

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2021-11
April 16, 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 January 19, 2021, 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 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 both of the SAT Co-Chairs for the school and the Principal; and
- research of applicable legal authority.

The Complaint in this matter alleges violations of the IDEA against the District with respect to the individual student named in the Complaint, as well as systemic violations of the IDEA against the District. The Complaint Resolution Report in this matter was originally due on or before March 20, 2021. The complaint investigator initially determined to investigate and resolve both the individual and systemic issues in a single report. However, as the investigation progressed it became obvious that providing the vast amount of requested information with respect to the systemic portion of the complaint investigation was very complicated and very time-consuming

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.

for the District. The District twice requested additional time to produce the documentation requested by the complaint investigator. It was then determined by the complaint investigator and the SED to bifurcate the investigation and produce a report regarding the individual student first and then a second report regarding the systemic allegations in the Complaint. An extension of the complaint investigation timeline to April 16, 2021, for the individual student issues was requested by the complaint investigator and agreed to by the SED. The following report involves only the named student.

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

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

1. Whether the District was aware, or suspected, that the Student is a student with a disability and failed to comply with its Child Find obligations under the IDEA by failing to take steps to evaluate and identify the Student, as required by 34 C.F.R. § 300.111 and 6.31.2.10(A) NMAC;
2. Whether the District failed to conduct an initial special education evaluation of the Student in response to Parents' verbal and/or written requests for an evaluation, as required by 34 C.F.R. §§ 300.301 and 6.31.2.10(D) NMAC;
3. Whether the District failed to respond with prior written notice to Parents' verbal and written requests for an initial special education evaluation of the Student, as required by 34 C.F.R. § 300.503 and 6.31.2.10(D)(1)(c)(iv) and 6.31.2.13(D)(2) NMAC;
4. Whether the District failed to provide Notice of Procedural Safeguards to Parents in response to Parents' verbal and/or written initial referral for a special education evaluation, as required by 34 C.F.R. § 300.504(a)(1) and 6.31.2.13(D)(3) NMAC;
5. Whether the District used the Student Assistance Team (SAT) process to delay or deny the provision of a special education evaluation to the Student; and
6. Whether the District's actions and/or omissions resulted in a denial of a free appropriate public education (FAPE) of the Student, as required in 34 CFR §§300.17 and 300.101 and 6.31.2.8 NMAC.

General Findings of Fact

1. The Parents in this matter filed a state complaint against the District on behalf of the Student and all other similarly situated students in the District.
2. The Student is currently seven years old and resides with the Parents within the boundaries of the District. During the 2019/2020 school year the Student attended an elementary school

in the District in the 1st grade. During the current 2020/2021 school year the Student attends an elementary school in the District in the 2nd grade.

3. The Student's 1st grade teacher reports that during the Fall, 2019, he initiated Tier 1 SAT interventions for the Student for reading and writing based on his observations that the Student needed additional time and assistance producing the Student's work and exhibited coding/decoding issues in the classroom. During the 2019 Fall parent/teacher conference, the teacher informed the Parents that he had initiated Tier 1 interventions for the student. The teacher reports that the Parents did not request that the Student be placed in special education or be evaluated for special education services, or that they wanted to bypass the interventions being provided by the teacher.
4. In late February or early March, 2020, the teacher met with the Parents for the Spring parent/teacher conference. The teacher reports that he informed the Parents that the Student was still not performing at grade level and he was submitting information to the SAT to initiate additional interventions. The teacher reports that the Parents agreed with the teacher's plan to continue working with the SAT team for the Student.
5. On March 3, 2020, the Student's teacher referred the Student to the District's Student Assistance Team (SAT) for Tier 2 interventions.
6. On March 5, 2020, the District notified the Parents of, and invited them to, a meeting of the SAT on March 18, 2020, (later rescheduled to March 20, 2020) in order to review existing data and determine if additional support was necessary for the Student.
7. 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.
8. 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 Lujan 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.
9. The Student's teacher reports that after virtual instruction began on April 13, 2020, he attempted to schedule a SAT meeting with the Parents, but they did not respond to his requests. The Parent thereafter informed the teacher that she was working and would be unable to help the Student log into the virtual classroom and would instead be using an online academic program for the Student's education. The teacher reports that the Student did not attend his virtual classroom during Spring, 2020, so Tier 2 interventions were not provided to the Student during the remainder of the 2019/2020 school year. The teacher reports that in his opinion, if the Student had participated in the Tier 2 interventions, he believes that the interventions would have been successful for the Student.
10. The Parents report that they made verbal requests to the Student's teacher for a special education evaluation for the Student during the 2019/2020 school year. The documentation provided by the Parents and the District does not include any documents that support the Parents' claim that they made verbal requests to the Student's teacher and/or other school staff for a special education evaluation for the Student during the 2019/2020 school year. The Student's teacher also reports that the Parents never informed him that the Student had been

previously evaluated for Autism or any other disability and never asked the teacher to test the Student or put an IEP in place for the Student.

