

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2021-08
January 15, 2021**

This report requires corrective action. See page 16.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on November 16, 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 C.F.R. §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 District's responses to the allegations, together with documentation submitted by the District at the request of the PED's independent complaint investigator;
- review of the District's compliance with federal IDEA regulations and state NMAC rules;
- telephonic interviews with the Parent; the District's Deputy Director of Student Support Services; and the Student's Special Education Teacher; and
- research of applicable legal authority.

¹The federal IDEA regulations are published at Title 34 of the Code of Federal Regulations (C.F.R.), 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 C.F.R. §§ 151 to 153 and in the state rules at Subsection H of 6.31.2.13 NMAC.

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 C.F.R. §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

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

1. Whether the District failed to comply with the Due Process Hearing Officer's (Hearing Officer) order in DPH 1819-03, entered in February, 2019 (Order), by failing to implement the reading/writing/spelling instruction remedy portion of the Hearing Officer's Order by:
 - a. unilaterally reducing the amount of compensatory education services provided to the Student by shortening the schedule for providing the services and refusing to make up service time when the Student is absent;
 - b. failing to provide compensatory education services to the Student in reading and writing through 1/1 instruction;
 - c. failing to provide compensatory education services to the Student in reading/spelling and writing/spelling that is compliant with the instruction described in the Hearing Officer's Order; and
 - d. failing to provide compensatory education services to the Student by a licensed special education teacher who has received the appropriate training, or oversight by an identified expert, as described in the Hearing Officer's Order.
2. Whether the District was in compliance with the Hearing Officer's Order when the District rejected the Parent's proposal to provide an Autism Evaluation for the Student at the Student's September 24, 2020, IEP team meeting.

General Findings of Fact

1. The Student, who is the subject of this complaint investigation, is currently 13 years of age and is in the 7th grade attending a middle school in the District. The Student lives with the Parent.
2. In July, 2018, the Parent filed a Request for Due Process Hearing against the District on behalf of the Student, alleging violations of the IDEA and State rules by the District, which request for hearing was designated as DPH 1819-03. At the time of the hearing in October, 2018, the Student was in the 5th grade attending an elementary school in the District.

3. On February 4, 2019, the Due Process Hearing Officer (Hearing Officer) filed her Memorandum Decision and Order (Order), which granted in part, and denied in part, the relief requested by the Parent against the District.
4. The District appealed the decision by the Hearing Officer to the United States District Court for New Mexico, [REDACTED]. In March, 2020, the United States District Court filed a Memorandum Opinion and Order Denying Defendant's Amended Brief in Chief and affirmed the Hearing Officer's Order.
5. 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.
6. 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.
7. The documentation indicates that the District attempted to schedule an IEP team meeting with the Parent in May, 2020, but the parties thereafter agreed that implementation of the Hearing Officer's Order would be delayed until the Fall of 2020, due to the closure of schools and ongoing health concerns.
8. The Hearing Officer's Order provides, in relevant part, the following findings of fact and conclusions of law and relief:
 - a. Findings of Fact:
 - i. The Parent filed her request for a due process hearing because the Student's teacher told the Parent that the District was intending to exit the Student from special education.
 - ii. The Student was eligible for special education services under the disability classification of Specific Learning Disability (SLD) in reading and written language.
 - iii. On March 25, 2015, the Student received a Speech/Language evaluation by an educational diagnostician for the District. This evaluation indicated that the Student was not eligible for speech language services based on the Student's SLD and recommended the Orton-Gillingham reading program for the Student.
 - iv. The Student's reading program used by the District was initially "Read Naturally," but during the 2017/2018 school year the District began offering training to teachers in the "Orton-Gillingham" reading program. The Student's teacher received a week of training in Orton-Gillingham and for the remainder of the 2017/2018 school year the teacher's curriculum included Orton-Gillingham and Read Naturally.
 - v. It was consistently noted by the Student's teachers that the Student missed school consistently throughout the Student's education. Up to the time of the due process

hearing in October, 2018, the Student had missed eight of 48 classes in fifth grade and was also frequently tardy. The Hearing Officer found that the Parent's reasons for some of the Student's absences did not appear to be appropriate or supportable and that the Parent "sometimes inappropriately discounted the importance of Student's absences and tardiness."

