

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2021-16
July 23, 2021**

This report requires corrective action. See page 10.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on May 26, 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 C.F.R. § 300.152(a)(5) and 6.31.2.13(H)(5)(b) NMAC.

Conduct of the Complaint Investigation

The PED'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 investigator;
- review of the District's compliance with federal IDEA regulations and state NMAC rules;
- telephonic interviews with the County Attorney, Guardian ad Litem (GAL), County Administrator for Government Relations, Special Education Director and Attorney for the District; and
- research of applicable legal authority.

¹ The 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); 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 implement the Individualized Education Program (IEP) for Student by not providing special education and related services after March 31, 2021, when Student was transferred to a detention facility, in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B) NMAC;
2. Whether the District failed to conduct an IEP meeting to discuss change of placement at the time that Student was transferred to a detention facility and failed to provide other procedural safeguards including a prior written notice to Student and Guardian ad Litem in violation of 34 C.F.R. § 300.503 and NMAC 6.31.2.13 (D); and
3. Whether the District's actions and/or omissions towards Student resulted in a denial of a free appropriate public education (FAPE) to the Student in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

Introduction

Initially, in their response, the District asserted that the GAL could not file a complaint on behalf of Student. Anyone can file a State complaint as long as the complaint satisfied the requirements set out in 34 C.F.R. § 300.153(b). The complaint filed by the GAL was a valid complaint.

When the District failed to provide any of the information requested by the investigator, repeated contacts were attempted with District personnel and attorney. Finally, contact was made with the District's attorney, who reported that the District never received the acknowledgement letter. Although email notification indicated the letter had been received, a copy of the acknowledgement letter was provided to the District's attorney and an extension of time was granted to submit requested information.

General Findings of Fact

1. At the time of the filing of the complaint, Student was eighteen years old and eligible for special education services under the eligibility categories of autism and speech-language impairment.
2. Student was detained in a county detention center on a pending criminal charge and would likely be detained there throughout the time period of this complaint.
3. The transition plan for student was to graduate in May, 2022, with a standard diploma, therefore, student continued to be eligible for special education services until Student graduated or aged out.
4. The detention center, where Student was detained, was not a state-run facility, but was operated by the local county (County).
5. Prior to Student's detention in the County Detention Center, Student's special education services had been provided in a self-contained classroom at a rehabilitation center within another school district.
6. From there, the Court ordered on March 31, 2021, that Student be transferred to the County Detention Center because of serious criminal charges in County.
7. Student has no parents to assist the Student, but has a court appointed GAL to assist the defense attorneys.
8. The GAL did not provide educational records to or contact the local school district but was working with the County officials including the County attorney and administrator to obtain special education services for Student.
9. The GAL did contact the County Detention Center about provision of services for Student.
10. The County Administrator contacted the Administrator for Government Relations (AGR) about this Student in a May 5, 2021 telephone call.
11. The AGR attempted to contact various District officials including the special education director beginning on May 6, 2021.
12. After repeated voice mails left for the special education director, the AGR was able to speak to the special education director's administrative assistant on May 7, 2021. In that conversation, the AGR informed the district that Student was special education eligible and was housed in the County Detention Center. The assistant informed the AGR that she would let the special education director know about the Student on Monday, May 10, 2021.
13. The AGR spoke with the special education director and informed her on Monday May 10, 2021 that Student has autism, was special education eligible, and was detained in the County Detention Center.
14. The AGR said the County was ready to assist the District and would even pay for a teacher if

needed.

15. The AGR again spoke with the special education director on May 12, 2021 when the special education director informed the AGR that they had no one available who wanted to work with Student. She also suggested that the AGR follow up with her on June 30, 2021.
16. The Complaint was filed by the GAL on behalf of the Student.
17. Student has not been enrolled in District schools, nor is Student able to go to the school to enroll.
18. The District does not have a plan or procedure about how special education eligible students detained in County detention facilities would be identified and served.
19. The previous facility for Student did not provide notice or records to the local District.
20. The District asserted that they were not aware that a special education eligible student was incarcerated in their County until the day the Complaint was filed.
21. In a conversation on May 19, 2021, between the AGR and the special education director, the director informed the AGR that she would share the name of the teacher that would provide services once a teacher was determined.
22. That was the last contact the AGR had with the District.
23. The District has not contacted Student, County officials, or the GAL about services for this Student.
24. The attorney for the District asserted that the District did not know that Student was a resident of the District until the Complaint was filed. She also reported that the District did not receive the Acknowledgement letter of June 2, 2021.
25. The District was notified of Student's presence in their district when the Complaint was filed by email on May 26, 2021; they also received the acknowledgement letter from the NMPED by email on June 2, 2021. Email notices verified receipt.
26. The District has also asserted that they are not responsible to provide services to Student until Student enrolled in District.
27. The special education director acknowledged during the interview that she was not really sure what to do because this was the first time a special education eligible student was incarcerated in the County Detention Center. She was waiting until she was told who to contact or whether the County hired a teacher to provide services.
28. The District's written response stated they could not be expected to provide services to a Student they did not know about; they were, however, ready to meet to discuss how to provide special education services to Student.
29. Copies of emails indicated that contact regarding Student's educational needs and services was between the GAL, the County Detention Center, the County Attorney, and the County Manager, but did not include the District.
30. The District did not complete any child find services to find and identify this Student who was eligible for special education services.