11. District records include a Parent Input Form for the 2020/2021 school year obtained from the Parents in the Spring prior to the end of the 2019/2020 school year. This form includes the Parent's statement that the Student "is slow on [the Student's] reading but great in other studies [the Student] has a a (sic) disability. But i have talked with [the Student's] teacher and he works with [the Student's] processing." It was further stated that [the Student] "still needs help with [the Student's] reading [the Student] is behind."
12. District records do not contain any PWNs provided to the Parents by the District regarding a proposal or refusal to evaluate the Student during the 2019/2020 school year.
13. District records do not contain any indication that the District provided the Parents with notice of their procedural safeguards during the 2019/2020 school year.
14. On September 16, 2020, not long after the beginning of the 2020/2021 school year, the school's SAT co-chairs communicated with the Student's 2nd grade teacher regarding the SAT Tier 2 interventions being provided to the Student and the need to collect a data point every two weeks for the first eight weeks. The teacher indicated that she had already begun collecting data points "as I do in case of the need for referring."
15. On September 26, 2020, the Student's teacher emailed the Student's progress report for the trimester to the Parents.
16. District records indicate that since the start of the 2020/2021 school year, the Student's father had expressed to the teacher his frustration with the online learning process, difficulty with the technology and managing the work for the Student. The teacher expressed her concerns to the Parent about the Parents doing too much of the work for the Student, which prevented the teacher from seeing what the Student was able to do. The teacher expressed to the Principal and other staff her concerns about the father's often angry and difficult communications with her.
17. On November 20, 2020, the Student's father spoke to the school clerk and indicated that the Student was having trouble with school because the computer was stressing the Student out and that online school is too hard and was causing anxiety and stress. The Parents were trying to get the Student in to see a psychiatrist, but because of her age they needed a pediatrician to make a referral.
18. District records indicate that at the parent/teacher conference for the Student on November 24, 2020, the teacher informed the Parents that the Student's excessive absenteeism from her one-on-one time was impacting the Student's progress and had prevented the teacher from completing eight weeks of Tier 2 interventions in order to determine whether the Student needed to be tested for special education. The father informed the teacher and the School Principal that Parents had documentation of the Student "being tested and diagnosed with something that would allow [the Student] accommodations." The Principal asked that the Parents send in the paperwork so that the school could move forward with SAT for the Student. The Parents did not provide any previous testing of the Student to the District.
19. The Student's 2nd grade teacher reports that the Parents never asked her for an educational evaluation for the Student. The teacher reports that in her opinion, if the Student had participated in the Tier 2 interventions, she believes that the interventions would have been successful for the Student.

20. The father contacted the school several times, including December 3, 2020, requesting that the school refer him to a Pediatrician so that he could get a referral to a psychiatrist for the Student.
21. On December 4, 2020, and December 7, 2020, the school counselor contacted the father regarding his request for a referral to a pediatrician, and informed the father that she could not recommend a specific pediatrician but that she could refer him to a counselor in the community for on-going counseling for the Student. The school counselor further stated: “[t]o determine if a student can receive special accommodations due to a diagnosis or academic need, the student is discussed in the school’s Student Assistance Team. During that process, interventions and data are measured to determine the scope of support needed.”
22. On December 7, 2020, the teacher sent an email to the father regarding documentation of the Student being tested and diagnosed previously. The teacher again asked the father to send any paperwork so the school “can then look it over and see what we need to do to forward. The SAT team can then determine what other steps we need to take at this point.”
23. On December 7, 2020, the Student’s father replied to the teacher’s email and stated that the “pediatrician said that the school is supposed to evaluate the children before they start school here in New Mexico that is the law.”
24. On December 8, 2020, the School’s SAT co-chair made the following statement in an email to the Student’s teacher in response to the Parent’s statement about the Student needing to be evaluated by the School: “This is not correct. We cannot submit [the Student’s] SAT paperwork until 1) he provides an evaluation or an IEP, or 2) you complete eight weeks of interventions.”
25. On December 10, 2020, at the direction of the school Principal, the school’s SAT co-chair sent an email to the Parent which stated as follows: “We are reaching out to you on behalf of [the school’s] Student Assistance Team (SAT) in regard to [the Student]. As you know, [the Student] was referred to SAT last school year. This year, [the Student’s teacher], is responsible for implementing and documenting eight weeks of targeted interventions before the SAT team can make any further recommendations. This process is in accordance with [District] regulations as defined by the New Mexico Public Education Department. To bypass the eight weeks of intervention and data collection, a parent can refer a child based on a previous evaluation or placement in special education. If you have documentation as mentioned above for a parent referral, sharing it with the SAT team can speed up the process. Otherwise, the targeted interventions should continue until the required data has been collected. This data will allow the team to make informed decisions regarding [the Student’s] educational needs. If you have questions or need additional information about the SAT process, please contact us.”
26. The Parents report that on December 11, 2020, the Student’s father, who the Parents admit is a person with a serious mental illness, attempted to hand-deliver a written request to the Principal of the School to start the process for an IEP for the Student. The Parents report that the Principal refused to accept the Parent’s written request and stated that “this isn’t how it’s done.” The Principal reports that she looked at the document held by the father but did not read it and did not receive it. The Principal reports that she did not ask to read the document held by the Father. The December 11, 2020, written request states, as written by the Parent, as follows: “To whom it may concern: My [the Student] and [the Student’s sibling]