- vi. The District has not agreed to offer the Student a neuropsychological evaluation that would look at both autism and dyslexia.
- vii. District staff testified that the IEP team believed that the Student's social skills issues were related to a potential need for counseling, not to autism, and there was never any discussion of any need to evaluate Student for autism.
- viii. The Parent requested an evaluation of the Student for counseling, but then withdrew consent because a counselor the Parent did not like was going to do the evaluation.
- ix. None of the Student's teachers have observed the type of socially maladaptive or unusual behavior Parent sites as supporting a potential diagnosis of autism. Parent's testimony that Student is or has been repetitive in Student's actions and prefers routine, while credible, was not based on any special expertise by Parent with regard to diagnosing autism, and was not described in a way to make a reasonable observer suspect autism as the cause.
- x. Read Naturally is an appropriate program to teach reading in the special education setting, but Orton-Gillingham or a similar program was necessary to teach Student in terms of the Student's SLD.

b. Conclusions of Law:

- i. "[The Parent] failed in her burden of proof to show, through expert testimony or anecdotal reports, that Student has these symptoms of autism to any significant degree, much less that her alleged autism is a disabling condition recognized by IDEA that was not properly identified and educationally addressed."
- ii. "With regard to the assertion that the District failed to evaluate Student for autism, "[w]hile the threshold for suspicion [of disability] is low," a suspicion that "something was amiss," such as existed here, is not sufficient to trigger the District's child find substantive obligations or accompanying procedural protections pursuant to the IDEA."
- iii. The Parent did sustain her burden of proof to show that "child find" was triggered on the basis of the suspected disability of dyslexia. The District failed to appropriately evaluate Student for dyslexia. However, Parent failed to sustain her burden to show the District's failure to assess Student for dyslexia made it impossible to determine and deliver the specialized instruction required to meet the Student's needs and provide for the Student's progress. The specific issue of failure

to diagnose for dyslexia, standing alone, does not support an award of compensatory education. Because the Parent has been offered an IEE and has declined to participate, and because the Parent has not made clear to the Hearing Officer why an IEE that is different than the one already offered by the District is mandated by the IDEA for any reason, the Hearing Officer denies the Parent's request for a neuropsychological evaluation to look at both dyslexia and autism.

iv. The District failed to write reading/writing/spelling goals which were designed to meet Student's needs and allow Student to progress in the general curriculum.

c. Relief:

i. Student shall be maintained in special education through at least the conclusion of Student's sixth grade year.

ii. Student shall receive compensatory education in reading/writing/spelling beginning now and continuing through sixth grade with a 1/1 licensed special education teacher who has been extensively trained in Orton-Gillingham or similar program acceptable to Parent, or who will be overseen (long distance if needed) by an identified expert in instruction for students with reading deficits in the areas typically and often encompassed in the diagnosis of dyslexia, including de-coding, encoding, word analysis, fluency, and ability to read quickly enough to ensure comprehension, as recommended by the Southwest branch of the International Dyslexia Association or other expert agreed to by parent. Student shall receive 300 minutes for reading and 150 minutes for writing per week.

iii. Student is not awarded an independent neuropsychological evaluation.

iv. Student is not awarded an independent speech language evaluation.

v. Student shall receive an independent Assistive Technology evaluation, followed by the District's provision of all recommended services/equipment.

vi. Other relief was granted not relevant to the present complaint investigation.

