

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2021-02
October 23, 2020**

This report requires corrective action. See page 37.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on August 17, 2020, under the federal Individuals with Disabilities Education Act (IDEA) and the implementing Federal Regulations and State Rules governing publicly funded special education programs for children with disabilities in New Mexico.¹

Scope of Review and Authority

The PED SED administers the Federal Regulations and State Rules governing special education programming requirements for children with disabilities. The implementing regulations to the IDEA and the corresponding State rules require investigations into complaints regarding violations of these provisions. The PED has investigated the complaint and issues this report pursuant to 34 CFR §300.152 (a)(5) and 6.31.2.13(H)(5)(b) NMAC.

Conduct of the Complaint Investigation

The PED's independent complaint investigator's investigation process in this matter involved the following:

- review of the complaint and supporting documentation from complainant;
- review of the Department's responses to the allegations, together with documentation submitted by the Department at the request of the PED's independent complaint investigator;
- review of the Department's compliance with federal IDEA regulations and state NMAC rules;
- telephonic interviews with Student A's mother; the Department's Deputy Superintendent of Education/Director of Special Education; the Department's Special Education Coordinator; and four special education teachers at the School; and
- research of applicable legal authority.

Limits to the Investigation

Federal regulations and state rules limit the investigation of state complaints to violations that occurred not more than one year prior to the date the complaint is received. (34 CFR §300.153(c) and 6.31.2.13(H)(2)(d) NMAC). Any educator ethics issues, or any alleged ADA or Section 504 disability discrimination issues, are not within the jurisdiction of this complaint investigation and, as a result, were not investigated.

Issues for Investigation

¹The federal IDEA regulations are published at Title 34 of the Code of Federal Regulations (CFR), Part 300. The New Mexico Public Education Department's special education rules are published at Title 6, Chapter 31, Part 2 of the New Mexico Administrative Code (6.31.2 NMAC). The state-level complaint procedures are set forth in the federal regulations at 34 CFR §§ 151 to 153 and in the state rules at Subsection H of 6.31.2.13 NMAC.

The following issues regarding alleged violations of the IDEA, its implementing regulations and State rules, are addressed in this report:

1. Whether the Department failed to implement an Individualized Education Plan (IEP) that meets the needs resulting from the Student's and all other similarly situated students' disabilities to enable the Student and all other similarly situated students to be involved in and make progress in the general education curriculum from April 6, 2020 through the filing of the Complaint, as required by 34 CFR §§300.320-300.324 and 6.31.2.11(B) NMAC, specifically by:
 - a. failing to implement the special education and related services and/or accommodations as set forth in the IEPs of the Student and all other similarly situated students, as required by 34 CFR §§ 300.323(c)(2) and 300.320(a)(4); and 6.31.2.11(B)(1) NMAC;
 - b. unilaterally modifying the IEPs of the Student and all other similarly situated students after April 6, 2020, through the use of an addendum without meaningful parent participation, in violation of 34 CFR §§ 300.327 and 300.501(c)(1);
 - c. unilaterally modifying the IEPs of the Student and all other similarly situated students after April 6, 2020, through the use of an addendum that was not based on a state-approved Continuous Learning Plan, in violation of 34 CFR § 300.17;
 - d. failing to modify the IEPs of the Student and all other similarly situated students after April 6, 2020, through the use of an addendum that appropriately identifies the frequency, location, and duration of services and modifications, in violation of 34 CFR § 300.320(a)(7);
 - e. failing to provide the Parent, and the parents of all similarly situated students, with appropriate prior written notice prior to the implementation of a proposed change in the program and/or placement of the Student, and all similarly situated students, in violation of 34 CFR § 300.503;
 - f. failing to provide timely progress reports for the Student and all other similarly situated students, as required by 34 CFR § 300.320(a)(3)(ii);
 - g. failing to provide transition services to the Student and all other similarly situated students as set forth in their IEPs, in violation of 34 CFR §§ 300.43(a)(1) and 300.43(a)(2)(i-v); and
 - h. failing to appropriately consider the need for extended school year services for the Student and all other similarly situated students, in violation of 34 CFR § 300.106; and
2. Whether the Department's actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE) to the Student in violation of 34 CFR §300.101 and 6.31.2.8 NMAC.

General Findings of Fact

1. The Parents in this matter filed a formal complaint against the Department on behalf of their child (Student A) and all other special education students in the Department. The Department is a state-funded agency charged, among other things, with incarcerating and educating juvenile offenders who have been adjudicated and placed in its custody. Educational programs are accredited with the PED and must comply with federal and state mandates governing regular and special education (IDEA) requirements. The state licenses the Department's educational instructors.
2. Educational services for the juvenile offenders in the Department are provided through a separate entity which operates a high school program (the School) attended by Student A and other IDEA-eligible students.
3. Department records indicate that during the relevant time period set forth in the Complaint there were 41 students with IEPs in the custody of the Department.
4. The Department is a local education agency under State law and, as such, is responsible for providing special education and related services to IDEA-eligible students in the Department and attending the School.
5. The Complaint makes specific allegations regarding violations of the IDEA and state rules as to Student A, who is 16 years old.

6. In view of the fact that the Complaint also alleges a systemic violation of the IDEA and State rules regarding all students with IEPs in the custody of the Department, a review of student files was undertaken by the complaint investigator.
7. The Department provided to the complaint investigator the student identification numbers of all of the students with IEPs in the custody of the Department during the 2019/2020 school year. Due to the large number of students with IEPs in the Department, in addition to Student A, a random sampling of 10 of the representative students (25% of the total) were reviewed: (Students B, C, D, E, F, G, H, I, J and K). The complaint investigator reviewed the records of all 11 of the identified students, who are referred to collectively herein as "the Students."
8. The Students were housed in two separate living facilities, but all of the Students attended the School during the time period in question.
9. Student A was placed in the custody of the Department in December, 2019. The intake date for Student A in the Department was January 8, 2020.
10. On November 15, 2019, Student A's IEP team from Student A's home school district met to conduct the annual review of Student A's IEP. Student A was in 9th grade during the 2019/2020 school year. Student A's November 15, 2019, IEP provides, in relevant part, as follows:
 - a. Student A's primary disability is identified as Emotional Disturbance (ED), with identified areas of need in Math and Career Readiness.
 - b. The Student Profile indicates, generally, that after completing high school the Student wants to go to college and get a degree in Social Work.
 - c. The Graduation Option identified is the Standard Option, and Student A is not on target with graduation requirements.
 - d. Student A has no identified medical needs.
 - e. The IEP contains a statement of Measurable Post-Secondary Goals in the areas of Education/Training, Employment and Independent Living. Student A scored the highest in the Social, Realistic and Artistic career traits on the RIASEC Career Interest Inventory. Student A wants to complete post-secondary education and training and work in the field of Social Work. This section also included projected courses of study for the 2019/2020, 2020/2021 and 2021/2022 school years.
 - f. Transition planning needs in the area of Employment/Post-Secondary were included with referrals to the Division of Vocational Rehabilitation and the Disability Resource Center at the chosen school for Student A's senior year.
 - g. The Present Levels of Academic Achievement and Functional Performance (PLAAFP) in Student A's IEP sets forth Student A's then current academic functioning as follows:
 - i. WRAT 4 Math Computation - 7.4 grade equivalency (GE);
 - ii. STAR Math - 7.8 GE;
 - iii. STAR Reading - 6.9 GE;
 - iv. SRI Reading Assessment - 1195 lexile level, between 9th-10th grade level;
 - v. Student A's special education and general education teachers generally reported that Student A was cooperative, helpful, got along well with peers and worked hard Student A won the school-wide Geography Bee. However, Student A's identified ED requires specialized social/emotional supports for attention to task, self-distraction and mood regulation in order to access the general education curriculum.
 - h. Student A's IEP did not indicate the need for Consideration of Special Factors.
 - i. Annual Goals were developed for Student A in the following areas of need:
 - i. Mathematics: "Within one year, in preparation for post secondary education, training, or employment, [Student A] will independently solve simple rational and radical equations in one variable with 80% accuracy as measured by teacher assessment."
 - ii. Career Readiness: "Within one year, in preparation for post-secondary education, training, or employment, [Student A] will independently demonstrate positive work behaviors (e.g. situationally appropriate language/conversation, task initiation and completion, managing

- frustration levels, and attention to detail) 80% of the time, as assessed by daily points and teacher record."
- j. Schedule of Services: The IEP includes Special Education Services, as follows:
 - i. Special Education Life/Work Skills for 250 minutes per week in the special education setting
 - ii. Special Education Math services for 250 minutes per week in the special education setting;
 - iii. Rehab Counseling services for 120 minutes per year in the special education setting.
 - k. Instructional Accommodations were included as follows:
 - i. Environment:
 1. Preferential seating; and
 2. Minimize distractions.
 - ii. Instructional Material:
 1. Use of timer during task completion;
 2. Allow extra time for written response; and
 3. Provide scaffolding of skills/concepts.
 - iii. Behavior Supports:
 1. Clearly defined limits/progressive discipline;
 2. Positive reinforcements; and
 3. High ratio of + to - interactions.
 - l. The IEP states that a written report of progress on Student A's annual goals will be sent home to the Parents in accordance with grading periods.
 - m. Extended School Year: the IEP indicated ESY was considered but Student A did not qualify then.
 - n. Student A's November 15, 2019, IEP team meeting was attended by Student A and the Parent.
 - o. The Parent reports that Student A's November 15, 2019, IEP was thorough and well-developed.
 11. The Parent has not objected to the implementation of Student A's IEP by the Department prior to the beginning of distance learning on April 6, 2020.
 12. On March 12, 2020, New Mexico Governor Michelle Lujan Grisham ordered all New Mexico K-12 public schools to close for three weeks beginning March 16, 2020, due to the risk of community spread of the COVID-19 virus.
 13. On March 27, 2020, the PED announced the continued closure of New Mexico public schools through the end of the 2019/2020 school year due to the COVID-19 pandemic and the Stay-At-Home Orders issued by Governor Grisham, and informed public schools that the PED required schools to provide Continuous Learning to students through a Continuous Learning Plan that must also include special education.
 14. The Department's Education leadership team was informed that all of its facilities would be closed to all outside programming and visitation and that instruction would have to be provided from a distance.
 15. On March 27, 2020, the Department's Education team met with all education staff to share the Education Distance Learning Plan (EDLP) that had just been created by the Department and requested that all teachers make preparations to implement the plan. The Department's EDLP provides, with respect to Special Education students, in relevant part, as follows:
 - a. Core teachers will:
 - i. provide a 30-45 minute group activity daily aligned to the content area they teach;
 - ii. be available by phone Monday-Friday, between the hours of 7:30 – 11:30 a.m. and 12:30 – 2:30 p.m. (unless participating in MDT's or Team Meetings) to respond to questions about the activities from students or staff;
 - iii. provide unit supervisors at least five days of lessons; and
 - iv. identify which students have disabilities and are receiving needed additional support in the classroom.
 - b. "Special Education teachers will collaborate with their core teacher partners to provide accommodations and modifications to the activities for special education students based on their disability and needs. They will also be available to students and unit staff to answer questions and provide additional information as needed."

- c. In addition to providing distance-learning opportunities and feedback to students, teachers will also be expected to phone into MDT's and Team Meetings for their group.
16. The Department's documentation indicates, and the Special Education Coordinator for the Department and the School stated, that the Department began its efforts to implement the EDLP on April 6, 2020. The Special Education Coordinator stated that he had many meetings with various individuals, and reviewed the PED and other guidance, to decide how to best move forward with implementing the IEPs of students with disabilities. He determined that the best approach would be to contact the parents of all current special education students and amend these students' IEPs by a written agreement without a meeting of the IEP team, and to develop a new IEP for all special education students who began attending the School after the start of the mandated distance-learning.
17. The Department's Special Education Coordinator reported that after the EDLP was prepared and it was determined to amend the special education students' IEPs by agreement rather than an IEP team meeting, he reviewed the IEP of each special education student and determined the changes to be proposed to the parents of each student with an IEP due to the COVID-19 restrictions and school shut down. These proposed changes were then provided to the special education teacher of each student with an IEP to review with each student's parents and obtain their agreement to the proposed changes. The Department then provided the parents with Prior Written Notice of Agreement to Amend IEP Without a Meeting.
18. The documentation of both parties indicates that Student A's Special Education Teacher contacted the Parents by telephone on May 26, 2020, seven weeks after distance-learning began. The Department's Special Education Coordinator reported that he was also on the call with the Parents.
 - a. The Special Education Teacher reports that he reviewed all of the proposed changes to Student A's IEP with the Parent and the Parent did not object to the changes, or propose any different or additional changes, to Student A's IEP.
 - b. The Special Education Coordinator reports that the Special Education Teacher reviewed all of the proposed changes to Student A's IEP with the Parent and the Parent did not object to the changes, or propose any different or additional changes, to Student A's IEP.
 - c. The Parent reports that the call was "rushed" and she does not recall if changes were discussed regarding Student A's IEP during the May 26, 2020, telephone call.
 - d. The Parent did not request an IEP Team meeting to discuss the changes proposed by the Department.
 - e. The Special Education Teacher stated that he emailed the Parent a copy of the May 26, 2020, Prior Written Notice of Agreement to Amend IEP Without a Meeting, and the Parent reports that she did receive this document and that she did review the document.
 - f. Both parties also consistently report that the Parent did not thereafter call or email the Department to object to, or to discuss, the changes to Student A's IEP.
 - g. Student A's Special Education Teacher reported that proposed amendments to Student A's IEP were prepared after the school closure, and he admits that he was late in contacting Student A's parent to discuss the amendments.
19. The Prior Written Notice of Agreement to Amend IEP Without a Meeting dated May 26, 2020, provides, in relevant part, as follows:
 - a. "[Student A] will have a change in the setting and the amount of service hours [Student A] receives in [Student A's] current IEP temporarily while the special education teacher is unable to provide direct instruction. [Student A's] caseload teacher will keep in contact with [Student A's] unit supervisor weekly to monitor [Student A's] academic progress and provide one-on-one support as necessary through facility staff. Facility staff will call or text caseload teacher if [Student A] is struggling with an assignment or problem."
 - b. "[Student A's] caseload teacher will continue to provide behavioral and academic support to address [Student A's] IEP goals. The caseload teacher will address academic deficits and will work with general education teacher to modify assignments and provide accommodations. Packets and/or alternative assignments will be created to [sic] if [Student A] is unable to access the general