need a IEP done as soon as possible. Because they both are having problem. I have been asking for this sense the beginning of school year, 2020 it was mention to [the Student's], teacher [1st grade teacher] 1 first grade teacher last year and nothing had been done yet. As of 12-11-2020 I am also her to sign any legal papers necessary to get this process started immediately. [/signed/ Parent] 12/11-2020". The Principal reports that the father held his hand-written document in one hand and his cell phone in the other hand and repeatedly asked her to speak with his attorney "about the results." The Principal states that she understood the father was asking for "the results of the Tier 2 interventions" and not an evaluation for the Student.

27. District records do not contain a PWN provided to the Parents regarding the District's refusal to evaluate the Student, or any indication that procedural safeguards were provided to the Parents, in connection with the December 10, 2020, email from the School's SAT co-chair, or the December 11, 2020, written notice from the Parents to the school.
28. On January 8, 2021, the attorney for the Parents delivered a letter to the School Principal regarding a request for special education evaluation and copies of educational records for the Student. This letter made reference to the Student's father's attempt to hand-deliver a written request for evaluation on December 11, 2020. The letter indicates that the Principal refused to accept the letter and stated to the father that "this isn't how it's done." The letter stated that the school had taken no action to initiate an evaluation and further failed to provide the parents with prior written notice or with their procedural safeguards. The letter further stated as follows: "We are therefore requesting that the school system conduct a comprehensive educational evaluation of [the Student] to determine [the Student's] need for special education and related services. If you are refusing the family's request, please provide us prior written notice of your refusal in accordance with federal regulations."
29. On January 8, 2021, soon after receiving the letter from the Parent's attorney, the District's Interim Associate Superintendent of Special Education sent an email to the Parents attorney indicating that the District would be in touch with the school and the department that handles SAT at the Student school to see if a SAT file had been started. The Parent's attorney responded to this email and clarified that the Parents were not asking for a SAT referral but a comprehensive special education evaluation.
30. On January 15, 2021, the District notified the Parents of, and invited them to, a meeting of the SAT on January 21, 2021, in order to review existing data and determine if additional support was necessary for the Student.
31. On January 21, 2021, the District's SAT met with the Parents to discuss the Student's educational needs. The January 21, 2021, Initial SAT Meeting Summary Form provides, in relevant part, as follows:
 - a. Attendance concerns were reported by the Student's teacher indicating that the Student had surgery at the beginning of the school year and continued to miss class sometimes because mother is at work and father has doctor's appointments.
 - b. The Student reads words in isolation but struggles with reading text, and reading fluency is also an area of concern.
 - c. The Parent reported that the Student refuses to write at home, and the teacher reported that the Student will complete writing tasks when the teacher scaffolds writing assignments in class. The teacher did not report written language is an area of concern,

but it was difficult to collect accurate data on the Student's writing due to the Parents' assistance with the Student's assignments.