9. The District's documentation includes many emails to the Parent and Student from the Student's Special Education Teacher beginning in August, 2020, regarding the schedule for the Student's special education ELA class. Many of the emails indicate a lack of attendance by the Student. However, the Parent reports that it was not made clear to the Parent and the Student what the actual schedule for providing the services each week would be and that the schedule was not consistent. These emails do not appear to involve the 1/1 compensatory education services for the Student.

10. On September 24, 2020, Student's IEP team met to conduct the annual review of Student's IEP and to discuss, among other things, the implementation of the Hearing Officer's Order. Student is in 7th grade during the 2020/2021 school year. The Student's September 24, 2020, IEP provides, in relevant part, as follows:

a. Student's primary disability is identified as SLD, with identified areas of need in basic

- reading, reading fluency, and written expression.
- b. Annual Goals were developed for Student in the following areas of need:
 - i. Reading Fluency;
 - ii. English Language Arts; and
 - iii. Academic Success.
 - c. Schedule of Services: The IEP includes the following services:
 - i. Special Education Services:
 - 1. Individual and/or Group Setting English for 300 minutes per week in the special education setting.
 - ii. Compensatory Education:
 - 1. Compensatory 1 to 1 for Reading for a total of 140 hours (300 minutes per week) from September 28, 2020, to May 30, 2021, in the special education setting; and
 - 2. Compensatory 1 to 1 for Writing for a total of 70 hours (150 minutes per week) from September 28, 2020, to May 30, 2021, in the special education setting.
 - d. Student's September 24, 2020, IEP team meeting was attended by Student, Parent and Parent's advocate. The meeting was facilitated by a non-District professional facilitator.
11. On September 24, 2020, the District provided Prior Written Notice (PWN) to the Parent regarding the proposals set forth in the Student's September 24, 2020, IEP. The District's September 24, 2020, PWN provides, in relevant part, as follows:
- a. The IEP team determined that the Student is in need of special education services for English in a special education English class in addition to compensatory services in reading and written language.
 - b. The IEP Team, which includes the Parent, agreed on goals and objectives.
 - c. OT services to train the Student to access the Student's Chromebook are no longer needed and are discontinued.
 - d. The IEP team agreed that the Student will receive an Independent Assistive Technology (AT) Evaluation, as ordered by the Hearing Officer. The Parent has provided consent for the AT evaluator to obtain information and set a date for the evaluation.
 - e. At Parent request, the Student will attend school and receive all services virtually through the District's "Cohort C" model. Instruction will be provided via Google Classroom.
 - f. The Student will receive 300 minutes per week of special education services for English in a special education class. The Student will receive 300 minutes per week of Compensatory Reading provided daily as "Reading Tutoring" class in a one-on-one setting. The Student will receive 150 minutes per week of compensatory Writing provided in a 1 to 1 setting. "If [the Student] is absent, the district is not responsible to make up service time. If the teacher is absent, time will be made up."
 - g. The IEP team discussed the attendance policy for virtual participation. The Student will need to log in to the school's 7th grade daily attendance by 9:00 a.m. After 9:00, students

are counted absent and the following day it is corrected in Skyward.

