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

[redacted]

[redacted]

[redacted]

[redacted]

Re: Special Education Complaint # 24-34

Dear [redacted]:

The New Hampshire Department of Education, Bureau of Special Education Support ("the Department"), has concluded its investigation of complaint # 24-34. 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, indicating 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.

This complaint centers around a child who was in the legal custody of the Division of Children, Youth, and Families (DCYF) when the alleged violations of special education law occurred. Therefore, it is important for the Department to lay the foundation explaining the laws and protections for these children. When DCYF has legal guardianship of a child and that child is referred for special education, or is already receiving special education and related services, then the child requires a surrogate parent trained by the Department to advocate and make decisions on their behalf. A surrogate parent functions as the "parent" of the IEP team, as defined by Ed 1102.04(h).[1] The last known residential local education agency (LEA) of the child's parent is the district of liability for special education and related services and is also responsible for initiating the request for a surrogate parent pursuant to Ed 1105.02(b).[2]

[1] Ed 1102.04(h): "'Parent' means a biological or adoptive parent, surrogate parent, or a guardian pursuant to 34 CFR 300.30. Parent does not mean the state when the state has legal guardianship."
[2] Ed 1105.02(b): "The LEA shall initiate the appointment of a surrogate parent, pursuant to Ed 1115.02."

By way of relevant information, on [redacted], the [redacted] Court awarded legal custody of the then[redacted]-year-old child to the Division of Children, Youth, and Families (DCYF). In the case of this special education complaint, the district of liability is [redacted] District ("the District"). The child was transitioned to a new foster home in [redacted] on [redacted], and 3 days later, the new foster parent emailed the District to set up a meeting to discuss a referral for special education. On [redacted], the Court joined both the [redacted] District and the [redacted] District pursuant to RSA 169-C:20(I).[3] By joining the school districts, the Court required that they determine whether the child qualifies for special education. However, the judge did not order the appointment of a surrogate parent at that time. While DCYF had custody of this child back on [redacted], legal guardianship was not transferred to DCYF until a motion was signed by the Court on [redacted]. It is unclear to the Department when the District was notified of this change in guardianship because the District contacted the Department seeking guidance on this topic on [redacted]. The Department advised the District that an educational surrogate could not be appointed if the parent's residual rights had not yet been terminated, which suggests that the District was not aware of the change in guardianship status. However, any confusion was resolved at a hearing on [redacted], when the Court ordered a surrogate parent be appointed. On [redacted] the District submitted the paperwork to the Department requesting a surrogate parent, and an individual was appointed to serve in that capacity 7 days later. It is worth noting that the complainant in this matter is the appointed surrogate parent.

Since the appointment, the surrogate parent and District have worked together with the child's foster family and resident school district to provide special education and related services.

Allegation 1—Unsubstantiated

The first allegation in this matter is that the District failed to comply with Ed 1115.02, which, in relevant part provides that:

> Any employee of a local education agency (LEA), […], or any other person who knows or believes that a child's parent is not known, or is not able to be located, or that the child is under legal [sic] of DCYF[4], or any person who knows or believes that a court has issued a written order for a surrogate parent, shall initiate the appointment of a surrogate parent.

Specifically, the complainant asserts that the District did not initiate the appointment of an surrogate parent when they were aware that the child was in custody of DCYF.

The District exercised due diligence in seeking the appointment of a surrogate parent for the child. When the child's biological parent, who still retained residual legal rights until [redacted], failed to

3 RSA 169-C:20(I): "At any point during the proceedings, the court may, either on its own motion or that of any other person, and if the court contemplates a residential placement, the court shall immediately, join the legally liable school district for the limited purposes of directing the school district to determine whether the child is a child with a disability […] If the court orders the school district to determine whether the minor is a child with a disability, the school district shall make this determination by treating the order as the equivalent of a referral by the child's parent for special education, and shall conduct any team meetings or evaluations that are required under law when a school district receives a referral by a child's parent."