- curriculum without modifications or accommodations. Special education teachers will be available to offer [Student A] support and will make sure that assignments are being completed and turned in on time."
- c. The May 26, 2020, PWN explained that the accepted changes would be implemented temporarily for the remainder of the 2019/2020 school year "and/or until school resumes without restrictions." It was noted that the changes were due to the Governor's directive to close all schools due to the corona virus pandemic.
 - d. It was further noted that in-person support by the special education teacher would be more appropriate but was rejected because of the school closure directive aimed at protecting students and staff from the corona virus.
20. The documentation does not include any Progress Reports for Student A for the 2019/2021 school year dated after April 6, 2020. The 2019/2020 school year ended approximately one week after Student A's IEP was amended on May 26, 2020, and the Complaint in this matter was filed approximately 4 weeks after the start of the 2020/2021 school year. Student A earned all passing grades and credits for the Spring semester of the 2019/2020 school year.
 21. The Multi-Disciplinary Team (MDT) meeting reports by the Department's education and facility staff on Student A indicate as follows:
 - a. March 25, 2020: Grades are A's and B's with one D in Math;
 - b. April 24, 2020: Math – completed 10% of distance-learning assignments; History – completed 40% of assignments; Science – completed 60% of assignments; Art – completed 0% of assignments; English – completed 80-90% of assignments.
 - c. May 26, 2020: Math – completed 56% of assignments; History – earned .5 credit for the Spring 2020 semester; Art – completed 5% of assignments; English – completed 70% of assignments.
 - d. July 30, 2020: World History – good progress; Creative Art – 83%; ELA – doing well; Geometry – doing well; Caseload – doing well.
 - e. August 28, 2020: Special Education Case Manager – Student A is a model student.
 - f. September 1, 2020: Student A is enrolled in a dual credit program at Central New Mexico in Criminology and Composition I Plus.
 22. The documentation indicates that on September 3, 2020, Student A's IEP team met to amend Student A's November 15, 2020, IEP again to document a hybrid teaching model for the 2020/2021 school year.
 23. The notes from the September 12, 2020, MDT meeting indicate that Student A's grades have improved, and Student A's parent also reports that Student A is doing well in school.
 24. Student B began attending the School during the 2017/2018 school year. Student B is 17 years of age and is in the ninth grade. On April 24, 2020, Student B's IEP team at the School, including Student B and his parent, held a Zoom meeting to conduct the annual review of Student B's IEP. Student B's IEP was revised in accordance with the Department's EDLP and provides, in relevant part, as follows:
 - a. Student B's primary disability is identified as ED, with identified areas of need in Math and Social/Behavioral.
 - b. The Graduation Option identified is the Standard Option, and Student B is not on target with graduation requirements.
 - c. Student B has no identified medical needs.
 - d. The IEP contains a statement of Post-Secondary Goals in the areas of Education/Training, Employment and Independent Living. Student B scored the highest in the Realistic career trait on the RIASEC Career Interest Inventory and wants to attend trade school to become a mechanic.
 - e. Transition planning needs in the area of Employment/Post-Secondary were included with referrals to the Division of Vocational Rehabilitation and the Disability Resource Center at the chosen school for Student B's senior year.
 - f. Student B's IEP did not indicate the need for Consideration of Special Factors except for behavior. Student B requires a Behavioral Intervention Plan (BIP).
 - g. The PLAAFP in Student B's IEP states that Student B was performing well in math and making progress on Student B's math goal. Student B has a difficult time working and the biggest area of

- concern is getting along with peers.
- h. Annual Goals: annual goals were developed for Student B in the following areas of need:
 - i. Mathematics: "By April 2021, [Student B] will be able to solve systems of equations by substitution or elimination with 80% accuracy or better on 4 out of 5 attempts as measured by classroom assignment and assessment. [Student B] will need to increase math skills to prepare for [Student B's] post-secondary education and employment goals."
 - ii. Social/Emotional/Behavior: "By January 2021 [Student B] will work with a peers/peers on classroom assignments or group projects multiple times per semester across multiple content/subject areas as measured by teacher observation and records. [Student B] will need to improve [Student B's] ability to work alongside [Student B's] peers to prepare [Student B] for [Student B's] post-secondary education and employment goals."
 - i. Schedule of Services: The IEP includes Special Education Services, as follows:
 - i. Individual and/or Group Setting Behavior for 30 minutes per week in the regular classroom;
 - ii. Individual and/or Group Setting Math for 180 minutes per week in the regular classroom;
 - j. Instructional Accommodations were included as follows:
 - i. Environment:
 - 1. Minimize visual and auditory distractions; and
 - 2. More physical space for learner.
 - ii. Instructional Material:
 - 1. Use supplemental materials; and
 - 2. Use high interest.
 - iii. Assignment/Homework:
 - 1. Extra time for assignments up to one class scheduled with the teacher; and
 - 2. Allow use a calculator when/if needed.
 - iv. Testing:
 - 1. Allow use of calculator when/if needed;
 - 2. Alternative testing location; and
 - 3. Frequent breaks within the testing location.
 - v. Behavior Supports:
 - 1. Clearly defined limits;
 - 2. Frequent reminder of rules;
 - 3. In-class time out (10 minutes or less);
 - 4. Private discussion regarding behavior;
 - 5. Re-direction to task;
 - 6. Behavior Intervention Plan; and
 - 7. Fidget Contract.
 - vi. Instructional Presentation Mode:
 - 1. Provide Predictable routine;
 - 2. Clear concise directions;
 - 3. Be consistent with daily instruction;
 - 4. Opportunity to have instructions written;
 - 5. Opportunity to have instruction repeated; and
 - 6. Multimodal and/or multi sensory presentation.
 - vii. Instructional Strategies:
 - 1. Frequent feedback;
 - 2. Checking for understanding of instructional words;
 - 3. Use small group/individual instruction; and
 - 4. Extra time for written response.
 - viii. Other:
 - 1. Monitor [Student B] frequently in class to help [Student B] complete assignments;
 - k. The IEP states that a written report of progress on Student B's annual goals will be sent home to

- parents in accordance with grading periods.
- l. ESY: the IEP team indicated ESY was considered but Student B did not qualify.
 - m. Student B's April 24, 2020, IEP team meeting was attended by Student B and his parent.
25. The Documentation indicates that the parent of Student B has not objected to the implementation of Student B's IEP by the Department.
 26. The PWN from the Department to Student B's parents dated April 24, 2020, indicates that Student B's special education services will be provided in accordance with the Department's EDLP due to the corona virus restrictions. Student B will receive work packets and assignments that focus on Student B's IEP goals and the Department's special education staff will contact Student B weekly and keep in constant contact with facility staff to monitor progress and behavior.
 27. The Progress Report for Student B dated June 2, 2020, indicates no progress being made in Math and Social/Emotional due to the IEP having been recently revised. The Complaint in this matter was filed four weeks after the start of the 2020/2021 school year. Student B earned all passing grades and credits for the Spring semester of the 2019/2020 school year.
 28. The MDT meetings reports by the Department's education and facility staff on Student B indicate as follows:
 - a. April 24, 2020: Math – 0% of assignments; History – 0% of assignments; Science – 0% of assignments; Art – 0% of assignments; English – 0% of assignments; Writing – 0% of assignments.
 - b. May 15, 2020: Math – 0% of assignments; History – 20% of assignments; Art – completed 25% of assignments; English – 20% of assignments; Science – 0% of assignments; Writing – 40% of assignments.
 - c. June 1, 2020: Math – 0% of assignments; History – 0% of assignments; Science – 0% of assignments; Art – 0% of assignments; English – 0% of assignments; Writing – 0% of assignments.
 - d. August 28, 2020: World History – F; Creative Art – F; ELA – F; Algebra – F; Science – F; Caseload – refuses to work.
 29. The documentation indicates that on August 31, 2020, Student B's IEP team met to amend Student B's April 24, 2020, IEP again to document a hybrid teaching model.
 30. Student C began attending the School during the 2018/2019 school year. On April 10, 2020, Student C's IEP team at the School, including Student C and his parent, held a Zoom meeting to conduct the annual review of Student C's IEP. Student C's IEP was revised, in relevant part, as follows:
 - a. Student C's primary disability is identified as ED, with identified areas of need in Math, Reading and Written Language.
 - b. The Graduation Option identified is the Standard Option, and Student C is not on target with graduation requirements.
 - c. Student C has no identified medical needs.
 - d. The IEP contains a statement of Post-Secondary Goals in the areas of Education/Training, Employment and Independent Living. Student C scored the highest in the Enterprising, Realistic and Social career traits on the RIASEC Career Interest Inventory and wants to work as a commercial truck driver and attend school to become a barber.
 - e. Transition planning needs in the area of Employment/Post-Secondary were included with referrals to the Division of Vocational Rehabilitation and the Disability Resource Center at the chosen school for Student C's senior year.
 - f. Student C's IEP did not indicate the need for Consideration of Special Factors except for limited English Proficiency.
 - g. The PLAAFP in Student C's IEP states that Student C needs extensive help with math fluency, math calculation and problem-solving and struggles with understanding the basics functions. Student C is able to perform one step equations. Student C needs extensive help with written comprehension and making inferences. Student C also needs extensive help with grammar, spelling and written and oral expression.
 - h. Annual Goals: annual goals were developed for Student C in the following areas of need:
 - i. Mathematics: "By April 2021, [Student C] will be able to solve problems that require him to

- divide, multiply, add and subtract fractions with 75% accuracy or better on 3 out of 4 attempts as measured by teacher assignments and assessments. [Student C] will need to increase math skills to prepare for [Student C's] post-secondary education and employment goals."
- ii. Reading: "By April of 2021 [Student C] will be able to recall 3 to 4 facts and/or main ideas from text he has read across multiple content areas 70% of the time as measured by teacher assessment that observation. [Student C] will need to improve [Student C's] reading skills to prepare for [Student C's] post-secondary education and employment goals."
 - iii. Written Language: "By April of 2021 [Student C] will be able to compose a multi-paragraph persuasive essay on a given topic as measured by assignment rubric with a 70% average or better on 3 out of 4 attempts. [Student C] will need to improve [Student C's] writing skills to prepare for [Student C's] post-secondary education and employment goals."
 - iv. Life Skills: "By April of 2021 [Student C] will decrease the number of times he has to be redirected by his teachers in class by 50% as measured by teacher observation/documentation. [Student C] will need to improve [Student C's] ability to stay on task and not be redirected to prepare for [Student C's] post-secondary education and employment goals."
- i. Schedule of Services: The IEP includes Special Education Services, as follows:
 - i. Individual and/or Group Setting Math for 180 minutes per week in the regular classroom;
 - ii. Individual and/or Group Setting English for 180 minutes per week in the regular classroom;
 - j. Instructional Accommodations were included as follows:
 - i. Environment:
 - 1. Minimize auditory distractions;
 - 2. More physical space for learner;
 - 3. Minimize distractions;
 - 4. Preferential seating; and
 - 5. Small group setting.
 - ii. Instructional Material:
 - 1. Reading material at instructional level for science, social studies and reading;
 - 2. Study aids and/or manipulatives;
 - 3. Reading material at the sixth grade level;
 - 4. Chart/Visual aids/graphs;
 - 5. Highlighted printed materials pointing out key points using own highlighter;
 - 6. Written notes, Outlines of material read with help; and
 - 7. Allow use of times table chart when needed.
 - iii. Assignment/Homework:
 - 1. Reduced homework load and/or assignments;
 - 2. Extra time for assignments if necessary; and
 - 3. Emphasis on major points.
 - iv. Testing:
 - 1. Small Group when possible;
 - 2. Extended time;
 - 3. Extended time for exams that require reading;
 - 4. Open book test for science and social studies;
 - 5. Exams a reduced length by crossing out one of the options in a multiple-choice test; and
 - 6. Use of calculator.
 - v. Behavior Supports:
 - 1. Frequent reminder of rules;
 - 2. Positive reinforcement; and
 - 3. Re-direction to task;
 - vi. Student Response Mode:
 - 1. Extra time for oral response; and
 - 2. Extra time for written response.