- h. Parent proposed an autism evaluation for the Student. "The District rejects the Autism Evaluation as there have been no indicators in the school setting that would make Autism suspected. The DPHO relieved the district of this obligation as upheld by the District Court in its decision."
 - i. The District proposed a Mental Health screening for the Student due to the behaviors stated by the Parent. The screening was refused by the Parent.
 - j. The compensatory services provided to the Student in Reading and Writing "will be offered from 9/24/2020 – 5/30/2021 during available times." The Parent requested that the compensatory services "be provided consecutively."
 - k. The Parent proposed 360 hours of compensatory reading and 180 hours of writing in addition to the time proposed by the District, or financial compensation in lieu of those hours. The District rejected Parent's proposal and stated that the "relief in the DPHO 1819-03 means total time owed from "beginning now" which would have been the date of the DPHO report and continuing through the 6th grade but because of the district's appeal of the due process hearing order and COVID 19, no compensatory services have been offered to date." The District also rejected any financial compensation because the District is providing compensatory services.
12. In reviewing the Hearing Officer's Order regarding the length of the compensatory education services awarded to the Student, the Order provides for 14 weeks (which equals the number of weeks remaining in the 2018/2019 school year following the date of the Order) plus one full school year (which, according to the District, is 36 weeks), for a total of 50 weeks of compensatory education services.
13. The Student's September 24, 2020, IEP and the accompanying PWN indicate that the District proposed that the compensatory education services would begin on September 24, 2020, and end on May 30, 2021. This period of time is considerably less than 50 school weeks.
14. The Student's Special Education Teacher reports that her 1/1 compensatory education services were scheduled immediately following the September 24, 2020 IEP team meeting, but the Student's attendance was very poor.
15. The District's documentation includes an email sent on October 23, 2020, from the Student's Special Education Teacher to the Parent setting forth a specific schedule for the Student's "one-on-one compensatory time," which was scheduled to begin on Monday, October 26, 2020. The schedule indicates that the teacher and the Student will meet during sixth period on Mondays, Tuesdays, Thursdays and Fridays at 2:35 to 4:05 p.m. (1.5 hours per day, four days per week). The District reports that the main reason for this schedule change was to avoid confusion and to allow most of the daily services to be provided during the normal school day, as requested by Parent. On this schedule, the Student is offered a total of 360 minutes (six hours) of 1/1 compensatory services per week. The documentation indicates

that this schedule was communicated to the Parent and the Student.

16. The District's documentation includes the Student's attendance records for the Fall, 2020, semester. The records indicate that after September 24, 2020, through the last day of school in 2020, the Student was marked as absent from sixth period class (compensatory education services) a total of 18 times.
17. The Parent reports that the District's attendance records are not accurate as to the Student. The Parent states that the Student was not able to log in to the class due to connectivity issues on occasion and also that the Student was late logging in on occasion because the Student was kept over late by the teacher in the Student's previous class.
18. The District reports that the Student was not being held over by her fifth period teacher and that the Parent and the Student did not ever communicate to the Special Education Teacher that the Student was experiencing any connectivity issues. The Documentation also includes many emails from the Special Education Teacher to the Parent regarding the Student's poor attendance and requests that the Parent respond to the teacher's emails and telephone calls regarding the Student.
19. The District's documentation includes a licensure report regarding the Student's Special Education Teacher, who is the teacher providing special education services and compensatory education services to the Student. The documentation indicates that during the times in question in this complaint investigation the Special Education Teacher held, and currently holds, a Level Three, K-8 teaching license with a Bilingual Education endorsement, and a Level Three, Special Education PK-12 teaching license, from the New Mexico Public Education Department.
20. The District's documentation indicates that the Student's Special Education Teacher has obtained the following trainings in Orton-Gillingham reading instruction through the Institute for Multi-Sensory Education:
 - a. January, 2000 – Comprehensive Orton-Gillingham Training;
 - b. August, 2015 – Introductory Orton-Gillingham Training;
 - c. 2019, 2020 - Comprehensive Orton-Gillingham Training, and Comprehensive Virtual Orton-Gillingham Training, initiated but not completed;
 - d. May 1, 2020 – Certificate of completion of 30-hour Intermediate Virtual Orton-Gillingham Training.
21. A review of the District's and the Parent's documentation regarding the 1/1 compensatory education services reasonably provided by the District to the Student to date, in view of all the relevant facts and circumstances alleged by the parties and found by the complaint investigator, indicates the following:
 - a. The District began providing the 1/1 compensatory education services ordered by the Hearing Officer to the Student on October 26, 2020.
 - b. The schedule for providing the services was reasonably communicated to the Parent and

Student no later than October 23, 2020.