- d. The report did not indicate concerns with Math, English language, communication, physical health, behavior, attention and interest in school, impulse control, peer relationships and relationships with adults/teachers.
 - e. The report indicates that the next step for the Student is to move the Student to Tier 2.
32. District records include a Classroom Intervention Plan for Tier 2 (R4), which does not appear to be dated. This document indicates that the Student's teacher provided eight weeks of Tier 2 interventions in the area of Reading Fluency starting on September 1, 2020, and ending on January 11, 2021. It was further indicated that the Student is not making adequate grade level gains.
 33. On January 21, 2021, the District's SAT met with the Parents and completed a Follow-Up SAT Meeting Summary Form. This document indicates that "Reading Fluency continues to be an area of concern for both the classroom teacher and the parents." The SAT recommended that the Student "be referred for evaluation at this time due to parent/attorney request." The SAT co-chair reports that this was the first time that she was aware that the Parents were requesting a special education evaluation for the Student. The SAT co-chair reports that she was aware of the January 8, 2021, letter from the Parents' attorney, but she did not read the letter and reports that the Principal told her that the letter was only asking for records.
 34. On January 21, 2021, the SAT co-chair sent a copy of the Procedural Safeguards by email to the Parents.
 35. On January 25, 2021, the SAT obtained a Dyslexia Characteristic Checklist by the Student's teacher and also conducted a Student Observation by the Resource Teacher.
 36. On January 25, 2021, the school Principal signed a Confirmation of Fidelity regarding Tier 1 and Tier 2 interventions.
 37. District records indicate that on January 26, 2021, the District's Educational Diagnostician sent an email to the Parents regarding the evaluation requested by the Parents. The Diagnostician included four documents attached to the email as follows: Parent and Child Rights in Special Education Procedural Safeguards Notice, Special Education Notice to Parents Proposal for Initial Evaluation for Special Education, Special Prior Written Notice Regarding Additional MET Evaluation. During the COVID-19 Pandemic, and a Parent Consent form. This referral indicates that it is based on a "Parent requested initial Educational Diagnostic Evaluation based on parent information."
 38. On January 26, 2021, the parent signed the Consent for Special Education Evaluation for the Student. The evaluations to be conducted were as follows: Educational Evaluation of Learning and Achievement, Observation of Learning Environment, Psychoeducational assessment, Social/Emotional Assessment, Adaptive Behavior Assessment, Speech/Language Evaluation, Fine Motor Assessment, Gross Motor Assessment, and Autism Specific Instruments.
 39. On February 8, 2021, the Parent signed a Consent to Obtain Confidential Information in order to allow the District to obtain the Student's educational and medical records from prior to transferring to the District. These records were received the week of February 15, 2021, and indicate as follows:
 - a. In August, 2016, when the Student was three years of age, the Student received a Behavioral Health Assessment. The Parent reported that the Student was very defiant,

aggressive and demanding and has severe difficulty getting along with the mother and sibling at home and others at school. The Student was diagnosed with Attention-Deficit Hyperactivity Disorder, other type; Conduct Disorder, unspecified; Parent-Biological Child Conflict; and Sibling Rivalry. The Student and Parents received behavior coaching services under a Service Plan to learn coping skills to lessen signs of aggression/temper tantrums and to develop a secure attachment between the Student and the Parent.

- b. On August 22, 2016, the Student's previous district referred the Student for a special education evaluation. The evaluations conducted included: Speech/Language Evaluation, Cognitive, Social/Emotional, Gross Motor, Fine Motor and Adaptive Behavior. The MET Report dated September 7, 2016, indicated that the Student did not have an impairment that adversely impacted the Student's educational performance and did not require specially designed instruction.
40. The District conducted a comprehensive evaluation of the Student beginning on January 26, 2021, and completing it on March 10, 2021.
 41. On March 17, 2021, the District's Eligibility Determination Team (EDT) met to review and discuss the evaluation and other relevant data, and determined that the Student is a student with a disability who is in need of special education services. The Student's eligible disability classification is Developmental Delay (DD).
 42. On March 17, 2021, the Student's IEP team met and developed an IEP for the Student. The March 17, 2021, IEP provides, in relevant part, as follows:
 - a. Annual Goals were developed for the Student in the areas of Language Arts and Career Readiness.
 - b. Special Education Services were provided for the Student as follows:
 - i. Special Education English Language Arts for 240 minutes per week in the special education setting; and
 - ii. SLP services for 240 minutes per month in the special education setting.

Discussion and Conclusions of Law

Issue No. 1

Whether the District was aware, or suspected, that the Student is a student with a disability and failed to comply with its Child Find obligations under the IDEA by failing to take steps to evaluate and identify the Student, as required by 34 C.F.R. § 300.111 and 6.31.2.10(A) NMAC.

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); 6.31.2.7(B)(19) NMAC. The IDEA and its implementing regulations, and state rules, use the term "child find" to describe the

affirmative and continuing obligation of school districts to identify, locate and evaluate all children with disabilities residing within the district's jurisdictional boundaries who are in need of special education and related services. 34 CFR §300.111; 6.31.2.10(A) NMAC.

The requirements of Child Find apply to, among others, students who are suspected of being a student with a disability and who are in need of special education and related services, even though they are advancing from grade to grade. 34 CFR §§300.101(a), 300.111(c)(1); 6.31.2.10(A) NMAC. The obligation to evaluate arises when there is a reason to suspect a disability and reason to suspect that the disability is adversely affecting a child's educational performance so that the child needs special education services. The threshold for "suspicion" is relatively low. The key is not whether the child is actually qualified, but whether the child should be referred for an evaluation. *Department of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Hawaii 2001); *School Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 942 (E.D. Va. 2010). In an opinion from the Ninth Circuit, which is persuasive, if not precedential authority, the court held that a disability is suspected when the district is put on notice that symptoms of disability are displayed by the child. *See Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9th Cir. 2016). Notice may come in the form of expressed parental concerns about a child's symptoms, expressed opinions by informed professionals, or less formal indicators, like the behaviors in and out of the classroom. *Id.* at 1121.

