-profit private schools." Then, the original decision letter referenced NH administrative rule Ed 1115.01(d), which states, "The child find system shall include children who are placed unilaterally in private schools within the geographic boundaries of the local school district by their parents without involving the LEA." The original decision letter used this rule as the legal basis to claim that the School District, as the school district of geographical location, was the party responsible under child find for students enrolled in . However, the state administrative rules were the improper legal basis because they do not distinguish between for-profit and nonprofit schools within their definitions for private school or nonpublic school. As such, NH must follow federal law, creating a distinction for non-profit private schools and for-profit private schools.

Specifically, the section of IDEA that governs child find for parentally-placed private school children with disabilities is 34 CFR 300.131, which states, "Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA." Federal law goes further

to define "elementary school" as "a nonprofit institutional day or residential school," thereby limiting the child find obligation of the school district of geographic location to nonprofit private schools only.

Therefore, in the case of special education complaint # 24-23, the school district responsible for child find is the LEA of residence, the . With this change in legal reasoning, it was paramount that the Department review the allegations relative to child find and evaluations. Those were the first 3 allegations of the original decision letter.

Allegation 1—Unsubstantiated

The first allegation in this matter is that the failed to comply with Ed 1115.01(c), which, in relevant part provides that:

> The local education agency (LEA) must find, identify, and evaluate all children ages 2.5 to 21 suspected to be children with disabilities who may need special education and/or related services.

The complainant asserted that the failed to implement child find to locate and identify the child to receive a free appropriate public education (FAPE). Since is a for-profit school, neither School District) nor the are obligated to proactively go to the school and meet with personnel about any students who are suspected to have a disability. Therefore, the child find obligation falls to the . This obligation requires the to use other means of outreach to inform parents residing in the district of the district's child find policies and procedures.

The Department reviewed these procedures and found, as is common educational practice, that the has special education referral information, as well as child find and school-based personnel contact information, posted to their SAU website. Child find policies and procedures should include an established referral program, which the has, and the parents and staff used. The also has monthly contact with area daycares, early intervention service providers, HeadStart, and other agencies. Therefore, after careful review of the facts and under the revised legal reasoning set forth above, the Department still considers this allegation unsubstantiated. The has met its outreach obligation for a child residing in the district that attends an out of district for-profit school.

Allegation 2—Substantiated

The second allegation in this matter is that the failed to comply with Ed 1106.01(e), which, in relevant part provides that:

> The LEA shall within 15 business days of receiving a referral, give the parent written notice of its disposition of referral, including any individual evaluations needed to determine the child's disabilities.

The complainant asserted that the did not complete the disposition of referral with a list of evaluations within the 15-business day deadline. From the day that the received a special education referral letter for the child to the day the disposition of referral meeting took place was 13 days, which is within the 15-business day window mandated by the statute. However, since there was still a dispute over which district was responsible, the was unprepared to finalize a list of evaluations at the disposition of referral meeting and subsequently did not provide the parents with a list of evaluations until , approximately 5 weeks later.

The Department had previously found this allegation to be unsubstantiated. This finding reflected the incorrect assumption by the Department that [redacted] School District was responsible for the evaluation. Given this incorrect assumption, the Department could not find the [redacted], the party named in the complaint, responsible for an obligation of [redacted] School District. However, given that the [redacted] was in fact responsible for conducting the evaluation given the status of [redacted] as a for-profit school, the Department reverses its initial finding and deems this allegation substantiated. [redacted] exceeded its 15-day statutory timeline to finalize a list of evaluations.

Allegation 3—Unsubstantiated

The third allegation in this matter is that the [redacted] failed to comply with 34 CFR 300.304(c)(4), which, in relevant part provides that:

> The child must be assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

The complainant asserted that the [redacted] did not evaluate the child in all areas of the suspected disability. When the child was initially referred for special education, the child had already obtained an anxiety diagnosis and had previously received outpatient speech services from [redacted]. This information served as the basis for the IEP team's decision to propose evaluations in the following areas: academic performance, speech social pragmatics, health, occupational therapy, and social/emotional. While the parent had raised questions about the possibility of Autism, the [redacted] felt it was appropriate to begin with these evaluations as they were the required evaluations for the disability categories of developmental delay, emotional disturbance, other health impairment, and speech-language impairment. However, when the IEP team met on [redacted] and [redacted], to review the evaluation reports and determine eligibility for special education, the child was determined ineligible for special education. The parent disagreed with that determination. In an email to the [redacted] on [redacted], the parent requested an independent educational evaluation in the areas of psychological, additional occupational therapy, and additional speech therapy, to which the [redacted] agreed. Those evaluations were conducted in [redacted] and [redacted] and the IEP team reconvened on [redacted], to discuss the results of these additional evaluations. The outcome of this meeting was that the child qualified for special education services with a disability of Other Health Impairment.

The Department recognizes that the [redacted] used historical context from previous data and services to generate the initial list of evaluations. While this was a logical starting point for beginning the list of possible evaluations, it failed in a substantive way. An integral member of the IEP team, the parent has a wealth of observations and experiences about the child that can and should be considered when determining which evaluations may need to be complete. There is no indication that this input was fully considered in the initial determination of evaluations, the effect of which may have delayed the student from receiving supports and services. While there is no indication of a dispute in the determination of the initial evaluations, if there were outstanding disagreements about which evaluations were being completed, then local dispute resolution procedures or state procedures such as neutral conference, mediation, or due process hearing would be the appropriate avenue to settle those disputes.

Conclusion

The Department apologizes for the error in legal analysis used in the original decision letter and appreciates this opportunity to correct the record. The outcome of this addendum is the reversal of the Department's original findings in the second allegation. The Department finds that the child's evaluation

was delayed approximately 5 weeks, and subsequent provision of FAPE likely by more. As of the conclusion of the complaint investigation, there has not yet been a consented-to IEP. Therefore, the allotment of compensatory services is complex in this matter and is set forth below. In this case, the parent has strongly expressed that the educational setting of the which is an outdoor-oriented learning environment, would better meet the needs of the now-diagnosed child. The Department encourages the IEP team appropriately weigh this information from a vital member of the IEP team – the parent – and to thoughtfully consider the parents' expertise of their child and all factors that may optimize the chances for their child's success.

Corrective Action

The School District will review their internal polices related to child find responsibility and revise, if necessary, to ensure compliance with state and federal requirements. Evidence of this corrective action must be submitted to the Department of Education Attn: Special Education Complaints, 25 Hall Street, Concord, NH 03301 by **May 31, 2024.**

The School District will provide 5 weeks of compensatory services once services have been agreed-upon by the IEP team. If the IEP team cannot reach an agreement on services, then local or state dispute resolution procedures should be utilized. Evidence of this corrective action must be submitted to the Department of Education Attn: Special Education Complaints, 25 Hall Street, Concord, NH 03301 by **May 31, 2024.**

Please note that with the issuance of this addendum, both parties can file a request for reconsideration for any allegations associated with complaint #24-23 pursuant to Ed 1121.04(a) within 20 days of receipt of this letter. We hope that in the future the district and parent will work together to resolve any differences that may arise.

Frank Edelblut
Commissioner of Education
NH Department of Education