- c. The schedule includes 1.5 hours of services on Monday, Tuesday, Thursday and Friday of each week for a total of 6 hours of services per week. In view of the Hearing Officer's Order which requires 7.5 hours of compensatory education services per week, the District's current schedule creates a shortfall of 1.5 hours per week.
- d. In reviewing the District's calendar for the 2020/2021 school year, between October 26, 2020, and January 15, 2021, the date of this Complaint Resolution Report, the District has provided 8 weeks of compensatory education services to the Student (10 total weeks at 4 service days per week = 40 days, or 8 total weeks, of compensatory education services).
- e. The remaining weeks of compensatory education services owed to the Student as of the date of this Report equals 42.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to comply with the Hearing Officer's Order in DPH 1819-03, entered in February, 2019, by failing to implement the reading/writing/spelling instruction remedy portion of the Hearing Officer's Order by:

- a. **unilaterally reducing the amount of compensatory education services provided to the Student by shortening the schedule for providing the services and refusing to make up service time when the Student is absent;**
- b. **failing to provide compensatory education services to the Student in reading and writing through 1/1 instruction;**
- c. **failing to provide compensatory education services to the Student in reading/spelling and writing/spelling that is compliant with the instruction described in the Hearing Officer's Order; and**
- d. **failing to provide compensatory education services to the Student by a licensed special education teacher who has received the appropriate training, or oversight by an identified expert, as described in the Hearing Officer's Order.**

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 U.S.C. §1415(b)(6). The Parent filed the Complaint with the PED seeking PED intervention to order the District to comply with the Hearing Officer's Order. The SED has jurisdiction to investigate the Parent's Complaint and, if appropriate, to order corrective action. The State rules clearly provide that a complaint alleging a public agency's failure to implement a due process decision will be resolved by the SED. 6.31.2.13(H)(4)(c) NMAC.

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 C.F.R. §300.1(a), and 6.31.2.8 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.” *Thompson R2-J School Dist. v. Luke.*, 540 F.3d 1143, 1145 (10th Cir. 2008) (citing 20 U.S.C. § 1414(d)). 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 C.F.R. § 300.320(a)(2)(i).

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 C.F.R. § 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).

As described in the facts above, the dispute between the Parent and the District was initially raised in a due process hearing filed by the Parent against the District in July, 2018. On February 4, 2019, the Hearing Officer entered her Order, which found violations of the IDEA by the District and ordered relief for the Parent on behalf of the Student. The District appealed the Hearing Officer's Order to the United States District Court, and the District Court affirmed the Hearing Officer's Order in March, 2020. The documentation does not include any indication that the District appealed the ruling of the District Court Magistrate. Therefore, it is clear at the present time that the District is subject to, and must fully comply with the relief granted in, the Hearing Officer's Order.

The Hearing Officer's Order clearly states that the compensatory education services awarded to the Student were required to begin immediately upon entry of the Order "and continuing through sixth grade." The compensatory education award was not calculated as a certain number of hours that the District would be required to provide to the Student, but it was a certain number of minutes per week in reading and writing that the student would receive over a set

amount of time, i.e. through the end of the Student's sixth grade year. It is evident from a review of the District's school calendars for the 2018/2019 and 2019/2020 school years that the total amount of compensatory education services described by the Hearing Officer equals 50 school weeks (February 4, 2019 – May 20, 2020) at 7.5 hours per week. Currently, the District's schedule for providing compensatory services to the Student provides only 6 hours of services per week. Moreover, the Student's September 24, 2020, IEP and the accompanying PWN indicate that the District proposes that the services will only be provided to the Student from September 24, 2020 through May 30, 2021. It is concluded that the District's current schedule for providing compensatory education services to the Student will not provide the 42 weeks of additional required services, as calculated above, by May 30, 2021. Therefore, it is concluded that the District's current proposal for providing compensatory education services to the Student does constitute a unilateral reduction in the amount of service time owed to the Student by shortening the weekly number of minutes provided to the Student and shortening the total number of weeks of service time awarded to the Student.

As to Issue No. 1(a), the District is cited. Corrective Action is required.