The first issue raised by the Parents is that the District knew, or should have suspected, that the Student was a student with a disability who may be in need of special education services and, therefore, should have referred the Student for an evaluation prior to January, 2021. The District disputes the allegation that it knew, or suspected, that the Student was a student with a disability. It is clear that in the Fall of 2019, the Student's 1st grade teacher became aware that the Student needed additional support in the classroom in reading and writing. The Student was referred to the SAT and Tier 1 interventions were provided for the Student. The teacher reports that at the Spring parent/teacher conference the Parents were supportive of continuing the interventions and did not voice any concerns with the Student's educational progress at that time and did not request an evaluation. There is nothing in the record to dispute this point. The Teacher further informed the Parents that he believed the Student needed additional support and he was referring the Student to the SAT for Tier 2 interventions. There is no indication in the record that the Parents disagreed with continuing the interventions or that the Parents requested an evaluation at that time. The teacher reports that the Parents never informed him that the Student had been evaluated by a previous school in a neighboring state, and there is no indication in the documentation that the Parents did inform the 1st grade teacher about the previous evaluation. The teacher further reports that the Student did not exhibit any unusual or extreme behaviors in his classroom. Due to the school closures ordered by the Governor caused by COVID-19 pandemic safety concerns, Tier 2 interventions were not started by the teacher until after the transition to online learning began in April, 2020. Unfortunately, the interventions did not continue because the Student did not attend the teacher's virtual classroom during the Spring of 2020. The teacher reports that he believed at that time that Tier 2 interventions would have been successful for the Student if he had been able to provide them to the Student. Therefore, it is concluded that during the 2019/2020 school year, the documentation does not support a

conclusion that the District was aware, or should have suspected, that the Student was a student with a disability who was in need of special education services.

The issue as to whether the District complied with its Child Find obligation as to the Student during the 2020/2021 school year is more complicated. Soon after the beginning of the current school year the school's SAT co-chairs communicated with the Student's 2nd grade teacher regarding the provision of Tier 2 interventions for the Student. The Teacher reported that she had already begun providing Tier 2 interventions, but the Student's poor attendance in her one-on-one sessions and her belief that the Parents were doing much of the Student's work, prevented her from determining the effectiveness of the interventions. The teacher reports that the father's communications with her were often very angry and inappropriate. On November 20, 2020, the Student's father informed the school clerk that the Student was struggling with school and was experiencing stress and anxiety due to the difficulty with online learning. The father indicated the family was trying to find a pediatrician who could make a referral for the Student to a psychiatrist. At the Fall parent/teacher conference on November 24, 2020, the Parents informed the teacher and the School Principal that they had documentation of the Student "being tested and diagnosed with something that would allow [the Student] accommodations." The Principal asked that the Parents send in the paperwork. The Parents did not provide any previous testing or diagnoses of the Student to the District at that time. The father contacted the school several times thereafter, including December 3, 2020, requesting that the school refer him to a pediatrician so that he could get a referral to a psychiatrist for the Student.

On December 7, 2020, the teacher again asked the Parents for documentation of the Student being previously tested and diagnosed. The Student's father replied to this email and stated that he had been informed by a pediatrician that the school was supposed to evaluate the Student before school began. On December 8, 2020, the School's SAT co-chair made the following statement in an email to the Student's teacher in response to the Parent's statement about the Student needing to be evaluated by the School: "This is not correct. We cannot submit [the Student's] SAT paperwork until 1) he provides an evaluation or an IEP, or 2) you complete eight weeks of interventions." On December 10, 2020, at the direction of the school Principal, the school's SAT co-chair sent an email to the Parent which stated as follows:

We are reaching out to you on behalf of [the school's] Student Assistance Team (SAT) in regard to [the Student]. As you know, [the Student] was referred to SAT last school year. This year, [the Student's teacher], is responsible for implementing and documenting eight weeks of targeted interventions before the SAT team can make any further recommendations. This process is in accordance with [District] regulations as defined by the New Mexico Public Education Department. **To bypass the eight weeks of intervention and data collection, a parent can refer a child based on a previous evaluation or placement in special education.** If you have documentation as mentioned above for a parent referral, sharing it with the SAT team can speed up the process. Otherwise, the targeted interventions should continue until the required data has been collected. This data will allow the team

to make informed decisions regarding [the Student's] educational needs. If you have questions or need additional information about the SAT process, please contact us.

(Emphasis added.)