- k. The IEP states that a written report of progress on Student C's annual goals will be sent home to parents in accordance with grading periods.
 - l. ESY: the IEP team indicated ESY was considered but Student C did not qualify.
 - m. Student C's April 10, 2020, IEP team meeting was attended by Student C and his parent.
31. The Documentation indicates that the parent of Student C has not objected to the implementation of Student C's April 10, 2020, IEP by the Department.
 32. On May 4, 2020, Student C's IEP team met via a Zoom meeting to amend Student C's April 10, 2020 IEP. The PWN to Student C's parents dated May 4, 2020, indicates that Student C's special education services would be reduced and provided in accordance with the Department's EDLP due to the corona virus restrictions. Student C would receive work packets and assignments that focus on Student C's IEP goals and the Department's special education staff would contact Student C weekly and keep in constant contact with facility staff to monitor progress.
 33. Progress reports for Student C dated June 2, 2020, indicate no progress being made in Math, Reading, Written Language and Life Skills due to the IEP having been recently revised. Student C earned all passing grades and credits for the Spring semester of the 2019/2020 school year.
 34. The documentation indicates that Student C's exit date from the Department was June 24, 2020, prior to the start of the 2020/2021 school year.
 35. Student D began attending the School on April 15, 2020, in the 9th grade. On May 15, 2020, Student D's IEP team at the School, including Student D and his surrogate parent, held a Zoom meeting to conduct the annual review of Student D's IEP. Student D's IEP was revised in accordance with the Department's EDLP and provides, in relevant part, as follows:
 - a. Student D's primary disability is identified as ED, with identified areas of need in Math, Reading and Written Language.
 - b. The Graduation Option identified is the Standard Option, and Student D is not on target with graduation requirements.
 - c. Student D has no identified medical needs.
 - d. The IEP contains a statement of Post-Secondary Goals in the areas of Education/Training, Employment and Independent Living. Student D scored the highest in the Enterprising and conventional career traits on the RIASEC Career Interest Inventory and wants to attend school to become a veterinarian.
 - e. Transition planning needs in the area of Employment/Post-Secondary were included with referrals to the Division of Vocational Rehabilitation and the Disability Resource Center at the chosen school for Student D's senior year.
 - f. Student D's IEP did not indicate the need for Consideration of Special Factors.
 - g. The PLAAFP in Student D's IEP states that Student D is able to complete grade level math assignments when provided with accommodations. Student D struggles with understanding word meaning and reading fluency, and also struggles with spelling, punctuation and sentence structure.
 - h. Annual Goals: annual goals were developed for Student D in the following areas of need:
 - i. Mathematics: "By May 2021, [Student D] will be able to solve 1 and 2 step equations with 80% accuracy in 4 out of 5 attempts as measured by teacher assessments, assignments, grade book/observation. [Student D] will need to increase math skills to prepare for [Student D's] post-secondary education and employment goals."
 - ii. Reading: "By May 2021, when given a passage at grade level, [Student D] will be able to infer the purpose of the passage with 80% in 4 out of 5 attempts as measured by assignments, assessments progress reports and grade book. [Student D] will need to improve [Student D's] reading skills to prepare for [Student D's] post-secondary education and employment goals."
 - iii. Written Language: "By May 2021, [Student D] will be able to write a 4 paragraph essay with proper grammar, punctuation, noun/verb agreement with 80% accuracy in 4 out of 5 attempts as measured by work samples. [Student D] will need to increase [Student D's] writing skills to prepare for [Student D's] post-secondary education and employment goals."
 - iv. Life Skills: "By May of 2021 [Student D] will identify post-secondary schools that have

- veterinarian programs and the academic requirements of the institutions that offer them. [Student D] will also look into possible jobs that will give him job experience to help prepare him for his post-secondary education and employment goals as measured by teacher observation. By May 2021, [Student D] will fill out three job applications to give him the skills needed to pursue jobs that will prepare him for his post-secondary education and employment goals."
- i. Schedule of Services: The IEP includes Special Education Services, as follows:
 - i. Individual and/or Group Setting Math for 120 minutes per week in the regular classroom;
 - ii. Individual and/or Group Setting English for 180 minutes per week in the regular classroom;
 - j. Instructional Accommodations were included as follows:
 - i. Environment:
 1. Minimize visual and auditory distractions
 2. Preferential seating; and
 3. Small group setting.
 - ii. Instructional Material:
 1. Study aids and/or manipulatives;
 2. Use of calculator; and
 3. Copy of notes.
 - iii. Assignment/Homework:
 1. Reduced homework load and/or assignments; and
 2. Extra time for assignments if needed.
 - iv. Testing:
 1. Extended time for exams that require reading;
 2. Small Group when possible; and
 3. Extended time.
 - v. Behavior Supports:
 1. Clearly defined limits;
 2. Frequent reminder of rules; and
 3. Re-direction to task.
 - vi. Instructional Presentation Mode:
 1. Short instructions (one or two steps);
 2. Opportunity to have instruction repeated; and
 3. Check for understanding.
 - vii. Instructional Strategies:
 1. Frequent feedback;
 2. Immediate feedback;
 3. Positive reinforcement for academic skills stated without peers present;
 4. Repeat, clarify and/or simplify directions; and
 5. Checking for understanding without attention drawn to him;
 - viii. Student Response Mode:
 1. Extra time for written response.
 - k. The IEP states that a written report of progress on Student D's annual goals will be sent home to parents in accordance with grading periods.
 1. ESY: the IEP team indicated ESY was considered but Student D did not qualify.
 - m. Student D's May 15, 2020, IEP team meeting was attended by Student D and his surrogate parent.
36. The Documentation indicates that the surrogate parent of Student D has not objected to the implementation of Student D's IEP by the Department.
37. The PWN from the Department to Student D's surrogate parent dated May 15, 2020, indicates that Student D's special education services will be provided in accordance with the Department's EDLP due to the corona virus restrictions. Student D will receive work packets and assignments that focus on Student D's IEP goals and the Department's special education staff will contact Student D weekly and

- keep in constant contact with facility staff to monitor progress.
38. The Progress Report for Student D dated June 2, 2020, indicates no progress being made in Math, Reading, Written Language and Life Skills due to the IEP having been recently revised. The Complaint in this matter was filed four weeks after the start of the 2020/2021 school year. Student D earned all passing grades and credits for the Spring semester of the 2019/2020 school year.
 39. The MDT meetings reports by the Department's education and facility staff on Student D indicate as follows:
 - a. April 24, 2020: Math – 60% of assignments; History – 60% of assignments; Art – 100% of assignments; English – 80% of assignments; Science – 20% of assignments.
 - b. May 27, 2020: Math – 65% of assignments; History – 0% of assignments; Art – 25% of assignments; English – 60% of assignments; Science – 20% of assignments.
 - c. August 28, 2020: World History – B+; Creative Art – A; ELA – A; Math – B; Science – B+; Caseload – doing well.
 40. The documentation indicates that on August 21, 2020, Student D's IEP team met to amend Student D's May 15, 2020, IEP to document a hybrid teaching model for the 2020/2021 school year.
 41. Student E began attending a Department school on January 9, 2020, in the 9th grade. The Documentation indicates that on February 13, 2020, Student E's IEP team, including Student E and his parent, met to review the Student's IEP. The IEP team discussed the behavior point system and the special education services to be provided to Student E. In person classes were canceled on April 6, 2020, due to the COVID-19 restrictions and teachers provided individual work for Student E and scheduled calls to work with Student E individually. Student E's accommodations remained in place.
 42. On April 24, 2020 Student E's special education Case Manager contacted Student E's parent by telephone to discuss changes to Student E's IEP during the school closure. These changes were documented in a PWN provided to Student E's parent who expressed consent to the changes.
 43. On May 13, 2020, Student E's IEP team, including Student E and his parent, held a Zoom meeting to conduct the re-evaluation/annual review of Student E's IEP. Student E was found eligible for special education services and Student E's IEP was revised in accordance with the Department's EDLP and provides, in relevant part, as follows:
 - a. Student E's primary disability is identified as Specific Learning Disability (SLD), with identified areas of need in Math, Reading and Written Language. A secondary disability is identified as Other Health Impairment (OHI), with the identified area of need as Behavior.
 - b. The Graduation Option identified is the Standard Option, and Student E is not on target with graduation requirements.
 - c. Student E has no identified medical needs.
 - d. The IEP contains a statement of Post-Secondary Goals in the areas of Education/Training, Employment and Independent Living. Student E took the Career Cluster Interest Inventory and wants to obtain a pre-law college degree and then attend law school.
 - e. Transition planning needs in the area of Employment/Post-Secondary were included with referrals to the Division of Vocational Rehabilitation and the Disability Resource Center at the chosen school for Student E's senior year. Student E is participating in a self-paced curriculum that will allow him to progress each class at the pace and understanding and allow him to earn up to five credits each semester.
 - f. Student E's IEP did not indicate the need for Consideration of Special Factors except for positive behavioral interventions, strategies and accommodations which are included in the IEP.
 - g. The PLAAFP in Student E's IEP states that Student E's behaviors are challenging in class and he avoids work. Student E is well below grade level in reading and written language and is working on improving reading and writing skills. Student E struggles with staying focused and on task during class.
 - h. Annual Goals: annual goals were developed for Student E in the following areas of need:
 - i. Math: "[Student E] will be able to solve 3 step equations, graph inequalities, and solve systems of equations with 80% accuracy," as measured by testing and class work observation.

- ii. Reading: "[Student E] will identify the most important or relevant information from the reading section 7 out of 10 times. (70%). [Student E] will also compare/contrast characters, events, and ideas from a reading section 7 out of 10 times (70%)." Measured by NWEA scores and teacher assignments and assessments.
- iii. Written Language: "[Student E] will explain the components and patterns for writing sample sentence 7 out of 10 times (70%). [Student E] will write complete simple sentences, that contain simple subjects and verbs 7 out of 10 times (70%). [Student E] will use correct grammar, punctuation, capitalization, and structure 7 out of 10 times (70%)." Measured by NWEA scores, teacher observation and student grades.
- iv. Social/Emotional, Behavior and Transition: "[Student E] will maintain appropriate dress and behavior for employment as demonstrated by earning 80% of the possible PBS points for at least 9 of the next 12 month periods." Measured by observation and class work.
- i. Schedule of Services: The IEP includes Special Education Services, as follows:
 - i. Group Math for 300 minutes per week in the regular classroom;
 - ii. Group English for 300 minutes per week in the regular classroom; and
 - iii. Individual Case Management for 30 minutes per week in the special education classroom.
- j. Instructional Accommodations were included as follows:
 - i. Environment:
 - 1. Minimize visual and auditory distractions
 - 2. Preferential seating; and
 - 3. Small setting.
 - ii. Instructional Material:
 - 1. Allow use of times table chart when needed; and
 - 2. Reading material at grade level.
 - iii. Assignment/Homework:
 - 1. Extra time for assignments if needed; and
 - 2. Emphasis on major points.
 - iv. Testing:
 - 1. Extended time for exams that require reading;
 - 2. Small Group when possible; and
 - 3. Extended time.
 - v. Behavior Supports:
 - 1. Clearly defined limits;
 - 2. Frequent reminder of rules;
 - 3. Positive reinforcement; and
 - 4. Re-direction to task.
 - vi. Instructional Presentation Mode:
 - 1. Opportunity to have instruction repeated;
 - 2. Check for understanding;
 - 3. When introducing new material present the information visually due to auditory processing problems; and
 - 4. Provide examples as necessary.
 - vii. Instructional Strategies:
 - 1. Frequent feedback;
 - 2. Checking for understanding without attention drawn to him; and
 - 3. Repeat, clarify and/or simplify directions.
 - viii. Student Response Mode:
 - 1. Extra time for oral response; and
 - 2. Extra time for written response.
 - ix. Other:
 - 1. Motivational accommodations (point system to address student behavior).