4 In the text of ED 1105.02(a), there is a word missing after "legal". It is important to clarify that in versions of the NH administrative rules published in 2001, 2008, and 2014, the subsequent word is guardianship. When the administrative rules were revised and published in 2017, the word guardianship was omitted. There is no documentation that the rule was changed legislatively, so therefore, Department policy is to require evidence that the parent is not known or able to be located, or that the child is under legal guardianship of DCYF.

respond to requests to seek parental consent for the initial evaluation, the District contacted the Department to inquire about a surrogate parent for the child and was declined because DCYF did not have legal guardianship of the child. Then, when the Court ordered that a surrogate parent be requested in [redacted], the District completed the paperwork promptly. Therefore, the Department finds that this allegation is unsubstantiated.

Allegation 2—Unsubstantiated

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

> A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services.

Specifically, the complainant asserts that the District took longer than 30 days to develop the IEP after the student was found eligible for special education.

The child was found eligible for special education during an IEP team meeting on [redacted], and a proposed IEP was developed on [redacted]. The proposed IEP was signed in partial consent by the surrogate parent on [redacted]. Therefore, the Department finds that this allegation is unsubstantiated.

Allegation 3—Unsubstantiated

The third allegation in this matter is that the District failed to comply with Ed 1109.06(c), which, in relevant part provides that:

> The LEA, upon written request for an IEP team meeting by the parent, guardian or adult shall schedule or convene the IEP team at a mutually agreed upon time and date, or provide the aforementioned party with written prior notice detailing why the LEA refuses to convene the IEP team, within 21 days following the receipt of the written request for the IEP team meeting.

Specifically, the complainant asserts that the District did not respond within the 21-day time frame when the surrogate parent requested an IEP team meeting.

The District received an email from the surrogate parent on [redacted], requesting that an IEP team meeting be scheduled for mid-September to discuss the child's progress with services. The following day, the District responded to the surrogate parent with the suggestion that, since the services were to begin on [redacted], meeting at the end of September would allow the IEP team to have a more accurate picture of the child's adjustment and progress. The District asked if that change was amenable to the surrogate parent, who responded that the end of the September was acceptable. On [redacted], the surrogate parent emailed the District asking for possible dates for the meeting. Three days later, the District sent a IEP team meeting notice to team members, including the surrogate parent, pursuant to Ed 1103.02(a).[5] The IEP team meeting was held on [redacted].

[5] Ed 1103.02(a): "The LEA shall ensure that the parent or parents of the child with a disability receive a written notice no fewer than 10 days before an IEP meeting. If the parent(s) agrees in writing, the LEA may satisfy this requirement via transmittal by electronic mail. Such an agreement shall be effective until revoked in writing. A notice sent by first class or certified U.S. mail 12 days prior to the meeting shall be deemed received 10 days before an IEP team meeting."

When the surrogate parent emailed the District to request an IEP team meeting in August, the District responded promptly. Then, the parties both agreed to exceed the 21-day timeframe and convene the IEP team at the end of September. When the surrogate parent reached out to the District in [redacted], the District responded promptly, produced an IEP team meeting notice, and convened the IEP team in accordance with administrative rules. Therefore, the Department finds that this allegation is unsubstantiated.

Allegation 4—Unsubstantiated

The fourth allegation in this matter is that the District failed to comply with 34 CFR 300.305(a), which, in relevant part provides that:

> As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP team and other qualified professionals, as appropriate, must review existing evaluation data on the child, including evaluations and information provided by the parents of the child.

Specifically, the complainant asserts that the District refused to consider recently completed evaluations and medical doctor assessments into consideration when determining eligibility for Autism.