On December 11, 2020, the Student's father met with the school Principal at the school. The father reports that he was there to deliver a hand-written request for an IEP for the Student (and the Student's sibling), but the Principal refused to accept his hand-written request and stated "this isn't how it's done." The Principal admits that she saw the hand-written note and saw that it had the names of the Student and the Student's sibling on it, but did not read the rest of the note. The Principal reports that the father did not try to give her the note, and she did not ask the father to give her the note. On January 8, 2021, the attorney for the Parents delivered a letter to the School Principal on behalf of the Parents specifically requesting a special education evaluation and copies of educational records for the Student. This letter made reference to the Student's father's meeting with the Principal on December 11, 2020. The letter stated that the school had taken no action to initiate an evaluation and further failed to provide the parents with prior written notice or with their procedural safeguards. The letter further stated as follows: "We are therefore requesting that the school system conduct a comprehensive educational evaluation of [the Student] to determine [the Student's] need for special education and related services. If you are refusing the family's request, please provide us prior written notice of your refusal in accordance with federal regulations." On January 21, 2021, after meeting with the Parents, the School's SAT referred the Student for a special education evaluation.

The question now at hand is whether the District knew, or suspected, that the Student was a student with a disability and in need of special education services at some point during the Fall of 2020. As indicated in the legal analysis above, the District's obligation to evaluate arises when there is a reason to suspect a disability and reason to suspect that the disability is adversely affecting a child's educational performance, and the threshold for suspicion is low. It is concluded that in view of the facts and circumstances detailed above regarding the Parents' multiple expressions of concern about the Student's symptoms, the Student's struggles with reading and writing, and the fact that the District was informed that the Student had previously been evaluated and diagnosed with a disability, the District should have suspected that the Student had a disability and initiated the process for a special education evaluation no later than December 11, 2020. The District actually obtained the Parents' consent for evaluation on January 26, 2021. Therefore, it is concluded that during the 2020/2021 school year the District was aware, or should have suspected, that the Student is a student with a disability and failed to comply with its Child Find obligations under the IDEA by failing to take steps to evaluate and identify the Student. ***As to Issue No. 1, the District is cited. Corrective action is required.***

Issue No. 2

Whether the District failed to conduct an initial special education evaluation of the Student in response to Parents' verbal and/or written requests for an evaluation, as required by 34 C.F.R. §§ 300.301 and 6.31.2.10(D) NMAC;

The Parents argue in their Complaint that they made verbal requests for a special education evaluation for the Student during the 2019/2020 school year. The documentation provided by the Parents and the District do not mention or provide any indication of such verbal requests. The Student's teacher and school staff uniformly report that the Parents never asked for an evaluation for the Student, and in fact were supportive of the interventions provided to the Student during 1st grade. The facts indicate that the chief complaint made by the Parent to the District was that the Parent and the Student were having problems with the technology that was required for the teacher's virtual classroom. The Student's 1st grade teacher reports that after virtual learning began, he does not recall the Student attending his virtual classroom for the remainder of the 2019/2020 school year. The Parent Input Form filled out by the Parent in May, 2020, also supports the District staff's argument that the Parent was supportive of the teacher's interventions and did not ask for a special education evaluation. It is concluded that the documentation does not support the Parent's claim that they made verbal requests to the District for a special education evaluation for the Student during the 2019/2020 school year.

The Parents further argue in their Complaint that they made verbal and written requests for a special education evaluation for the student during the 2020/2021 year. It is concluded that the facts, as set forth above, support the Parents' claim that they made verbal and written requests for an evaluation for the Student no later than December 11, 2020. During the November 24, 2020, parent/teacher conference, the Student's father informed the teacher and the Principal that the Student had previously been evaluated and diagnosed with a disability that would entitle the Student to accommodations. In the father's December 7, 2020, email to the Student's teacher, the father informed the teacher that the Student's pediatrician told him that the school was supposed to evaluate the Student before the beginning of school. On December 10, 2020, in response to the father's December 7, 2020, email, the school's SAT co-chair incorrectly advised the Student's father that a parent referral required a previous evaluation or placement in special education. The Federal regulations and state rules clearly place no such requirements on the parents' right to refer to their child for a special education evaluation at any time prior to, during, or following the SAT process. Finally, on December 11, 2020, the Student's father met with the Principal and attempted to hand-deliver a request for an IEP for the Student. The complaint investigator does not find credible the Principal's statements that the Parent did not attempt to leave the hand-written request with the Principal, or that the Parent did not verbally request an IEP for the Student. Moreover, in view of the long history of parent complaints to the school regarding the Student, it is not reasonable that the Principal would fail to read the document being proffered by the Parent in order to at least better understand what the Parent was concerned about. The District cannot abrogate its Child Find obligations simply by refusing to accept the Parent's written request for an evaluation or an IEP for the Student. Therefore, it is concluded that the District failed to conduct an initial special education evaluation of the Student in response to Parents' verbal and/or written requests for an evaluation. ***As to Issue No. 2, the District is cited. Corrective action is required.***

Issue No. 3

Whether the District failed to respond with prior written notice to Parents' verbal and written requests for an initial special education evaluation of the Student.