- k. The IEP states that a written report of progress on Student E's annual goals will be sent home to parents in accordance with grading periods.
 - l. ESY: the IEP team indicated ESY was considered but Student E did not qualify.
 - m. Student E's May 13, 2020, IEP team meeting was attended by Student E and his parent.
44. The Documentation indicates that the parent of Student E has agreed to the implementation of Student E's IEP by the Department.
 45. The PWN from the Department to Student E's parent dated May 13, 2020, indicates that during distance learning or hybrid learning Student E's special education services will be provided via a one-to-one phone call by school staff for instructional support for assignments given at least two times per week due to the corona virus restrictions. When classes meet in person, Student E will receive all of the special education support set forth in the IEP.
 46. The Progress Reports for Student E dated June 1, 2020, indicate sufficient progress in Reading and Written Language and insufficient progress in Math and Social/Emotional, Behavior and Transition due to the IEP having been recently revised. The Complaint in this matter was filed four weeks after the start of the 2020/2021 school year. Student E earned one passing grade and credit in New Mexico History for the Spring semester of the 2019/2020 school year.
 47. The MDT meetings reports by the Department's education and facility staff on Student E indicate as follows:
 - a. May 6, 2020: Math – B; History – C; PE – B; English – P; Science – B.
 - b. May 27, 2020: Math – 0% of assignments; History – 60% of assignments; Art – completed 0% of assignments; English – 0% of assignments; Science – 0% of assignments.
 48. The documentation indicates that on September 3, 2020, Student E's IEP team met to amend Student E's May 13, 2020, IEP to document a hybrid teaching model for the 2020/2021 school year.
 49. Student F began attending the School on December 4, 2019, in the 9th grade.
 50. The documentation indicates that following the April 6, 2020, school closure order, Student F's Special Education Teacher contacted Student F's parent by telephone on April 20, 2020. The Department's Special Education Coordinator reported that he was also on the call with the parent.
 - a. The Special Education Teacher reports that she reviewed all of the proposed changes to Student F's IEP with his parent and the parent did not object to the changes, or propose any different or additional changes, to Student F's IEP.
 - b. Student F's parent did not request an IEP Team meeting to discuss the changes proposed by the Department.
 - c. The Special Education Teacher stated that she sent Student F's parent a copy of the April 20, 2020, Prior Written Notice of Agreement to Amend IEP Without a Meeting.
 - d. The Special Education Coordinator reports that Student F's parent did not thereafter call or email the Department to object to, or to discuss, the changes to Student F's IEP.
 51. The Prior Written Notice of Agreement to Amend IEP Without a Meeting dated April 20, 2020, provides, in relevant part, as follows:
 - a. "[Student F] will not receive the amount of special education services or be provided services as documented in his current IEP temporarily or for the remainder of the 2019/20 school year and/or until school resumes full-time without restrictions."
 - b. "SE teachers will continue to provide [Student F] special education support and make sure he is working on his IEP goals. SE teachers will keep in contact with general education teachers and make modifications to assignments as needed. SE staff will keep in contact with unit supervisors weekly and monitor [Student F's] academic progress. SE teachers will be available via phone throughout the week if [Student F] is struggling with an assignment or needs help and provide one-on-one support as necessary through facility staff."
 - c. "SE staff will stay updated with the text that [Student F] is reading on so they can help him and give him the support he needs on ELA assignments."
 - d. The April 20, 2020, PWN explained that the accepted changes would be implemented temporarily for the remainder of the 2019/2020 school year "and/or until school resumes without restrictions."

It was noted that the changes were due to the Governor's directive to close all schools due to the corona virus pandemic.

52. On May 5, 2020, Student F's IEP team, including his parent, held a Zoom meeting to conduct the re-evaluation/annual review of Student F's IEP. Student F was found eligible for special education services and Student F's IEP was revised in accordance with the Department's EDLP and provides, in relevant part, as follows:
- a. Student F's primary disability is identified as Specific Learning Disability (SLD), with identified areas of need in Reading, Behavior, Life Skills and Written Language.
 - b. The Graduation Option identified is the Standard Option, and Student F is not on target with graduation requirements.
 - c. Student F has no identified medical needs.
 - d. The IEP contains a statement of Post-Secondary Goals in the areas of Education/Training, Employment and Independent Living. Student F took the Career Cluster Interest Inventory and is strongest in the areas of Enterprising, Social and Realistic. Student F wants to have a career in the military.
 - e. Transition planning needs in the area of Employment/Post-Secondary were included with referrals to the Division of Vocational Rehabilitation and the Disability Resource Center at the chosen school for Student F's senior year.
 - f. Student F's IEP does not indicate the need for Consideration of Special Factors except for positive behavioral interventions, strategies and accommodations which are included in the IEP.
 - g. The PLAAFP in Student F's IEP states that Student F needs to continue to work on grammar and punctuation as well as expanding on his ideas. Student F Can be easily distracted and needs to stay focused. Student F gets into arguments with other students and will often interrupt people in midsentence.
 - h. Annual Goals: annual goals were developed for Student F in the following areas of need:
 - i. Reading: "Within one year, in preparation to join the military and employment, in a variety of educational settings, [Student F] will determine and describe a theme or central idea of the text, while analyzing the development of the story as well as its relationship to the characters, setting, and plot with 75% accuracy, as measured by teacher log."
 - ii. Behavior: "Within one year, in preparation to join the military and employment, in a variety of educational settings, [Student F] will demonstrate appropriate problem-solving techniques when in challenging situations with 75% accuracy, as measured by teacher observations."
 - iii. Life Skills: "By May 2021 [Student F] will increase his math score from 205 to 230 as measured by the NWEA short cycle assessment. [Student F] will need to improve his math skills to prepare for his postsecondary education and employment goals. [Student F] will need to get the math score required by the branch of the military he decides to enroll on the ASVAB. By May 2021 [Student F] will be able to solve problems that require him to multiply and divide fractions and decimals with 75% accuracy or better on four out of five attempts as measured by teacher assignment or assessment. [Student F] will need to increase his math skills to prepare for his post-secondary education and employment goals." Measured by teacher work log.
 - iv. Written Language: "By May 2021 [Student F] will be able to compose a multi-paragraph essay on a given topic across multiple content areas with a 75% average or better as measured by assignment rubric and teacher observation on four out of five attempts."
 - i. Schedule of Services: The IEP includes Special Education Services, as follows:
 - i. Individual and/or Group Setting Reading for 60 minutes per week in the regular classroom;
 - ii. Individual and/or Group Setting Written Language for 60 minutes per week in the regular classroom.
 - j. Instructional Accommodations were included as follows:
 - i. Environment:
 1. Minimize visual and auditory distractions.

- ii. Instructional Material:
 - 1. Reading material at 7th grade level;
 - 2. Highlighted printed materials pointing out key points using own highlighter; and
 - 3. Reading material at instructional level for science, social studies, and reading.
 - iii. Assignment/Homework:
 - 1. Extra time for assignments if needed.
 - iv. Testing:
 - 1. Exams of reduced length by crossing out one of the options in a multiple-choice test;
 - 2. Extended time for exams that require reading;
 - 3. Open book test;
 - 4. Opportunity to test in special education classroom if test questions need to be read to him; and
 - 5. Opportunity after regular class, extended time.
 - v. Behavior Supports:
 - 1. Clearly defined limits;
 - 2. Positive reinforcement; and
 - 3. Re-direction to task.
 - vi. Instructional Presentation Mode:
 - 1. Short instructions (one or two steps)
 - 2. Opportunity to have instruction repeated;
 - 3. Opportunity to have instructions written; and
 - 4. Provide examples as necessary.
 - vii. Instructional Strategies:
 - 1. Frequent feedback;
 - 2. Immediate feedback;
 - 3. Positive reinforcement for academic skills stated without peers present;
 - 4. Positive reinforcement for communication skills;
 - 5. Checking for understanding without attention drawn to him; and
 - 6. Repeat, clarify and/or simplify directions.
 - viii. Student Response Mode:
 - 1. Extra time for oral response; and
 - 2. Extra time for written response.
 - k. The IEP states that a written report of progress on Student F's annual goals will be sent home to parents in accordance with grading periods.
 - 1. ESY: the IEP team indicated ESY was considered but Student F did not qualify.
 - m. Student F's May 5, 2020, IEP team meeting was attended by Student F's parent.
53. The Documentation indicates that the parent of Student F agreed to the implementation of Student F's IEP by the Department.
54. The PWN from the Department to Student F's parent dated May 5, 2020, indicates that during distance learning Student F's work and assignments and special education services will be provided by special education school staff working with the general education teacher for instructional support for assignments due to the corona virus restrictions. When classes meet in person, Student F will receive all of the special education support set forth in the IEP.
55. The Progress Report for Student F dated June 4, 2020, indicate sufficient progress in Reading, Behavior, Life Skills and Written Language The Complaint in this matter was filed four weeks after the start of the 2020/2021 school year. Student F earned all passing grades and credits for the Spring semester of the 2019/2020 school year.
56. The documentation indicates that Student F's IEP team met to amend Student F's IEP to implement a hybrid teaching model for the 2020/2021 school year.
57. Student G began attending the School on February 5, 2020, in the 9th grade. On March 20, 2020, Student G's IEP team, including Student G and his IDEA parent, met to conduct the annual review of

Student G's IEP. Student G's IEP provides, in relevant part, as follows:

- a. Student G's primary disability is identified as OHI, with the identified areas of need in reading comprehension, math calculation skills, problem-solving and written expression.
- b. The Graduation Option identified is the Modified Option, and Student G is not on target with graduation requirements.
- c. Student G does have identified medical needs but not an Individualized Health Plan.
- d. The IEP contains a statement of Post-Secondary Goals in the areas of Education/Training, Employment and Independent Living. Student G took the Career Cluster Interest Inventory and scored highest in Realistic, Enterprising and Conventional and wants to earn a mechanic's certification from college.
- e. Transition planning needs in the area of Employment/Post-Secondary were included with referrals to the Division of Vocational Rehabilitation and the Disability Resource Center at the chosen school for Student G's senior year.
- f. Student G's IEP did not indicate the need for Consideration of Special Factors.
- g. The PLAAFP in Student G's IEP states that Student G struggles with remembering steps to solve problems and is still learning how to use notes to help him remember. Student G is easily distracted and has trouble staying focused in class.
- h. Annual Goals: annual goals were developed for Student G in the following areas of need:
 - i. Math: "By March 2021 [Student G] will be able to solve problems that require him to add, subtract, multiply and divide fractions with 75% accuracy or better on three out of four attempts as measured by teacher assessment/assignment/grade book/observation."
 - ii. Reading: "by March 2021 [Student G] will be able to recall 3-5 facts from text he has read or had read to him across all content areas 80% of the time as measured by teacher grade book and observation."
 - iii. Written Language: "By March 2021 [Student G] will compose a multi-paragraph essay on a given topic with correct spelling, grammar and punctuation with a 75% average or better on three out of four attempts as measured by assignment rubric."
 - iv. Life Skills: "By March 2021 [Student G] will create a resume and fill out three job applications to help prepare him for his post-secondary education and employment goals."
- i. Schedule of Services: The IEP includes Special Education Services, as follows:
 - i. Individual and/or Group Setting English for 120 minutes per week in the regular classroom;
 - ii. Individual and/or Group Setting Math for 180 minutes per week in the regular classroom; and
- j. Related Services:
 - i. Social Work services for 30 minutes per week in the special education setting.
- k. Instructional Accommodations were included as follows:
 - i. Environment:
 1. Minimize auditory distractions;
 2. More physical space for learner;
 3. Minimize distractions;
 4. Preferential seating; and
 5. Small setting.
 - ii. Instructional Material:
 1. Reading material at instructional level for science, social studies, and reading;
 2. Highlighted printed materials pointing out key points using own highlighter;
 3. Visual cues;
 4. Written notes, outlines of material read with help from a study buddy;
 5. study aids and/or manipulatives; and
 6. Charts/visual aids/graphs.
 - iii. Assignment/Homework:
 1. Extra time for assignments if needed; and
 2. Emphasis on major points.

- iv. Testing:
 1. Exams of reduced length by crossing out one of the options in a multiple-choice test;
 2. Extended time for exams that require reading;
 3. Open book test for science and social studies; and
 4. Extended time.
 - v. Behavior Supports:
 1. Reminder of classroom and school rules;
 2. Positive reinforcement; and
 3. Re-direction to task.
 - vi. Instructional Presentation Mode:
 1. Short instructions (one or two steps);
 2. Opportunity to have instructions written;
 3. Check for understanding;
 4. Provide repetition and clarification regularly; and
 5. Provide examples as necessary.
 - vii. Instructional Strategies:
 1. Positive reinforcement for academic skills stated without peers present;
 2. Checking for understanding without attention drawn to him; and
 3. Repeat, clarify and/or simplify directions.
 - viii. Student Response Mode:
 1. Extra time for written response.
 - ix. Other:
 1. Seating where other students will not observe length of time to complete an assignment.
1. The IEP states that a written report of progress on Student G's annual goals will be sent home to parents in accordance with grading periods.
- m. ESY: the IEP team indicated ESY was considered but Student G did not qualify.
- n. Student G's March 20, 2020, IEP team meeting was attended by Student G and his grandmother.
58. The Documentation indicates that the parent of Student G has agreed to the implementation of Student G's IEP by the Department.
59. On May 4, 2020, Student G's IEP team met to amend Student G's IEP due to the Corona virus restrictions imposed by the state. The PWN from the Department to Student G's parent dated May 4, 2020, indicates that during distance learning Student G's special education services minutes will be changed. Student G will be provided special education support from the special education staff and educational support from facilities staff. The Special education teacher will work with general education teachers and modify assignments and packets for Student G. Special education staff will contact Student G weekly and check in weekly with general education teachers to make sure assignments are being turned in. When restrictions are listed Student G will receive all of the special education support set forth in the IEP.
60. The Progress Reports for Student G dated June 2, 2020, indicate sufficient progress in Math, Reading, Written Language and Life Skills. Student G earned all passing grades for the second semester of the 2019/2020 school year. The Complaint in this matter was filed four weeks after the start of the 2020/2021 school year. Student G earned all passing grades and credits for the Spring semester of the 2019/2020 school year.
61. The MDT meetings reports by the Department's education and facility staff on Student G indicate as follows:
- a. April 24, 2020: Math – 0% of assignments; History – 0% of assignments; Science – 20% of assignments; Art – 50% of assignments; English – 30-40% of assignments.
 - b. May 26, 2020: Math – 0% of assignments; History – passing grade; Art – completed 5% of assignments; English – 30% of assignments; Science – 0% of assignments.
 - c. August 28, 2020: World History – F; Creative Art – B+; ELA – F; Math – B; Science – F; Caseload – not doing well