In her Complaint, the Parent also takes issue with the District's language in the September 24, 2020, PWN indicating that any service time lost by the Student due to the Student being absent will not be made up. The Parent argues that the number of Student absences recorded by the District to date is not accurate and that the absences are not the fault of the Student or Parent because they were due mainly to connectivity issues with the District-assigned Chromebook and Google Meet invitations and to confusion over the schedules set up by the District. The District argues that the Student and the Parent have never notified the Special Education Teacher regarding any problems with the Student connecting to the District's Google Meet classroom. The District also points out that the Student's education records indicate a long history of poor attendance at District schools.

The Hearing Officer's Order does acknowledge the history of absences and tardiness by the Student as well as indicating that the Parent's reasons for some of the Student's absences did not appear to be appropriate or supportable and that the Parent "sometimes inappropriately discounted the importance of Student's absences and tardiness." It is concluded that the Student does have a history of unexcused absences and tardiness in general, but also specifically with regard to the class time scheduled by the District to provide compensatory education services to the Student. However, it is also concluded that the Student must be given a reasonable opportunity by the District to take advantage of the compensatory education services awarded to the Student by the Hearing Officer. Therefore, the corrective action set forth below includes a specific process for the Special Education Teacher and the Parent and Student to follow in order

to allow the Student reasonable access to the compensatory services, and to allow the District to accurately account for the service hours being provided to the Student.

With respect to Issues Nos. 1(b) and 1(d), the findings of fact set forth above are dispositive of these two issues. The schedule proposed and currently being followed by the District provides reading and writing compensatory education services to the Student in a 1/1 virtual classroom setting. The District staff person providing the compensatory education services to the Student is a currently licensed Special Education Teacher "who has been extensively trained in Orton-Gillingham. . ." beginning in 2000 and continuing through 2020. Therefore, it is concluded that the District did not fail to provide compensatory education services to the Student in reading and writing through 1/1 instruction that is compliant with the instruction described in the Hearing Officer's Order.

As to Issues Nos. 1(b) and 1(d), the District is not cited. Corrective Action is not required.

With respect to Issue No. 1(c), the findings of fact are also dispositive of this issue. The Hearing Officer's Order requires the District to provide 50 weeks of compensatory education to the Student consisting of 300 minutes per week of reading and 150 minutes per week of writing instruction. Currently, the District's schedule for providing compensatory education services to the Student only provides for 240 minutes per week of reading and 120 minutes per week of writing instruction provided over four days per week.

The Parent has objected to this schedule of services as inadequate and not in compliance with the Hearing Officer's Order. The District argues that the District does not have a normal school schedule on Wednesdays due to the SEL instruction given to the students, and also points to the fact that the Parent expressed concerns to the District with the Student being the only student required to receive reading and writing instruction on Wednesdays. However, the fact that the Student is attending school virtually effectively alleviates the concerns of both parties to providing compensatory education services on Wednesdays. The Student is in a 1/1 instructional setting with no other students around, and the District has admitted that there is time during normal school hours on Wednesday to provide 1.5 hours of compensatory services to the Student.

In order to comply with the timing and manner in which the compensatory services are required to be provided to the Student, the District is required to provide an additional 60 minutes of reading and 30 minutes of writing instruction as compensatory services per week to the Student. Therefore, the District has failed to provide compensatory education services to the Student in

reading/spelling and writing/spelling that is compliant with the instruction described in the Hearing Officer's Order.

As to Issue No. 1(c), the District is cited. Corrective Action is required.

Issue No. 2

Whether the District was in compliance with the Hearing Officer's Order when the District rejected the Parent's proposal to provide an Autism Evaluation for the Student at the Student's September 24, 2020, IEP team meeting.