Issues No. 4

Whether the District failed to provide Notice of Procedural Safeguards to Parents in response to Parents' verbal and/or written initial referral for a special education evaluation.

The Federal regulations and State rules provide that a parent may request an initial special education evaluation at any time during the SAT process. If the public agency agrees with the parent that the child may be a child who is eligible for special education services, the public agency must provide prior written notice and evaluate the child. If the public agency declines the parent's request for an evaluation, the public agency must issue prior written notice in accordance with 34 CFR § 300.503. The parent can challenge this decision by requesting a due process hearing. 6.31.2.10(D)(1)(c)(iv) NMAC. Similarly, a copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents upon initial referral or parent request for evaluation. 34 C.F.R. § 300.504(a)(1); 6.31.2.13(D)(3) NMAC. It is important to note that neither the Federal regulations nor the State rules require that the referral, or parental request, for a special education evaluation be in writing.

The complaint investigator has concluded, above, that the District has failed to comply with its Child Find obligations by failing to refer the Student for an evaluation, and also failed to evaluate the Student based on the Parents' verbal and written requests for an evaluation. There is no documentation that the District provided prior written notice, or a copy of the procedural safeguards, to the Parents at any time prior to the filing of the Parents' Complaint. Therefore, it is concluded that the District failed to respond with prior written notice to Parents' verbal and written requests for an initial special education evaluation of the Student. It is further concluded that the District failed to provide Notice of Procedural Safeguards to the Parents in response to the Parents' verbal and/or written initial referral for a special education evaluation. ***As to Issues Nos. 3 and 4, the District is cited. Corrective action is required.***

Issue No. 5

Whether the District used the Student Assistance Team (SAT) process to delay or deny the provision of a special education evaluation to the Student.

The State rules provide that each public agency in the State shall follow a three-tier model of student intervention as a proactive system for early intervention for students who demonstrate a need for educational support for learning as set forth in Subsection D of 6.29.1.9 NMAC. 6.31.2.10(B) NMAC. However, a parent may request an initial special education evaluation at any time during the public agency's implementation of tiers 1 and 2 of the three-tier model of student intervention. If the public agency agrees with the parent that the child may be a child who is eligible for special education services, the public agency must evaluate the child. If the public agency declines the parent's request for an evaluation, the public agency must issue prior written notice in accordance with 34 CFR Sec. 300.503. The parent can challenge this decision by requesting a due process hearing. 6.31.2.10(C)(1)(d) NMAC. Moreover, consistent with the

consent requirement in 34 CFR Sec. 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. 34 CFR §300(b); 6.31.2.10(D)(1)(b) NMAC.

The U.S. Department of Education's Office of Special Education and Rehabilitative Services issued a memorandum dated January 21, 2011, entitled: "A Response to Intervention (RTI) Process Cannot Be Used to delay or deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA)". *Memorandum to State Directors of Special Education OSEP 11-07*, 56 IDELR 50 (OSEP 2011). OSEP references 34 CFR §300.301(b) regarding evaluations, and states that the use of RTI strategies cannot be used to delay or deny a full evaluation. See NMTEAM, <https://webnew.ped.state.nm.us/wp-content/uploads/2018/02/NM-TEAM-Technical-Evaluation-and-Assessment-Manual.pdf> at 29. See also *El Paso Independent School District v. Richard R.*, 567 F. Supp. 2d 918, 941, 947–48 (W.D. Tex. 2008).

The facts set forth above clearly indicate that the School staff continued to utilize the SAT process even after staff were aware that the Parent was requesting an evaluation or an IEP for the Student. This is evident in the emails from the teacher, SAT co-chairs, School Counselor and the Principal. The most egregious evidence of this is in the December 10, 2020, email from the SAT co-chair to the Parent. The SAT co-chair states, correctly, that a parent can refer their child for an evaluation, but incorrectly states that in order to avoid the eight weeks of SAT interventions the referral must be based on a previous evaluation or placement in special education. This is clearly contrary to the Federal regulations and State rules, as set forth above. Therefore, it is concluded that the District's continuation of the SAT process and the failure to initiate a special education evaluation did in fact have the effect of delaying or denying the provision of a special education evaluation to the student. ***As to Issue No. 5, the District is cited. Corrective action is required.***

Issue No. 6

Whether the District's actions and/or omissions resulted in a denial of a free appropriate public education (FAPE) of the Student.