The child received a medical diagnosis of Autism from a neurologist on [redacted]. The following day, the surrogate parent emailed the District to request an IEP team meeting to discuss this medical diagnosis and, ideally, amend the IEP to include the educational disability category of Autism. This meeting occurred on [redacted], and the outcome was that the District proposed additional evaluations before amending the IEP. This is because administrative rule Ed 1107.04(b), which includes Table 1100.1, identifies the assessments—and the examiners qualified to administer those assessments—required to identify children with a disability. The aforementioned table excerpt describes the assessments required to qualify a child with the educational disability of Autism:

Disability	Assessments Required	Qualified Examiners
Autism	Academic Performance	Associate School Psychologist Certified Educator Guidance Counselor Psychologist Specialist in the Assessment of Intellectual Functioning School Psychologist
	Adaptive Behavior	Associate School Psychologist Certified Educator Guidance Counselor Psychiatrist Psychologist Specialist in the Assessment of Intellectual Functioning School Psychologist Licensed Social Worker
	Communicative Skills	Speech-Language Pathologist Speech-Language Specialist
	Health	Professional Licensed to provide a Health Evaluation

At the [redacted] meeting, the IEP team agreed to accept the Health Evaluation provided by the neurologist and proposed assessments in the following areas: academics, adaptive behavior, classroom observation, communication, fine motor, gross motor, and an Autism diagnostic observation. The District's perspective was that the child had been experiencing significant progress since starting services at the [redacted] preschool and that new evaluations would provide updated information on the child's skills. While the child had just been evaluated 6 months prior, but the surrogate parent signed permission for these updated evaluations on [redacted].

The written prior notice (WPN) from the [redacted] meeting documents that the IEP team considered and accepted the neurologist's outside evaluation and medical diagnosis. Furthermore, the IEP team considered the prior evaluations, but the District representatives believed they did not accurately reflect the child's current abilities at the time of considering the educational disability of Autism. Therefore, given that the IEP team reviewed existing evaluation data, the Department finds that this allegation is unsubstantiated.

Regardless of the determination, the Department takes this opportunity to note that, pursuant to Ed 1120.02(a), "The parent shall have the right to appeal any decision of the LEA regarding the referral, evaluation, determination of eligibility, IEP, provision of FAPE, or placement of a child with a disability using the procedures delineated in Ed 1123." The Department offers dispute resolution procedures, including neutral conference, mediation, administrative due process hearings, to help parties resolve disagreements amongst the IEP team.

Allegation 5—Unsubstantiated

The final allegation in this matter is that the District failed to comply with 34 CFR 300.306(a), which, in relevant part provides that:

> Upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals and the parent of the child determines whether the child is a child with a disability.

Specifically, the complainant asserts that the District refused to consider input from the surrogate parent as a member of the IEP team when determining if the child is a child with a disability under the category of Autism.

The WPN from the [redacted] meeting notes that the surrogate parent was an active participant in the meeting, voicing disagreement with the proposed updated evaluations and the District's decision to not amend the disability category of the child's IEP to Autism. Any parent, or parental voice, is significant to the IEP team and should be valued appropriately. However, even though the ultimate outcome of the IEP team meeting was different than what the surrogate parent wanted, the District still provided the opportunity to give meaningful input. Therefore, the Department finds that this allegation is unsubstantiated.

Additionally, the Department will take this opportunity to clarify that when there is a disagreement within the IEP team regarding the referral, evaluation, determination of eligibility, IEP, provision of a free appropriate public education (FAPE), or placement of a child with a disability, then either party is free to utilize state dispute resolution procedures such as neutral conference, mediation, or administrative due process, or dispute resolution procedures at the local level.

[redacted]

Conclusion

The Department would first like to extend its thanks to all surrogate parents for their service and diligence to the children of New Hampshire. Their noble service and experienced perspective should be valued and considered by all school districts throughout the state. While the allegations in this case were not substantiated based on the evidence provided to the investigator, the Department encourages the District to review its internal policies and procedures related to requesting surrogate parents and how they are included and treated as members of the IEP team going forward.

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

Frank Edelblut
Commissioner of Education
NH Department of Education