62. The provider logs from the Department's Social Worker show that the Social Worker contacted or met with Student G once per week from the school closure through the end of the 2019/2020 school year, and once per week from the beginning of the 2020/2021 school year forward and did provide the service minutes set forth in his IEP.
63. The documentation indicates that on August 28, 2020, Student G's IEP team met to amend Student G's March 20, 2020, IEP to implement a hybrid teaching model and provide all of Student G's IEP services. Student G's parent agreed to all proposals and signed the PWN.
64. Student H began attending the School on May 6, 2020, in the 10th grade, approximately three weeks before the end of the 2019/2020 school year. The April 6, 2020, school closure order was still in effect for the School at the time of Student H's intake.
65. The documentation does not include a copy of Student H's IEP in effect at the time of his intake in the Department.
66. The documentation does not include a Prior Written Notice of Agreement to Amend IEP Without a Meeting for Student H.
67. On August 14, 2020, Student H's IEP team, including Student H and his parent, held a Zoom meeting to conduct the annual review of Student H's IEP. Student H's IEP provides, in relevant part, as follows:
 - a. Student H's primary disability is identified as OHI with identified areas of need in Math Calculation.
 - b. The Graduation Option identified is the Standard Option, and Student H is not on target with graduation requirements.
 - c. Student H has no identified medical needs.
 - d. The IEP contains a statement of Post-Secondary Goals in the areas of Education/Training, Employment and Independent Living. Student H took the Career Cluster Interest Inventory and scored the highest in the area of Enterprising and wants to obtain a college degree and work in the business or oil industry.
 - e. Transition planning needs in the area of Employment/Post-Secondary were included with referrals to the Division of Vocational Rehabilitation and the Disability Resource Center at the chosen school for Student H's senior year.
 - f. Student H's IEP did not indicate the need for Consideration of Special Factors.
 - g. The PLAAFP in Student H's IEP states that Student H struggles with math to grasp math concepts and solve problems that involve fractions, decimals and subtracting.
 - h. Annual Goals: annual goals were developed for Student H in the following areas of need:
 - i. Math: "Within one year, in preparation for post-secondary education and employment, in a variety of educational settings, [Student H] will be able to solve multi-step equations and inequalities for one variable by adding, subtracting, multiplying and dividing with 80% accuracy measured by teachers log in four out of five attempts. This will include real-world problems including percentages, decimals, ratios, measurements, money management as well as anything that will help him make connections to his everyday life."
 - ii. Life Skills: "Within one year, in preparation for post-secondary education and employment, in a variety of educational settings, [Student H] will achieve the academic knowledge and skills required for career and post-secondary education opportunities by demonstrating appropriate study habits, efficient task completion, organization of tasks and materials, recognizing and asking for help, when needed, and maintain a 80% average in all classes as measured by teacher's log and report card grades."
 - i. Schedule of Services: The IEP includes Special Education Services, as follows:
 - i. Individual and/or Group Setting Math for 140 minutes per week in the regular classroom;
 - j. Instructional Accommodations were included as follows:
 - i. Environment:
 1. Minimize distractions;
 2. Preferential seating; and
 3. Check for understanding.

- ii. Instructional Material:
 - 1. Allow use of calculator; and
 - 2. reinforce basic skills in the areas of addition, subtraction, multiplication and division.
- iii. Assignment/Homework:
 - 1. Emphasis on major points.
- iv. Testing:
 - 1. Positive support and reinforcement; and
 - 2. Extra time as needed.
- v. Behavior Supports:
 - 1. Clearly defined limits;
 - 2. Frequent reminder of rules;
 - 3. Positive reinforcement; and
 - 4. Re-direction to task.
- vi. Instructional Presentation Mode:
 - 1. Visual aids (pictures, flashcards, etc.);
 - 2. Multimodal and/or multi sensory presentation;
 - 3. Check for understanding;
 - 4. Provide repetition and clarification regularly; and
 - 5. Provide examples as necessary.
- vii. Instructional Strategies:
 - 1. Frequent feedback;
 - 2. Checking for understanding without attention drawn to him;
 - 3. Repeat, clarify and/or simplify directions;
 - 4. Positive reinforcement for academic skills; and
 - 5. Checking for understanding.
- viii. Student Response Mode:
 - 1. Extra time for processing; and
 - 2. Check for understanding.
- k. The IEP states that a written report of progress on Student H's annual goals will be sent home to parents in accordance with grading periods.
 - 1. ESY: the IEP team indicated ESY was considered but Student H did not qualify.
- m. Student H's August 14, 2020, IEP team meeting was attended by Student H and his parent.
- 68. The Documentation indicates that the parent of Student H has agreed to the implementation of Student H's IEP by the Department.
- 69. The PWN from the Department to Student H's parent dated August 14, 2020, indicates that Student H's special education math services will be reduced to 110 minutes per week provided in a hybrid teaching model due to continued corona virus restrictions. When classes meet in person, Student H will receive all of the special education support set forth in the IEP.
- 70. There are no Progress Reports for Student H for the 2019/2020 school year due to Student H's intake in the Department just before the end of the 2019/2020 school year. The Complaint in this matter was filed four weeks after the start of the 2020/2021 school year.
- 71. The MDT meetings reports by the Department's education and facility staff on Student H indicate as follows:
 - a. September 2, 2020: World History – C; PE – A; ELA – C; Math – TBD; Science – B.
- 72. Student I began attending the School on May 8, 2019, and is currently in the 9th grade. On October 4, 2019, Student I's IEP team, including Student I and his parent, met to conduct the annual review of Student I's IEP. Student I's IEP provides, in relevant part, as follows:
 - a. Student I's primary disability is identified as OHI, with the identified areas of need in Reading, Written Language and Math.
 - b. The Graduation Option identified is the Standard Option, and Student I is not on target with graduation requirements.

- c. Student I does not have identified medical needs.
- d. The IEP contains a statement of Post-Secondary Goals in the areas of Education/Training, Employment and Independent Living. Student I took the Career Cluster Interest Inventory and scored highest in Realistic and Enterprising and wants to attend college and work in the law or business areas.
- e. Transition planning needs in the area of Employment/Post-Secondary were included with referrals to the Division of Vocational Rehabilitation and the Disability Resource Center at the chosen school for Student I's senior year.
- f. Student I's IEP did not indicate the need for Consideration of Special Factors.
- g. The PLAAFP in Student I's IEP states that Student I struggles with being distracted by his peers and following directions in class. He needs to work on staying focused with his own work. Student I needs support with starting the writing process. Student I needs to avoid confrontations with his peers. Student I struggles with problems that require him to multiply and divide and has difficulty with subtraction.
- h. Annual Goals: annual goals were developed for Student I in the following areas of need:
 - i. Math: "Within one year, in preparation for post-secondary education and employment, in a variety of educational settings, [Student I] will be able to solve multi-step equations for one variable including linear equations and inequalities by adding, subtracting, multiplying and dividing with 80% accuracy measured by teacher's log on four out of five attempts."
 - ii. Reading: "Within one year, in preparation for post-secondary education and employment, in a variety of educational settings, [Student I] will independently read a passage and identify the main idea as well as the supporting details of the text, by answering comprehensive questions following the teacher's rubric with 80% accuracy according to teacher's log on four out of five attempts."
 - iii. Written Language: "Within one year, in preparation for post-secondary education and employment, in a variety of educational settings, [Student I] will be able to produce a clear and coherent essay which the development, organization and style of his writings accurately analyze the text. [Student I] will follow a standard five paragraph essay format, with a grade of 80% or better according to a rubric for the assignment or teacher's log on four out of five attempts."
 - iv. Behavior/Career Development: "Within one year, in preparation for post-secondary education and employment, in a variety of educational settings, [Student I] will achieve the academic knowledge and skills required for career and post-secondary education opportunities by demonstrating appropriate study habits, efficient task completion, organization of tasks and materials, recognizing and asking for help, when needed, and maintain a 80% average in all classes as measured by teacher's log and report card grades."
- i. Schedule of Services: The IEP includes Special Education Services, as follows:
 - i. Individual and/or Group Setting Math for 165 minutes per week in the regular classroom;
 - ii. Individual and/or Group Setting Reading for 82 minutes per week in the regular classroom; and
 - iii. Individual and/or Group Setting Written Language for 82 minutes per week in the regular classroom.
- j. Instructional Accommodations were included as follows:
 - i. Environment:
 - 1. Firm boundaries;
 - 2. Consistent expectations;
 - 3. Minimize distractions; and
 - 4. Small setting.
 - ii. Instructional Material:
 - 1. Study aids and/or manipulatives; and
 - 2. Charts/visual aids/graphs.
 - iii. Assignment/Homework:

1. Extra time for assignments schedule would teacher up to one class period.
- iv. Testing:
 1. Extra time for exams scheduled for teacher;
 2. Small group when possible.
- v. Behavior Supports:
 1. Clearly defined limits;
 2. Frequent Reminder of rules;
 3. Positive reinforcement; and
 4. Re-direction to task.
- vi. Instructional Presentation Mode:
 1. Teach and reteach if needed;
 2. Positive feedback;
 3. Positive reinforcement for academic skills;
 4. Chunk information; and
 5. Check for understanding.
- vii. Instructional Strategies:
 1. Frequent feedback
 2. Positive reinforcement for academic skills;
 3. Checking for understanding; and
 4. Repeat, clarify and/or simplify directions.
- viii. Student Response Mode:
 1. Allow additional processing time.
- k. The IEP states that a written report of progress on Student I's annual goals will be sent home to parents in accordance with grading periods.
- l. ESY: the IEP team indicated ESY was considered but Student I did not qualify.
- m. Student I's October 4, 2019, IEP team meeting was attended by Student I and his parent.
73. The Documentation indicates that the parent of Student I agreed with the implementation of Student I's IEP by the Department.
74. The documentation does not include an amended IEP for Student I, or a PWN of any amendments made to Student I's October 4, 2019, IEP.
75. There are no Progress Reports for Student I after April 6, 2020. The Complaint in this matter was filed four weeks after the start of the 2020/2021 school year. Student I earned all passing grades and credits for the Spring semester of the 2019/2020 school year.
76. The Academic Transition Coordinator for the Department reports that Student I was doing well academically at the beginning of the 2020/2021 school year.
77. On September 6, 2019, Student J's IEP team from Student J's home school district met to conduct the annual review of Student J's IEP. Student J began attending the School on October 16, 2019, in the 10th grade.
78. Student J's September 6, 2019, IEP provides, in relevant part, as follows:
 - a. Student J's primary disability is identified as SLD, with identified areas of need in Reading, Writing, Career Readiness and Social/Emotional.
 - b. The Graduation Option identified is the Standard Option and Student J is not on target with graduation requirements.
 - c. Student J has no identified medical needs.
 - d. The IEP contains a statement of Post-Secondary Goals in the areas of Education/Training, Employment and Independent Living. Student J scored the highest in the Investigating, Realistic and Enterprising career traits on the RIASEC Career Interest Inventory.
 - e. Transition planning needs in the area of Employment/Post-Secondary were included with referrals to the Division of Vocational Rehabilitation and the Disability Resource Center at the chosen school for Student J's senior year.
 - f. The PLAAFP in Student J's IEP indicate that Student J's special education and general education

teachers generally reported that Student J had a poor attendance record and struggles with reading fluency and also struggles with written work which impacts his ability to access the general education curriculum.