31. The last IEP for Student, dated October 7, 2020, provided for 30 hours per week of special education services including speech language and social work services.
32. Student has not received any special education services since his transfer to the County Detention Center, and no IEP meeting has been convened.
33. The last day of school for the 20-21 school year for students in the District was May 27, 2021.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to implement the Individualized Education Program (IEP) for Student by not providing special education and related services after March 31, 2021, when Student was transferred to a detention facility in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B) NMAC.

Student was eligible for special education services at the time Student was transferred through Court order to the County Detention Center. 34 C.F.R §§ 300.320-300.328; 6.31.2.11(B) NMAC. When the detention facility is not operated by the State, the local school district is responsible for providing special education services to incarcerated students. 6.31.2.11(K)(6) NMAC. Therefore, the District was responsible for the provision of special education services for this Student. 34 C.F.R §§ 300.320-300.328; 6.31.2.11(B) NMAC.

The District had multiple explanations for why this Student was not provided services after March 31, 2021, the date of arrival at the County Detention Center. The first explanation was they were not aware of Student's existence until the filing of the Complaint. The District knew that this special education eligible Student was at the County Detention Center at least by May 7, 2021. The second explanation was the Student had not enrolled in the District so the intrastate transfer rules do not apply. Student was an adult, did not have parents, a guardian, or surrogate parents to assist with the enrollment process. Also, because Student was incarcerated, Student was limited in phone calls and could not go to the District offices to enroll. The third explanation was that child find did not apply because Student was already eligible for services and those services would be provided after Student enrolled. Another explanation was that the District was not sure who was responsible for making educational decisions for this Student. The final explanation was that the District had never had a situation like this before and were not sure what to do so they waited. None of these explanations relieve the District of the obligation to provide special education services to this Student.

The District knew at least by May 7, 2021 that this Student was entitled to special education services from the District. Child find is not limited to young children nor does the obligation cease

once a child is determined eligible. The District continued to have a child find obligation. 34 C.F.R. § 300.111(a)(1)(i). The District had an ongoing, affirmative obligation to seek out those children within their district that are in need of special education services. 34 C.F.R. § 300.111(b). By May 7, 2021, if not sooner, the District should have taken the necessary steps to ensure this student received services. If the District had an agreement with the County to be informed about detained students, this Student could have been receiving services since March 31, 2021. The District on May 12, 2021, informed County officials that they were having difficulty finding a teacher who would work with student. Although this may have been the first special education student that was detained at the County Detention Center, the District had a child find obligation to develop a plan to be informed about possible special education students detained within their District, including at the adult detention facility located within the District, and to ensure that a student in that situation receives the special education services to which they are entitled. The District did not have any such plan. It is not the obligation of the Student or GAL to inform the District, it is the obligation of the District to seek out such students or have a plan in place to ensure the District is notified so appropriate services can be provided in a timely manner.

Moreover, the District's explanation that a transfer Student is not entitled to special education services until the Student is enrolled is self-serving and incorrect as it ignores the child-find obligations of the District. Student was an adult and incarcerated, and there are obvious barriers to the Student's ability to enroll. Once District knew of Student's existence, it could have made arrangements to have Student enrolled and implemented the IEP. Instead, the District did nothing.

Student was detained in the County facility beginning March 31, 2021, and has not received any special education services for approximately two months before the end of the 2020-2021 school year. This was a procedural violation of part B of IDEA.

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

Issue No. 2.

Whether the District failed to conduct an IEP meeting to discuss change of placement at the time Student was transferred to a detention facility and failed to provide other procedural safeguards including a prior written notice to Student and Guardian ad Litem in violation of 34 C.F.R. § 300.503 and NMAC 6.31.2.13 (D).

The District failed to conduct an IEP meeting regarding change of placement or provide a prior written notice (PWN), NMAC 6.31.2.13(D). Once the Court ordered the transfer to the County

Detention Center, that constituted a change of placement. The District was aware by May 7, 2021, that this Student was eligible for special education services, yet has not had an IEP meeting or provided any special education services to this Student. While there are challenges to scheduling an IEP meeting and/or providing services because this Student was detained, the District has not made any attempts to serve this Student since becoming aware that the Student was in their District. When a student with an IEP transfers to a new district within the State, the District must provide a FAPE to the student and provide services comparable to that in the existing IEP until the District adopts the IEP from the previous school or develops a new IEP. 34 C.F.R. § 300.323(e); 6.31.2.11(H)(1) NMAC. Procedural safeguards provide for a PWN anytime the district proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of FAPE. 34 C.F.R. § 300.503(a); 6.31.2.13(D)(2) NMAC. As of yet, there has been no action by the District requiring a PWN. The failure to hold an IEP meeting, however, was a procedural violation of Part B of IDEA.

As to Issue No. 2, the District is cited. Corrective Action is required.