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 *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1125-26 & n.4 (10th Cir. 2008), the court held 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 District failed to comply with its Child Find obligations and failed to evaluate the Student, which are substantive violations of the IDEA. The Complaint Investigator has also concluded that the District failed to provide the Parents with appropriate prior written notice and procedural safeguards regarding the District’s refusal to evaluate the Student, and used the SAT process to delay or deny an evaluation for the Student, which are clearly procedural violations of the IDEA. It is concluded that the procedural violations by the District have impeded the Student's right to a FAPE, significantly impeded the Parents’ opportunity to participate in the decision making process regarding the provision of a FAPE to the Student, and caused a deprivation of educational benefits to the Student. Therefore, it is concluded that the District's procedural failures have resulted in substantive failures by the District and have resulted in a denial of a FAPE. ***As to Issue No. 6, the District is cited. Corrective Action is required.***

Summary of Citations

Statutory and Regulatory Provisions	Citation
34 C.F.R. §300.111 and 6.31.2.10(A) NMAC	The District was aware, or suspected, that the Student is a student with a disability and failed to comply with its Child Find obligations under the IDEA by failing to take steps to evaluate and identify the Student.
34 C.F.R. §§ 300.301 and 6.31.2.10(D) NMAC	The District failed to conduct an initial special education evaluation of the Student in response to Parents’ verbal and/or written requests for an evaluation.
34 C.F.R. § 300.503 and 6.31.2.10(D)(1)(c)(iv) and 6.31.2.13(D)(2) NMAC.	The District failed to respond with prior written notice to Parents’ verbal and written requests for an initial special education evaluation of the Student.
34 C.F.R. § 300.504(a)(1) and 6.31.2.13(D)(3) NMAC.	The District failed to provide Notice of Procedural Safeguards to Parents in response to Parents’ verbal and/or written initial referral for a special education evaluation.
NMTEAM; 34 C.F.R. § 300.301(b).	The District used the Student Assistance Team (SAT) process to delay or deny the provision of a special education evaluation to the Student.
34 CFR §§300.17 and 300.101 and 6.31.2.8 NMAC	The District’s actions and/or omissions resulted in a denial of a free appropriate public education (FAPE) of the Student.

Required Actions and Deadlines

By April 30, 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
CAP Monitor
Special Education Division
New Mexico Public Education Department
120 South Federal Place
Santa Fe, NM 87501
Telephone: (505) 490-3918
Elizabeth.Cassel@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 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 Dr. Cassel.

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 April 30, 2022, and reported to the PED SED no later than May 7, 2022. All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C2021-11**.

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 District is required to provide training regarding the District obligations regarding Child Find, and specifically including: (1) the manner in which District staff become aware,	August 30, 2021	A copy of the name and qualifications of the independent expert to provide the training, as well as the proposed agenda for the training, for approval by SED.	July 15, 2021

	<p>or suspected, that a student is a student with a disability who needs an evaluation; (2) the federal and state requirements that the SAT process not be used to delay evaluations; (3) the different ways that a parent may request an evaluation; (4) the requirements for issuing a Prior Written Notice in response to parental request for evaluation, (5) the requirement for issuing a Notice of Procedural Safeguards in response to parental requests for initial evaluation; and (6) how to maintain documentation of parent requests and provision of Prior Written Notice and Notice of Procedural Safeguards.</p> <p>This training shall be provided to school staff and administrators at the Student’s school, including the SAT and special education personnel assigned to the school, as well as District level special education staff and administrators.</p> <p>This training shall be provided by an independent expert to be approved by the SED.</p> <p>An agenda for the training shall be approved by the SED.</p>		<p>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).</p> <p>An attendance list signed by each person who attended the training(s).</p> <p>A copy of a recording of the training presented to District staff.</p>	<p>July 31, 2021</p> <p>Sept. 7, 2021</p> <p>Sept. 7, 2021</p>
<p>[2]</p>	<p>The District is required to provide compensatory education to the Student as follows: (1) the Student will be provided with 28 hours of Special Education English Language Arts; and (2) the Student will be provided with seven hours of SLP services.</p> <p>The Student’s IEP team must meet within two weeks to discuss and agree upon a schedule for providing the compensatory education service</p>	<p>Sept. 3, 2021</p> <p>April 30, 2021</p>	<p>IEP documentation for the Student indicating the IEP team discussion and provision of compensatory education, and the compensatory education plan for the Student.</p> <p>Documentation of the provision of the compensatory education to the Student whether provided by the District or another agency/person.</p>	<p>May 7, 2021</p> <p>Sept. 10, 2021</p>

	hours. The plan for compensatory education must include the parent's input, including regarding the timing and method of delivery of the compensatory education service.			
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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