- g. Student J's IEP did not indicate the need for Consideration of Special Factors.
- h. Annual Goals: annual goals were developed for Student J in the following areas of need:
 - i. Reading:
 - 1. "When reading independently, [Student J] will be able to comprehend grade level material and summarize what he has read, finding the main idea and key details at 85% accuracy in four out of five trials in multiple environments by end of the IEP as measured by Short-Cycle Assessments.
 - 2. "When reading informational text, [Student J] will be able to cite details and information necessary to understand/comprehend what he has read as well as to complete assigned tasks at 80% accuracy in four out of five trials in multiple environments by end of the IEP as measured by Work Samples."
 - ii. Written Language: "When independently writing a 3 to 5 paragraph essay, [Student J] will be able to produce complete paragraphs with correct spelling, punctuation and grammar at 80% in four out of five trials in multiple environments (in multiple classes) by end of the IEP as measured by Work Samples. Two benchmarks were included regarding outlining, proofreading and editing his work.
 - iii. Career Readiness: "When given the opportunity to collaborate, [Student J] will be able to engage effectively in a range of collaborative discussions (one-on-one, in groups, and teacher-led) with diverse partners on grade level topics, texts and issues, building on others' ideas and expressing his own clearly at a rate of 8 out of 10 trials by end of the IEP as measured by observation."
 - iv. Social/Emotional: "When receiving social work services, [Student J] will be able to identify feelings that trigger negative emotions and develop healthy coping skills at 80% by end of the IEP as measured by observation."
- i. Schedule of Services: The IEP includes Special Education Services, as follows:
 - i. Individual and/or Group Setting Language Arts for 250 minutes per week in the regular education setting
 - ii. Individual and/or Group Setting Social Work services for 30 minutes per week in the regular education setting.
- j. Instructional Accommodations were included as follows:
 - i. Environment:
 - 1. Next to positive peer role model; and
 - 2. Minimize auditory/visual distractions due to ADHD.
 - ii. Instructional Material:
 - 1. Hard copy of notes.
 - iii. Assignment/Homework:
 - 1. Student can complete homework and assignments up to one class.; and
 - 2. Focus on major learning objectives.
 - iv. Testing:
 - 1. Ensure student can complete in same timeframe as peers; and
 - 2. Focus on major learning objectives.
 - v. Behavior Supports:
 - 1. Seat close to instruction for better attention to teacher.
 - vi. Instructional Presentation Mode:
 - 1. Opportunity to have instruction repeated;
 - 2. Multi-model and/or multi-sensory presentation; and
 - 3. Student benefits from having audio books/audio text programs.
 - vii. Instructional Strategies:

1. Positive reinforcement for academic skills; and
 2. Checking for understanding.
- viii. Student Response Mode:
1. Extra time for written response; and
 2. Oral instead of written response.
- ix. Other:
1. Please note students dyslexia and ADHD; and
 2. Assistive technology referral to help with reading.
- k. The IEP states that a written report of progress on Student J's annual goals will be sent home to parents in accordance with grading periods.
- l. Extended School Year: the IEP indicated ESY was considered but Student J did not qualify then.
- m. Student J's September 6, 2019, IEP team meeting was attended by Student J's parent.
- n. The documentation indicates that the Department implemented Student J's September 6, 2019, IEP until April 21, 2020.
79. The documentation indicates that following the April 6, 2020, school closure order, Student J's Special Education Teacher contacted his parent by telephone on April 21, 2020, and the Department's Special Education Coordinator reported that he was also on the call with Student J's parent.
- a. The Special Education Teacher reports that he reviewed all of the proposed changes to Student J's IEP with the parent and the parent agreed to the changes, and did not propose any different or additional changes, to Student J's IEP.
 - b. Student J's parent did not request an IEP Team meeting to discuss the changes proposed by the Department.
 - c. The Special Education Teacher stated that he sent Student J's parent a copy of the April 21, 2020, Prior Written Notice of Agreement to Amend IEP Without a Meeting.
 - d. Student J's parent did not thereafter call or email the Department to object to, or to discuss, the changes to Student J's IEP.
80. The Prior Written Notice of Agreement to Amend IEP Without a Meeting dated April 21, 2020, provides, in relevant part, as follows:
- a. "[Student J] will have a change in the setting and the amount of service hours he receives in his current IEP temporarily while the special education teacher is unable to provide direct instruction. [Student J's] caseload teacher will keep in contact with his unit supervisor weekly to monitor [Student J's] academic progress and provide one on one support as necessary through facility staff. Facility staff will call or text caseload teacher if [Student J] is struggling with an assignment or problem."
 - b. "[Student J's] caseload teacher will continue to provide behavioral and academic support to address [Student J's] IEP goals. The caseload teacher will address ELA deficits and will work with general education teacher to modify assignments and provide accommodations. Packets and/or alternative assignments will be created to [sic] if he is unable to access the general education curriculum without modifications or accommodations."
 - c. The April 21, 2020, PWN explained that the accepted changes would be implemented temporarily for the remainder of the 2019/2020 school year "and/or until school resumes without restrictions." It was noted that the changes were due to the Governor's directive to close all schools due to the corona virus pandemic. It was noted that the Department created a continuous learning plan which "will make sure that students who receive special education services will continue to get the support they need and will work on IEP goals (using [the School] facility staff)."
 - d. It was further noted that in-person support by the special education teacher would be more appropriate but was rejected due of the school closure directive aimed at protecting students and staff from the corona virus.
 - e. The April 21, 2020, PWN stated that the amendment amends Student J's September 6, 2019, IEP and that Student J's annual review was scheduled for September 6, 2020.
81. The Progress Reports for Student J dated June 5, 2020, indicate that Student J made sufficient progress

on his Reading and Written Language goals. Student J earned all passing grades and credits for the Spring semester of the 2019/2020 school year.

82. Student J was released from the Department and exited the School on July 24, 2020, four days after the beginning of the 2020/2021 school year.
83. Student K's intake with the Department was on July 17, 2020, and Student K began attending the School on July 20, 2020, in the 9th grade.
 - a. On August 28, 2020, five weeks after Student K started attending the School, Student K's IEP team met for Student K's three-year re-evaluation and to develop an IEP for Student K. Student K was determined eligible for special education services under the disability classification of SLD, and an IEP was developed for Student K dated August 28, 2020.
 - b. Student K's August 28, 2020, IEP was developed and implemented after the Complaint in this matter was filed on August 17, 2020.
 - c. The documentation indicates that the Department began implementing Student K's August 28, 2020, IEP during the School's hybrid learning period with the agreement of Student K's parent.
84. The documentation does not contain any Progress Reports for Student K after April 6, 2020, because he did not attend the School during the 2019/2020 school year. However, the Academic Transition Coordinator for the Department reports that Student K's MDT reports dated August 14, 2020, and September 11, 2020, both indicate that Student K is a hard worker and was improving his reading skills, and participates well in class.

Discussion and Conclusions of Law

Issue No. 1

Whether the Department failed to implement an Individualized Education Plan (IEP) that meets the needs resulting from the Student's and all other similarly situated students' disabilities to enable the Student and all other similarly situated students to be involved in and make progress in the general education curriculum from April 6, 2020 through the filing of the Complaint, as required by 34 CFR §§300.320-300.324 and 6.31.2.11(B) NMAC, specifically by:

- a. failing to implement the special education and related services and/or accommodations as set forth in the IEPs of the Student and all other similarly situated students, as required by 34 CFR §§ 300.323(c)(2) and 300.320(a)(4); and 6.31.2.11(B)(1) NMAC;
- b. unilaterally modifying the IEPs of the Student and all other similarly situated students after April 6, 2020, through the use of an addendum without meaningful parent participation, in violation of 34 CFR §§ 300.327 and 300.501(c)(1);
- c. unilaterally modifying the IEPs of the Student and all other similarly situated students after April 6, 2020, through the use of an addendum that was not based on a state-approved Continuous Learning Plan, in violation of 34 CFR § 300.17;
- d. failing to modify the IEPs of the Student and all other similarly situated students after April 6, 2020, through the use of an addendum that appropriately identifies the frequency, location, and duration of services and modifications, in violation of 34 CFR § 300.320(a)(7);
- e. failing to provide the Parent, and the parents of all similarly situated students, with appropriate prior written notice prior to the implementation of a proposed change in the program and/or placement of the Student, and all similarly situated students, in violation of 34 CFR § 300.503;
- f. failing to provide timely progress reports for the Student and all other similarly situated students, as required by 34 CFR § 300.320(a)(3)(ii);
- g. failing to provide transition services to the Student and all other similarly situated students as set forth in their IEPs, in violation of 34 CFR §§ 300.43(a)(1) and 300.43(a)(2)(i-v); and
- h. failing to appropriately consider the need for extended school year services for the Student and all other similarly situated students, in violation of 34 CFR § 300.106.

The IDEA provides that any party may present a complaint with respect to any matter relating to the identification, evaluation, educational placement, or provision of FAPE to a disabled student. 20 USC §1415(b)(6).

Students with disabilities who are eligible under the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 CFR §300.1(a), and 6.31.2.7(B)(19) NMAC. “Central to IDEA is the requirement that local school districts develop, implement, and annually revise an individualized education program (IEP) calculated to meet the eligible student’s specific educational needs. 20 U.S.C. § 1414(d).” *Thompson R2-J School Dist. v. Luke.*, 540 F.3d 1143, 1144 (10th Cir. 2008). The “IEP is a written statement that sets forth the child’s present performance level, goals and objectives, specific services that will enable the child to meet those goals, and evaluation criteria and procedures to determine whether the child has met the goals.” *Ass’n for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1043 (10th Cir. 1993). The goals must enable the child to be involved in and make progress in the general academic educational curriculum and meet each of the child’s other educational needs that result from the child’s disability. 34 CFR § 300.320(a)(2)(ii).

The IDEA and State rules require districts to ensure that students’ IEPs are implemented by each regular education teacher, special education teacher, the related services provider, and any other service provider responsible for its implementation. 34 CFR § 300.323(d). Although school districts should strive to follow IEPs as closely as possible, the IDEA does not require perfect adherence to a child’s IEP. Minor discrepancies between the services provided and the services called for by the IDEA do not give rise to an IDEA violation. *Van Dun ex. rel. Van Dun v. Baker Sch. Dist.* 5J, 502 F. 3d 811, 821 (9th Cir. 2007).

The IDEA provides that each public agency must ensure that “as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child’s IEP.” 34 CFR 300.323 (c)(2). It should be noted that the phrase “as soon as possible” does not mean immediately. The IDEA permits some delay in the implementation of the IEP. *Board of Educ. of Montgomery County v. Brett Y.*, 28 IDELR 460 (4th Cir. 1998) (holding that 30 days to implement an agreed-upon IEP was consistent with IDEA regulations); *D.D. v. New York City Bd. of Educ.*, 46 IDELR 181 (2d Cir. 2006) (noting that the IDEA permits some delay in implementing an IEP but also requires a specific inquiry regarding the causes of and reasons for the delay). In a situation where the student is being denied a significant portion of the services prescribed by the IEP, a failure to timely implement may rise to a denial of FAPE. *Wilson v. District of Columbia*, 56 IDELR 125 (D.D.C. 2011). *See also Sarah Z. v. Menlo Park City Sch. Dist.*, 48 IDELR 37 (N.D. Cal. 2007) (A two-week lapse in services did not deprive the student of FAPE.).

In the Complaint, the Parent has alleged that from “April 6, 2020 until approximately August 3, 2020, [Student A] has received no specialized instruction or related services in accordance with his current IEP of November 15, 2019.” The Parent further alleges in the Complaint that the Department “changed [Student A’s] educational program in response to the COVID-19 crisis unilaterally, without a meeting, and effective April 6, 2020.” The Complaint further alleges that the Department has indicated that it does not have a continuous learning plan and, therefore, the May 26, 2020, PWN from the Department to the Parent is a unilateral modification of Student A’s IEP not based upon a required continuous learning plan. The Parent also alleges that the Department’s actions with respect to Student A are typical of all other students with disabilities at the School.

As indicated in the Findings of Fact above, on March 12, 2020, New Mexico Governor Michelle Lujan Grisham ordered all New Mexico K-12 public schools to close for three weeks beginning March 16, 2020, due to the risk of community spread of the COVID-19 virus, which was later extended for the remainder of the 2019/2020 school year. On March 21, 2020, The U. S. Department of Education, *Office of Special*

Education and Rehabilitative Services and Office for Civil Rights provided guidance in the form of a Supplemental Fact Sheet to school districts across the nation regarding COVID-19, as follows:

At the outset, OCR and OSERS must address a serious misunderstanding that has recently circulated within the educational community. As school districts nationwide take necessary steps to protect the health and safety of their students, many are moving to virtual or online education (distance instruction). Some educators, however, have been reluctant to provide any distance instruction because they believe that federal disability law presents insurmountable barriers to remote education. This is simply not true. We remind schools they should not opt to close or decline to provide distance instruction, at the expense of students, to address matters pertaining to services for students with disabilities. Rather, school systems must make local decisions that take into consideration the health, safety, and well-being of all their students and staff.

School districts must provide a free and appropriate public education (FAPE) consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students. In this unique and ever-changing environment, OCR and OSERS recognize that these exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer flexibility where possible. However, school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.

The Department understands that, during this national emergency, schools may not be able to provide all services in the same manner they are typically provided. While some schools might choose to safely, and in accordance with state law, provide certain IEP services to some students in-person, it may be unfeasible or unsafe for some institutions, during current emergency school closures, to provide hands-on physical therapy, occupational therapy, or tactile sign language educational services. Many disability-related modifications and services may be effectively provided online. These may include, for instance, extensions of time for assignments, videos with accurate captioning or embedded sign language interpreting, accessible reading materials, and many speech or language services through video conferencing.

Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services – or even making decisions about how to provide services - IEP teams (as noted in the March 12, 2020 guidance) must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations.

Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary, and Secondary Schools While Serving Children with Disabilities, 76 IDELR 104 (OSERS March 21, 2020). The guidance further stated that "ensuring compliance with the . . . IDEA . . . should not prevent any school from offering educational programs through distance instruction." *Id.*

On April 1, 2020, the New Mexico PED prepared a document entitled: *Frequently Asked Questions: Providing a Free Appropriate Public Education (FAPE) through a Distance Learning Platform during a Closure to Normal School Operations due to the Corona virus (COVID-19) Pandemic 2020*, which provides, in relevant part, as follows:

With the extended school closure to the end of the school year, the PED is requiring Schools to provide Continuous Learning to students, to submit assurances about the provision of such learning, and to submit and obtain approval by the PED of a Continuous Learning Plan. Special Education is an included requirement of the Continuous Learning Plan.