Issue No. 3

Whether the District's actions and/or omissions towards Student resulted in a denial of a free appropriate public education (FAPE) to the Student in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

Students who are eligible for special education services are entitled to a FAPE. 34 C.F.R. § 300.101; 6.31.2.8 NMAC. Districts are obligated to provide a FAPE to students within their jurisdiction who have been determined eligible for special education services. 34 C.F.R. § 300.17. The type of services to be provided are determined by the IEP team. 34 C.F.R. § 300.320. The educational program for a student must be one that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County School District. RE-I*, 137 S.Ct. 988 (2017).

Student was deprived of special education services for almost two months, even though District was aware of Student, but was unable to find a teacher. The Student could not make progress if no services were provided. There was substantive denial of FAPE on this record when considering all the circumstances.

There was also procedural denials in this matter. The court in *J.L. v. Mercer Island School District*, 592 F3d 938, 951 (9th Cir. 2010), held that a procedural violation may be a denial of FAPE when it results in the loss of an educational opportunity, infringes on parents' opportunity to participate

in the development of the IEP or deprives the student of an educational benefit. *Id.* at 953. Failing to meet the child find obligation may be a denial of FAPE. See *T.B. v. Prince George's County Board of Education*, 897 F.3d 566 (4th Cir. 2018). Compensatory education from the time the district should have suspected the disability may be awarded for a denial of FAPE because of a child find violation. *Id.* Also, the more than two-month delay in the provision of services is the loss of an educational opportunity. These were procedural violations that rose to the level of a denial of FAPE.

As to Issue No.3, the District is cited. Corrective Action is required.

Summary of Citations

Statutory and Regulatory Provisions	Citation
34 CFR §§300.320-300.328; 6.31.2.11(B) NMAC	The District failed to implement the Individualized Education Program (IEP) for Student by not providing special education and related services after March 31, 2021, when Student was transferred to a detention facility.
34 CFR §300.101; 6.31.2.8 NMAC	The District failed to conduct an IEP meeting to discuss change of placement at the time Student was transferred to another detention facility and failed to provide other procedural safeguards to Student and Guardian ad Litem.
34 C.F.R. § 300.101; 6.31.2.8 NMAC.	The District's actions and/or omissions towards Student resulted in a denial of a free appropriate public education (FAPE) to the Student

Required Actions and Deadlines

By August 23, 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:

Dr. Elizabeth Cassel
Corrective Action Plan Monitor
Special Education Division
New Mexico Public Education Department
300 Don Gaspar
Santa Fe, NM 87501
Telephone: (505) 490-3918
Elizabeth.Cassel@state.nm.us

Dr. Cassel is assigned to monitor the District's progress with the Corrective Action Plan and to be the point of contact about this complaint and the implementation of the Corrective Action Plan.

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.

Please carefully read the entire CAP before beginning implementation. One or more steps may require action(s) in overlapping timeframes. All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C2021-16**, and submitted electronically to Dr. Cassel.

All corrective action must be completed no later than July 23, 2021, and reported to the PED SED no later than July 31, 2022.

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 will hold an IEP meeting for Student as soon as possible to determine the appropriate services for Student and implement those services.	August 9, 2021	The District will provide a copy of the new IEP, PWN, plan for implementation of IEP, and other relevant documents to the SED.	August 16, 2021
2.	<p>The District will provide 240 hours of compensatory education to Student for the services missed between March 31, 2021 until May 27, 2021, the end of the 20-21 school year. These compensatory services are above and beyond those required in the new IEP to be developed for the 21-22 school year.</p> <p>A plan to provide the compensatory education services must be determined by the IEP team, including Student and his GAL, at the IEP meeting required in Step 1 above. If Student is incarcerated in another facility not within the jurisdiction of the District, the District has a continuing responsibility to ensure Student receives all the compensatory education services</p>	<p>July 20, 2022</p> <p>August 9, 2021</p>	<p>Documentation, including logs, progress reports, and other information about services provided to Student shall be provided on an interim basis through July 20, 2022.</p> <p>The written plan for the provision of compensatory education to Student.</p>	<p>Interim submission every 9 week SY reporting period, with final submission on August 1, 2022</p> <p>August 16, 2021</p>

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>
4.	The District will ensure that the policies and procedures amended/developed in Step 3 are posted on its website and distributed to detention facilities within its geographic jurisdiction.	October 15, 2021	Written notification that the District has posted the policies and procedures on its website and distributed its policies and procedures to all detention facilities within its geographic jurisdiction.	October 29, 2021
5.	The District must communicate and meet with the appropriate County officials to advise them of the new District policies and to determine whether a Memorandum of Understanding (MOU) is needed with the County to ensure that the policies and procedures can be implemented and make arrangement for students with disabilities, including Student, receive the special education required by their IEPs while in the County Detention Center. The District shall develop the arrangements and MOU necessary for this purpose.	October 15, 2021	Documentation of meetings with County and agreements reached regarding provision of special education services to eligible students in County Detention Center.	October 29, 2021

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


Investigated by:

/s/ Michelle K. Bennett
Michele K. Bennett, Esq.
Complaint Investigator

Reviewed by:

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

Reviewed and approved by:


Deborah Dominguez-Clark
Director, Special Education Division