During the September 24, 2020, IEP team meeting, the Parent proposed that the Student be evaluated for autism. The District rejected the Parent's proposal "as there have been no indicators in the school setting that would make Autism suspected. . ." and "[t]he DPHO relieved the district of this obligation as upheld by the District Court in its decision." The Hearing Officer's Order includes several relevant findings of fact regarding this issue, as follows: (1) the District has conducted an evaluation to determine whether the Student has Dyslexia; (2) the Parent later requested an IEE for dyslexia, which the District granted; (3) the Parent later failed to follow through with the IEE for dyslexia and ultimately declined the IEE offered by the District; (4) the District has not conducted an evaluation to determine whether the Student has Autism; and (5) the District "has never offered Parent a neuropsychological evaluation for [the Student] to look at both dyslexia and autism. . ." The Hearing Officer concluded that the Parent "failed in her burden of proof to show, through expert testimony or anecdotal reports, that Student has these symptoms of autism to any significant degree, much less that her alleged autism is a disabling condition recognized by IDEA that was not properly identified and educationally addressed. See 34 C.F.R. §300.8." The Hearing Officer concluded that "[b]ecause Petitioner has been offered an IEE and has declined to participate, and because Petitioner has not made clear to the Hearing Officer why an IEE that is different from the one already offered by the District is mandated by the IDEA for any reason, the Hearing Officer denies Petitioner's request for a neuropsychological evaluation to look at both dyslexia and autism. The Hearing Officer's Order specifically states that "Student is *not* awarded and independent neuropsychological evaluation."

It appears that the effect of the Hearing Officer's Order with respect to the Parent's request for an autism evaluation is twofold. First, the Hearing Officer concluded that she was not presented with any convincing evidence by the Parent that the Student exhibited symptoms of autism to any significant degree. The District testified that District staff had not witnessed anything in the school setting that would lead the District to conclude that the Student might be a student with autism. As a result, the Hearing Officer concluded that the District did not violate the IDEA by failing to evaluate the Student for autism. Secondly, since the District had not previously

conducted, and was not required to conduct at that time, an evaluation for autism, the Parent was not granted an IEE to look at autism. See 34 C.F.R. §300.502(b)(1). It should be noted that the Complaint filed by the Parent in this matter is seeking only to enforce the Hearing Officer's Order and has not alleged any additional or different facts regarding whether the Student should be suspected of having autism than were presented to the Hearing Officer at the due process hearing. And the District has again affirmed that District staff have not observed anything in the school setting with respect to the Student that would lead them to suspect that the Student has Autism.

Therefore, this complaint investigator has no basis upon which to conclude that there currently exists a reasonable suspicion that the Student has autism, and order the District to evaluate the Student for autism. However, in view of the continuing and ongoing nature of the Child Find obligation set forth in the IDEA and State rules, it is specifically not concluded that the District is forever discharged from its Child Find obligations with respect to autism, but merely that at the present time and under the present circumstances, the Hearing Officer's Order does not entitle the Parent to an independent neuropsychological evaluation to look at autism. Therefore, the District was in compliance with the Hearing Officer's Order when the District rejected the Parent's proposal to provide an Autism Evaluation for the Student at the Student's September 24, 2020, IEP team meeting.

As to Issue No. 2, the District is not cited. Corrective Action is not required.

Summary of Citations

Statutory and Regulatory Provisions	Citation
6.31.2.13(H)(4)(c) NMAC.	The District's current proposal for providing compensatory education services to the Student does constitute a unilateral reduction in the amount of service time owed to the Student by shortening the weekly number of minutes provided to the Student and shortening the total number of weeks of service time awarded to the Student.
6.31.2.13(H)(4)(c) NMAC.	The District has failed to provide compensatory education services to the Student in reading/spelling and writing/spelling that is compliant with the instruction described in the Hearing Officer's Order.