This is a temporary situation, and schools must offer special education services to the most appropriate extent possible while students are away from their schools/programs. IEP teams may need to consider compensatory services when students return to school and IEP's may need to be adjusted accordingly. The IEP team should determine the amount of compensatory special education and/or related services students with IEPs may require, on a case-by-case basis, when normal school operations resume.

Once the school reopens, Schools should review all data regarding individual student progress during the period of school closure to determine whether to convene an IEP team meeting to consider compensatory services.

Compensatory services may be necessary when there is a decline in the student's skills or lack of progress that occurred as a result of not receiving services during an extended closure. The IEP team also must review the student's IEP and determine whether any other changes to the IEP are needed because of the extended absence from school. The IEP team may consider using available assessment information to determine whether there have been changes in a student's performance.

The closure of schools due to the public health emergency does not automatically result in a change of placement for students receiving special education and related services.

However, if the School is not able to provide services to a student with a disability in accordance with the student's IEP, the School must follow IDEA procedures to make changes to the IEP, including the change to distance-learning. The School can do this either through an IEP team meeting or through an amendment to the IEP without a meeting with parents' consent. The School should then document the changes to the IEP in a PWN and ensure that parents are provided with a copy of the IDEA Procedural Safeguards Notice.

Changes in services and accommodations may be made through the IEP amendment process. Schools can either do this through an IEP team meeting or through an amendment to the IEP without a meeting with parents' consent. In many cases, instructional accommodations may be met in an online environment by providing additional supports, such as individualized telephone or video conferencing. Schools should consider how current accommodations and modifications are provided in a physical classroom setting (i.e. extra time, redirection, small group, among others) and what this would look like in a virtual environment.

In all instances, a school should be using the PWN to document the changes to a student's IEP. If the parent has access to reliable email and agrees, schools are allowed to use email to communicate with parents and send the PWN by email.

If a student's IEP requires the provision of related services, the district is responsible for providing these services through a distance-learning platform. In many cases, services such as speech and language therapy, or other special education related services may be able to be provided in a virtual environment.

Related service providers can use any non-public facing remote communication product that is available for use, including applications for video chats such as FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, or Skype.

The Statement of Facts, set forth above, shows the following with respect to the implementation of special education services to the Students following the closure of all schools on April 6, 2020: On March 27, 2020, the PED directed all K-12 public schools in the state to develop a continuous learning plan. The Department did develop a Continuous Learning Plan (the EDLP) and reviewed it with the Department's education staff. The Department's Special Education Coordinator instructed all education staff to immediately implement the Department's EDLP with all students in the School, including all special education students.

The documentation and the statements from the Department's special education staff indicate that beginning on April 6, 2020, the special education teachers of the Students began implementing the Department's EDLP. Packets were prepared and modified for the students in accordance with their IEPs and were sent to the Facility Staff to be provided to the students. The regular education and special education teachers called the students weekly and were available for help and questions during the week. Provider logs from the Department's related service providers indicate that related services were provided to the Students. During the remainder of the 2019/2020 school year, no virtual instruction was permitted by the Department due to security concerns. All distance-learning was through packets sent to the Students and telephone calls and teletherapy. At the beginning of the 2020/2021 school year when a hybrid learning plan was implemented at the School, Zoom meetings were allowed by the Department and were utilized for distance-learning on the days the students were not in class. It is true that during the COVID-19 pandemic, it was not possible for the Department to provide all of the services in the same manner that were typically provided to Students A. However, as the Department has acknowledged under the above Federal and state guidance, it will be necessary for Student A's IEP team to meet and make "an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations." *Supplemental Fact Sheet, Id., at 105.*

Therefore, it is concluded that the Department did not fail to implement the special education and related services and/or accommodations as set forth in the IEPs of Student A and all other similarly situated students. **As to Issue No. 1(a), the Department is not cited. Corrective action is not required.**

In the complaint, the Parent alleges that the Department unilaterally modified the IEPs of Student A and all other similarly situated students after April 6, 2020, through the use of an addendum without meaningful parent participation, that was not based on a state-approved Continuous Learning Plan, and that does not appropriately identify the frequency, location, and duration of the services and modifications. The Federal regulations and State rules provide that changes to a child's IEP after the annual IEP team meeting for a school year, may be made by the entire IEP team, or the parent of a child with a disability and the public agency may agree not to convene an IEP team meeting for the purposes of making those changes and instead may develop a written document to amend or modify the child's current IEP. If changes are made to the child's IEP by an amendment without a meeting, the public agency shall ensure that the child's IEP team is informed of those changes. 34 CFR §§300.324 (4), (7); and 6.31.2.11(B)(4) NMAC.

On March 27, 2020, the Department's Special Education Coordinator instructed all special education staff that the IEP of any special education student with a current IEP attending the School would need to be amended for each such student in accordance with the EDLP without a meeting of the IEP team and with the parents' consent, and that the Department would convene an IEP team meeting to amend the IEP of all special education students who arrived at the School after the April 6, 2020, closure or whose IEPs were due for an annual review. The facts set forth above indicate that the Students' IEPs were amended by agreement or an IEP, after April 6, 2020, as follows:

<u>Student</u>	<u>Intake Date</u>	<u>IEP Amendment</u>
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A	January 8, 2020	Amendment without meeting on May 26, 2020
B	August 8, 2017	IEP team meeting on April 24, 2020
C	February 28, 2019	IEP team meeting on April 10, 2020
D	April 15, 2020	IEP team meeting on May 15, 2020
E	January 9, 2020	Amendment without mtg on April 24, 2020/IEP mtg on May 13, 2020
F	December 4, 2019	Amendment without mtg on April 20, 2020/IEP mtg on May 5, 2020
G	February 5, 2020	IEP mtg on May 4, 2020
H	May 6, 2020	IEP mtg on August 14, 2020
I	May 8, 2019	No amendment or IEP prior to August 3, 2020
J	October 16, 2019	Amendment without meeting on April 21, 2020
K	July 17, 2020	IEP team meeting on August 28, 2020.

Student A's IEP was amended by a written agreement to amend the IEP without an IEP team meeting. Student A's special education teacher called Student A's parents on May 26, 2020. The Department's Special Education Coordinator reported that he was also on this call with the Parent. All of the parties agree that the call took place, that the Parent did not object to anything discussed during the call (other than to request that Student A be allowed to take dual enrollment classes, which the special education teacher agreed to arrange for the following school year), that the Parent did not request an IEP team meeting, that the Parent did not thereafter call the Department to object to the amendment, and that the Parent received and reviewed a copy of the May 26, 2020, Prior Written Notice of Agreement to Amend IEP Without a Meeting, which was emailed to her by the special education teacher.

During the complaint investigator's interview with the Parent, she stated that the May 26, 2020, telephone conversation was short and seemed "rushed." The Parent also reported that she could not recall if changes to Student A's IEP were discussed during the call. The Parent argues that this shows that she was not allowed to meaningfully participate in making changes to Student A's IEP. However, the Parent did admit that she received and reviewed the May 26, 2020, PWN and she did not thereafter call the Department to object to the changes to Student A's IEP.

The IDEA Federal regulations and State rules require that districts must "take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate." 34 CFR § 300.322, and 6.31.2.11(B)(2) NMAC. In developing the IEP school personnel are required to consider the concerns of the parents for enhancing the education of their child (20 USC §1414(d)(3)(A)(ii)). A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Board of Education*, 993 F. 2d 1031,1036 (3rd Cir. 1993).)

The IEP team should work towards a general agreement, but the district is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a FAPE and to make sure that eligibility determinations are appropriately conducted. "The core of the statute, however, is the cooperative process that it establishes between parents and schools. School districts have a 'natural advantage' in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them." *Schaffer v. Weast*, 126 S. Ct. 528, 536 (2005). Although parents are "equal" participants in the IEP process, they do not have veto power over the IEP. *Garden Grove Unified Sch. Dist.*, 115 LRP 20924 (SEA CA 05/05/15). Also, there is not a "majority vote" rule for making decisions in IEP team meetings. According to the ED, if the team cannot reach consensus, the public agency must provide the parents with PWN of the agency's proposals or refusals, or both, regarding the child's educational program. 34 CFR §300.503(a); *Letter to Richards*, 55 IDELR 107 (OSEP 2010) and *Letter to Lieberman*, 56 IDELR 141 (OSEP 2008); and *Buser v. Corpus Christi Indep. Sch. Dist.*, 20 IDELR 981 (S.D. Tex. 1994), aff'd, 22 IDELR 626 (5th Cir. 1995).

The facts set forth above show that for 80-90% of the Student files reviewed in this complaint investigation, Department special education staff obtained the consent of the Students' parents to amend their IEPs by written agreement without a meeting and provided PWN of the amendment to the parents, or the Department convened an IEP team meeting with parents to discuss changes to the Students' IEPs and provided PWN to the parents.

Therefore, it is concluded that, while there is some disagreement among the statements of the parties who participated in the May 26, 2020, telephone call, the weight of the evidence indicates that the Department staff did discuss changes to Student A's IEP with the Parent, and the Parent did not object to anything proposed by the Department during the call, and the Parent did receive and review a copy of the May 26, 2020 PWN from the Department and did not object. Therefore, it is concluded that the Department did not unilaterally modify the IEP of Student A and all other similarly situated students after April 6, 2020, through the use of an addendum without meaningful parent participation. ***As to Issue No. 1(b), the Department is not cited. Corrective Action is not required.***

The Parent has argued in the Complaint that the Department unilaterally modified the IEPs of Student A and all other similarly situated students after April 6, 2020, through the use of an addendum that was not based on a state-approved Continuous Learning Plan. The facts set forth above show that the amendments to the Student's IEPs, including Student A, were in fact based upon a continuous learning plan (the EDLP) developed by the Department on March 27, 2020. However, the Department has admitted that it did not submit its EDLP to the PED for approval. The Department explains that the Department's Superintendent of Education was not notified by the PED of the requirement to submit its EDLP for state approval. The IDEA Federal regulations and State rules do not provide any requirements with respect to continuous learning plans or distance-learning plans. However, the IDEA does require that special education and related services provided to special education students by the Department must meet the standards of the PED. 34 CFR §300.17. It appears then that the issue is whether the EDLP, and the COVID-19 related amendments to the Students' IEPs based on the EDLP, met the standards of the PED and were in fact appropriate for the Students.

The Federal and PED guidance related to continuous learning plans and distance-learning, set forth above, provide a framework for providing FAPE to special education students in the very challenging and difficult time now faced by school districts that have been ordered to close their doors due to COVID-19. As noted in the guidance from OSERS, set forth above, "school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically." The guidance from the PED also affirms that in many cases, "instructional accommodations may be met in an online environment by providing additional supports, such as individualized telephone or video conferencing." *PED FAQ, supra*. The PED also provided to all schools an *Implementation Guide for Your Continuous Learning Plan* (PED Implementation Guide) to assist schools in developing and implementing a continuous learning plan. The PED Implementation Guide advises teachers that "weekly assignments, projects, video check-ins, and projects are all ways to assess learning. Focus on the critical standards needed for your content area. *PED Implementation Guide, p. 6*. One question that is very central to a continuous learning plan implemented through distance learning is how much time students should spend learning each day. The PED's "recommended guidelines for maximum student commitment in terms of direct instruction each day" for grades 6-12 is 30 minutes per teacher (3 hours max in a day). *Id.*, at 6. The PED also "recommends teachers have designated online office hours." *Id.*, at 4.

Following the March 27, 2020, school closure order from the PED, the Department, which is a juvenile correctional facility, informed its education leadership team that all of its facilities would be closed to all outside programming and visitation and that instruction would have to be provided from a distance. The Department did develop a continuous learning plan, the EDLP. A review of the Department's EDLP, and

the amendments to the Students' IEPs that followed, indicate that the EDLP and the relevant IEP amendments are substantially in compliance with the Federal and State guidance on using distance-learning in a continuous learning plan. As concluded above, the Department did not unilaterally amend the Students' IEPs. Moreover, the Students' IEP amendments indicate that the change in the Students' services is temporary, and when the COVID-19 restrictions are lifted and schools resume normal face-to-face instruction the Students will be provided with all of the special education services set forth in their IEPs. It is also important to note that the Federal and PED guidance consistently instruct schools that once normal school operations resume, "schools should review all data regarding individual student progress during the period of school closure to determine whether to convene an IEP team meeting to consider compensatory services." *PED FAQ, Supra*. This instruction certainly applies to the Department and all of the special education students attending the School.