Required Actions and Deadlines

By January 22, 2021, the District's Special Education Director must assure the PED in writing that the District will abide by the provisions of this Corrective Action Plan (CAP). The PED requests that the District submit all documentation of the completed corrective actions to the individual below, who is assigned to monitor the District's progress with the Corrective Action Plan and to be its point of contact about this complaint from here forward:

Dr. Elizabeth Cassel
Corrective Action Plan Monitor
Special Education Division
New Mexico Public Education Department
120 South Federal Place
Santa Fe, NM 87501
Telephone: (505) 490-3918
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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 District 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 District needs brief extensions for the steps in the Corrective Action Plan, contact Deborah Dominguez-Clark, Director of the Special Education Bureau.

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 15, 2022, and reported to the PED SED no later than March 15, 2022. All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C2021-08**.

Corrective Action Plan

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
1.	The District was required to provide a total of 50 weeks of compensatory education services to the Student per the Hearing Officer’s Order, 42 weeks of which remain to be provided as of the date hereof. The District is required to provide 300 minutes per week of reading instruction, and 150 minutes per week of writing instruction, as set forth in the Order, to the Student. The District's current schedule for providing the services during sixth period on Monday, Tuesday, Thursday and Friday is approved with the exception that the schedule must be amended to show an additional 60 minutes of reading and 30 minutes of writing instruction that will be provided to the Student on Wednesdays. The parties are free to amend the above schedule during the 2020/2021 school year, but only with the express written consent of the Parent.	1/29/2021	A copy of the current amended schedule, and any future schedule agreed to by the parties for providing compensatory education services to the Student.	2/1/2021
	The Student's IEP team must meet prior to the beginning of the 2021/2022 school year to discuss the Student's 8th grade class schedule and agree upon a schedule for providing the required compensatory education service minutes to the Student each week.	8/16/2021	A copy of the Student's IEP and accompanying PWN for the 2021/2022 school year identifying the schedule for providing compensatory education services to the Student	8/30/2021
2.	Provide the remaining 42 weeks of compensatory education service minutes that were awarded to the Student by the Hearing Officer due to a denial of FAPE the by the District. The Student must be given a reasonable opportunity by the District to receive the compensatory services ordered by the Hearing Officer.	Ongoing	A copy of the daily log kept by the teacher regarding the compensatory education sessions provided by the District during each term of the school year until all required services have been provided by the District.	Within one week following the end of each semester during which

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	<p>The Student and Parent must make reasonable efforts to receive the compensatory services offered by the District. Therefore, the following procedures shall be followed by the District and the Student and Parent with respect to compensatory education services:(1) it is expected that the Student will attend each day of scheduled compensatory services; (2) if the Student has a valid excuse for not attending a scheduled session, which is compliant with the District's attendance policies, it is expected that the Student and/or the Parent will contact the Student's teacher in advance to cancel the session and the time will be made up by the District, but the Student's absence from a session that is not excused is not required to be made up by the District; (3) if the teacher is required to cancel a scheduled session the time will be made up by the District; (4) it is expected that the Student will be on time for each compensatory education session; (5) if the Student does not arrive on time for a session, the Student and/or the Parent must immediately notify the teacher that the Student will be late; (6) if the Student and/or the Parent fails to notify the teacher that the Student will be late for a session, the teacher will wait for at least 20 minutes following the start time before canceling the session; (7) if prior to, or within 20 minutes of, the start of the session, the Student and/or the Parent notifies the teacher that the Student will be late, the teacher will wait for the Student to arrive and the entire session will be counted as provided; (8) if the Student or the Parent fails to notify</p>			<p>services were provided to the Student.</p>

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	<p>the teacher that the Student will be late prior to, or within 20 minutes following, the scheduled start time, the teacher may leave the session and the time is not required to be made up by the District; (9) the teacher shall keep a log of each compensatory education session and shall note the date, the starting time, the time the Student arrived for the session, the date, time and substance of each communication between the teacher and the Student and/or Parent regarding the Student's attendance, whether any absence by the Student is excused or not excused, and the number of minutes of service time provided to the Student.</p>			

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:



Deborah Dominguez-Clark

Director, Special Education Division