Therefore, it is concluded that the Department did not unilaterally modify the IEPs of Student A and all other similarly situated students after April 6, 2020, through the use of an addendum that was not based on a state-approved Continuous Learning Plan. ***As to Issue No. 1(c), the Department is not cited. Corrective Action is not required.***

The Parent's final issue regarding the manner in which the Department amended the IEP of Student A and other similarly situated students at the School, is that the Department failed to modify the IEPs of Student A and all other similarly situated students after April 6, 2020, through the use of an addendum that appropriately identifies the frequency, location, and duration of the Students' services and modifications. The IDEA provides that a student's IEP must include the projected start date of the services provided and a statement of the anticipated frequency, location, and duration of those services. 34 CFR §300.320(a)(7). Although the IDEA does not expressly require the IEP to specify the amount of services in terms of hours and minutes, precision is the best practice to the extent the nature of a student's disability and needed services permits quantification in terms of hours and minutes on a daily basis. *Letter to Copenhaver*, 21 IDELR 1183 (OSEP 1994). The IEP should also describe the setting in which a particular service or a particular type of specialized instruction will be provided. *See, e.g., S.H. v. Mount Diablo Unified Sch. Dist.*, 70 IDELR 98 (N.D. Cal. 2017). Finally, the student's need for modified or alternative instructional materials should be considered. *Letter to Anonymous*, 51 IDELR 194 (OSEP 2008).

In reviewing the May 26, 2020, amendment to Student A's IEP, it is clear that the Department was proposing a temporary change in Student A's educational setting and a temporary reduction in the amount of service hours Student A would receive for the remainder of the 2019/2020 school year and/or until school resumes without restrictions. It is also clear that the amendment does consider whether Student A may need modified or alternative instructional materials. However, the amendment fails to identify Student A's new setting or specify the amount of service hours Student A would receive. The amendment does provide that the Department will implement its continuous learning plan on behalf of Student A, but the language in the amendment lacks any specificity regarding special education service hours other than that it would be based upon the Department's EDLP. As mentioned above, while there is no IDEA requirement to specifically identify the exact number of service hours provided to Student A in the IEP, the failure to do so could impede the Parent's opportunity to participate in the decision making process regarding the provision of a FAPE to Student A. A review of the amendments to the IEPs of Students B, C, D, E, F, G, H, and J similarly show the Department's failure to appropriately identify the setting and specify the service hours being changed in such students' IEPs.

Therefore, it is concluded that the Department did fail to modify the IEPs of Student A and all other similarly situated students after April 6, 2020, through the use of an addendum that appropriately identifies the frequency and location of the Students' services and modifications. This constitutes a systemic procedural violation by the Department. ***As to Issue No. 1(d), the Department is cited. Corrective Action is required.***

The chart set forth above describing how the Students' IEPs were amended after April 6, 2020, also shows when each amendment was agreed to. With respect to the IEP amendments for the 11 Students after April 6, 2020, Student A's amendment was 50 days out; 8 of the Students' amendments were 30 or less days out; and the documentation does not include IEP amendments prior to the date of the filing of the Complaint for 2 of the Students who began attending the school approximately three weeks before the end of the school year. One of these two students, Student K, who began attending the School at the beginning of the 2020/2021 school year, had his three-year reevaluation and annual review on August 28, 2020, approximately 39 days after he began attending the School. It appears that 80-90% of the parents of the Students investigated, and arguably then 80-90% of all the parents of the special education students at the School, were timely provided with PWN of the changes to their child's IEP due to the restrictions caused by the COVID-19 pandemic.

Therefore, taking into consideration the "inevitable delay in providing services - or even making decisions about how to provide services" described in the March 21, 2020, federal guidance, it is concluded, as admitted to by Student A's special education teacher, that as to Student A, the Department did fail to provide the Parent of Student A with appropriate PWN prior to the implementation of a proposed change in the program and/or placement of the Student. However, based upon the fact that the Department was in compliance with the PWN requirements as to 80-90% of the Students, it is concluded that as to all similarly situated students in the School, no systemic violation occurred. **As to Issue No. 1(e), the Department is cited only as to Student A. Corrective action is required.**

The Parents have complained that the Department failed to timely provide progress reports for Student A and all similarly situated students. The IDEA requires the Department to include in the Students' IEPs a description of when periodic reports on the progress the Students are making toward meeting their annual goals will be provided to parents. 34 CFR §300.320(a)(3)(ii). All of the IEPs developed for the Students include a statement that progress reports will be provided to parents with the Students' grades. The Department also conducts a monthly MDT meeting for each student, which parents are invited to, and at which the School's educational staff provide a report on each student's educational progress. The documentation provided by the Department does not include a progress report for Student A for Spring semester of the 2019/2020 school year, but does include MDT reports for April, May, July, August and September 2020. The documentation does include progress reports in June for Students B, C, D, E, F, G, and J. The remaining three students, H, I and K, began attending the School at the end of the Spring semester or in the Summer, of the 2019/2020 school year, so there was not sufficient time to assess these students' progress. The Parent does not recall receiving a progress report from the Department and the documentation does not include a copy of a progress report sent to the Parent.

Therefore, based upon the foregoing facts, it is concluded that the Department did fail to provide timely progress reports for Student A, but did not fail to provide timely progress reports for all other similarly situated students. This constitutes a procedural violation as to Student A. **As to Issue No. 1(f), the Department is cited only as to Student A. Corrective action is required.**

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 appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills, and the transition services (including courses of study) needed to assist the child in reaching those goals. 34 CFR §300.320(b).

As more fully described in the Statement of Facts above, all of the IEPs of the Students, including Student A, include a Student Profile section, a section of Measurable Post-Secondary Goals, and a section of Transition Services, including courses of study for the 2019/2020, 2020/2021, and 2021/2022 school years.

In her complaint, the Parent argues that the May 26, 2020, amendment to Student A's IEP "does not address [Student A's] need for transition services in accordance with his IEP." It should be noted that the May 26, 2020, amendment to Student A's IEP did amend certain provisions of Student A's IEP, but it did not purport to amend, delete or replace all of the remaining provisions of Student A's IEP, including Student A's transition services. Therefore, the transition services set forth in Student A's November 15, 2019, IEP remained in effect following the May 26, 2020, amendment. Two specific examples of the Department providing transition services to Student A are that Student A maintained paid employment with the Department, and the Department arranged for Student A to take dual enrollment classes at CNM beginning in July, 2020. Both of these activities support Student A's Post-Secondary Goals. Moreover, there is nothing in the documentation, and no other evidence, that the transition plans and services of Students B – K are lacking or are inappropriate.

Therefore, it is concluded that the Department did not fail to provide transition services to Student A and all other similarly situated students as set forth in their IEPs. *As to Issue No. 1(g), the Department is not cited. Corrective Action is not required.*

The Parent has alleged in her Complaint that the Department failed to appropriately consider the need for ESY services for Student A and all other similarly situated students at the School, in violation of 34 CFR § 300.106. The IDEA Federal regulations define ESY to mean special education and related services that are provided to a child with a disability beyond the normal school year of the public agency in accordance with the child's IEP and at no cost to the parents of the child and meet the standards of the SEA. 34 CFR §300.106(b).

The Parent has not provided any evidence of her allegation regarding ESY other than the fact that the May 26, 2020, amendment to Student A's IEP does not indicate that ESY was discussed by the Parent and the Department during the May 26, 2020, telephone call. The complaint investigator's interviews with the Parent and the School staff also confirm that ESY was not discussed during the May 26, 2020, telephone call. However, as is true with the Students' transition services, discussed above, the fact that ESY was not discussed with the Parent during the May 26, 2020, telephone call, and does not appear in the May 26, 2020, amendment, does not mean that Student A's IEP team did not previously consider whether Student A needed ESY. In fact, Student A's November 15, 2019, IEP, which was the then current IEP for Student A between April 6, 2020, and August 3, 2020, clearly indicates that Student A's IEP team did consider whether Student A required ESY services and determined that he did not. There is no evidence to suggest that the Parent ever objected to the determination that Student A does not need ESY services either at the November 15, 2019, IEP team meeting, or in any subsequent conversations with Department educational staff. Department Educational staff have all consistently reported that the Parent has never raised an objection to Student A's IEP team's determination that Student A does not need ESY.

With respect to the issue as to whether ESY services were appropriately considered for other similarly situated students at the School, the complaint investigator reviewed the student files of Students B – K. This review revealed that all of the IEPs of Students B – K, which were then current between April 6, 2020, and August 3, 2020, clearly indicate that Students B – K's IEP teams did consider ESY for Students B – K and determined in each case that ESY was not required. Moreover, Student's B, C, D, E, F, and G's IEP team meetings took place in April or May, 2020, just prior to the end of the 2019/2020 school year. Two of the remaining Students arrived at the School close to the end of the school year and a third Student arrived at the School during the Summer of 2020.

Therefore, in view of the foregoing facts and legal authorities, it is concluded that the Department did not fail to appropriately consider the need for ESY services for Student A and all other similarly situated students at the School. *As to Issue No. 1(h), the Department is not cited. Corrective Action is not required.*

Issue No. 2

Whether the Department’s actions and/or omissions towards Student A resulted in a denial of a FAPE to Student A.

The federal regulations and State rules provide that violations of the IDEA may be based on either substantive or procedural violations. However, proving a procedural violation is only a first step to obtaining relief. In *Sytsema*, the court held that an “IEP’s failure to clear all of the Act’s procedural hurdles does not necessarily entitle a student to relief for past failures by the school district.” *Sytsema*, 50 IDELR at 216; quoting *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1125-26 & n.4 (10th Cir. 2008) (“[O]ur precedent hold[s] that procedural failures under IDEA amount to substantive failures only where the procedural inadequacy results in an effective denial of a FAPE.”); quoting *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996). Congress provided in the 2004 amendments to the IDEA that to find a denial of FAPE based on a procedural violation, the procedural violation must have: (1) impeded the student's right to a FAPE, (2) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or (3) caused a deprivation of educational benefits. 34 CFR §300.513(a)(2).

The Complaint Investigator has concluded, above, that the Department did fail to appropriately identify the frequency and location of services and modifications in the amendments to the Students' IEPs, and failed to provide the Parent of Student A with appropriate prior written notice prior to the implementation of a proposed change in the program and/or placement of Student A, and failed to provide timely progress reports for Student A to the Parent, which are clearly procedural violations of the IDEA. It is concluded that the procedural violations by the Department have significantly impeded the Parent's opportunity to participate in the decision making process regarding the provision of a FAPE to Student A. It is further concluded that the Department's procedural violations with respect to the failure to appropriately identify the frequency and location of the services set forth in the IEP amendments of all similarly situated students described above, have significantly impeded the parent's of all similarly situated students at the School the opportunity to participate in the decision making process regarding the provision of a FAPE to their child and, therefore, constitute a systemic violation by the Department. Therefore, it is concluded that the Department's procedural failures have resulted in substantive failures by the Department. ***As to Issue No. 2, the Department is cited. Corrective Action is required.***

Summary of Citations

Statutory and Regulatory Provisions	Citation
34 CFR § 300.320(a)(7).	The Department failed to modify the IEPs of Student A and all other similarly situated students after April 6, 2020, through the use of an addendum that appropriately identifies the frequency and location of the Students' services and modifications.
34 CFR § 300.503.	The Department failed to provide the Parent with appropriate prior written notice prior to the implementation of a proposed change in the program and/or placement of Student A.
34 CFR § 300.320(a)(3)(ii).	The Department failed to provide timely progress reports for Student A.

Required Actions and Deadlines

By **October 30, 2020**, the Department's Special Education Director must assure the PED in writing that the Department will abide by the provisions of this Corrective Action Plan (CAP). The PED requests that the Department submit all documentation of the completed corrective actions to the individual below, who is assigned to monitor the Department's progress with the Corrective Action Plan and to be its point of contact about this complaint from here forward:

Ms. Cynthia Romero
Data Manager
Special Education Division
New Mexico Public Education Department
120 South Federal Place
Santa Fe, NM 87501
Telephone: (505) 827-1457
Cynthia.Romero2@state.nm.us

The file on this complaint will remain open pending the PED's satisfaction that the required elements of this Corrective Action Plan are accomplished within the deadlines stated. The Department is advised that the PED will retain jurisdiction over the complaint until it is officially closed by this agency and that failure to comply with the plan may result in further consequences from the PED.

Each step in this Corrective Action Plan is subject to, and must be carried out in compliance with, the detailed procedural requirements of the IDEA 2004 and the implementing federal regulations and State rules. If the Department needs brief extensions for the steps in the Corrective Action Plan, contact Deborah Dominguez-Clark, Director of the Special Education Division.

Please carefully read the entire CAP before beginning implementation. One or more steps may require action(s) in overlapping timeframes. All corrective action must be completed no later than March 10, 2021, and reported to the PED SED no later than March 17, 2021. All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C1920-22**.

Corrective Action Plan

Step No.	<u>Actions Required by Department</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
[]1.	The Department is required to provide training to its special education and general education staff regarding the appropriate way to discuss with parents of students with IEPs, and document, all amendments made to IEPs by agreement without a meeting, or in an IEP team meeting, and specifically including: (1) the timing and content of discussions with	12/18/2020	A copy of the invitation(s) to all required participants of the training(s) required herein, a copy of the agenda or syllabus for the training(s), and an attendance list signed by each person who attended the training(s).	1/08/2021

This report constitutes the New Mexico Public Education Department's final decision regarding this complaint.

Investigated by:

/e/ Wallace J. Calder
Wallace J. Calder, Esq.
Independent Complaint Investigator

Reviewed by:

/e/ Debra Poulin
Debra Poulin, Esq.
Chief Counsel, Special Education
Division

Reviewed and approved by:

Timothy C. Crum

Deborah Dominguez-Clark <--- *For*
Director, Special Education Division