

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2021-18
August 27, 2021**

This report requires corrective action. See page 18.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on June 28, 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 complaint investigator's investigation process in this matter involved the following:

- review of the complaint and supporting documentation from complainant;
- review of the information provided by the District at the request of the PED's independent complaint investigator after the interview was completed;
- review of the District's compliance with federal IDEA regulations and state NMAC rules;
- telephonic interviews with the Parent and Attorney, the District's Assistant Superintendent for Instructional Programs, Special Education Teacher, Director of Elementary Special Services, Director of Special Services, and District's Attorney; 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 IEP in effect for the 20-21 school year while student was receiving at home services due to the COVID pandemic in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B) NMAC;
2. Whether the District failed to convene an IEP meeting to determine if additional accommodations or services were needed because student refused to wear a mask and had inappropriate behaviors and was returned to virtual educational services in violation of 34 C.F.R. § 300.324 (a)(2); 34 CFR § 300.324 (b)(2); 6.31.2.11 (F) NMAC;
3. Whether the District failed to monitor student's progress and provided progress notes to parent to determine whether recovery services were warranted while student was receiving educational services through a virtual hybrid format during the COVID pandemic in violation of 34 C.F.R. § 300.320 (c) (2); 6.31.2.13 (D) NMAC;
4. Whether the District failed to provide the parent with a copy of student's educational records after receiving a written request for such records in violation of 34 C.F.R. § 99.10; 6.31.2.13(B) NMAC;
5. Whether the actions or omissions of the District resulted in a denial of a free appropriate public education (FAPE) for student in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC?

Introduction

In the July 6, 2021 acknowledgement letter sent to the District and Attorney by email, the complaint investigator requested that the District provide a number of documents by July 16, 2021. The District did not submit any documents to the complaint investigator, and did not make any contacts with the complaint investigator about the requested information by July 16, 2021. On July 23, 2021, the complaint investigator contacted the District's attorney to inquire about the documents and schedule interviews. The attorney responded that the District was to

send that information. The attorney requested an opportunity to contact the District and send the information later. Since the District exceeded the deadline by seven days for submission of documents and a response, the complaint investigator declined submission of the late information, but provided the District an opportunity for interviews of staff. See 34 C.F.R. § 300.211 (“The LEA must provide the SEA with information necessary to enable the SEA to carry out its duties under Part B of the Act, including, with respect to §§ 300.157 and 300.160, information relating to the performance of children with disabilities participating in programs carried out under Part B of the Act”). Some documents were provided after the interviews, including the IEP that was in effect for the 2020-2021 school year.

General Findings of Fact

1. School started on September 14, 2020 and ended May 27, 2021 with 175 days of instruction.
2. Student was eight years old and had just completed second grade at the time the complaint was filed.
3. Student is special education eligible under the category of developmental disability and has been receiving special education and related services at District schools since 2018.
4. Student demonstrated significant needs in the area of receptive and expressive language, reading, written language, social/emotional skills, and fine motor skills.
5. The IEP in effect for Student for the majority of the 2020-2021 school year was developed at an IEP meeting on March 2, 2020.
6. This IEP noted that Student’s articulation skills were quite low, and intelligibility with unfamiliar people and unknown topics was limited.
7. Student was unable to count to twenty, identify upper and lower case letters, write name or cut, or color without assistance.
8. According to the IEP, Student had difficulty staying on task, was very active, and did not respect boundaries.
9. In the March 2, 2020 IEP, Student was to receive 18.5 hours of special education and related services per week: 330 minutes per week for written language, 390 minutes per week for reading, 300 minutes per week for math, 60 minutes per week for speech, and 30 minutes per week for occupational therapy services.
10. At the start of the 2020-2021 school year, students were receiving special education and related services remotely because of the COVID pandemic; the District was experiencing a high incidence of COVID cases.
11. The District was in a rural area with limited internet access or reliability. To address these concerns, the District provided buses with hot spots where students could come and access the hot spots for their tablets and iPads.

12. At the start of the 2020-2021 school year, Student did not have a table or iPad provided by the school.
13. The family had sporadic, limited internet capabilities and the hot spot on the bus was not a viable option for the family.
14. Many of the students in District had limited or no internet access so educational packets were prepared by the regular education teacher and specialists to send home to students.
15. Biweekly, Parent came to the school to pick up educational packets for Student to receive educational services.
16. No examples of the educational packets were provided to the investigator, but the Parent reported that the packets were not at Student's level, but were grade level materials.
17. The occupational therapist (OT) would include materials in the educational packets that went home to Student.
18. Parent reported there were no instructions or guidance included in the packets to assist Parent in helping Student complete the packets.
19. Parent reported that Student completed and turned in packets but feedback on the work was not provided; Parent was not sure if they were graded.
20. Parent attempted to contact the special education teacher and/or principal by telephone every two weeks to discuss the issues with the packets.
21. No one in the District returned a call regarding Parent's request for assistance.
22. When the packets were completed, Parent would try to return the packets or ask for assistance; the response was do not worry about, here is the new packet.
23. The OT in logs noted attempts to contact Parent by email to inquire about Student's welfare.
24. There was no email address for Parent on record at District, but the OT logs noted repeated attempts to contact Parent by email; on one occasion, the OT made a telephone call to Parent, but the call was disconnected before OT could talk to Parent.
25. The OT did not receive any of the materials sent to Student in the packets. When the OT contacted the special education teacher in December 2020, the teacher reported that she had not received any completed packets for the quarter.
26. The speech clinician's logs indicated that services were provided only one time on September 17, 2020 during the 2020-2021 school year. The clinician provided material for the packets once and never attempted other means to provide services to Student.
27. The special education teacher stated that Student was provided packets every two weeks but no completed packets were returned.
28. Neither the special education teacher nor the administration reached out to the Parent to determine the reason packets had not been returned or to discuss other options to

ensure Student was receiving educational services.

29. In February, 2021, Student began receiving services at school.
30. After only two days, the District sent Student home with Parent because Student would not wear a mask, would lie under the table or misbehave.
31. The District contacted Parent and told Parent that Student could not be in school anymore because Student would not wear a mask.
32. The District indicated that it was a violation of their code of conduct if students did not wear masks they could not stay at school.
33. The NMPED Re-entry Guidance stated that “all students must wear masks at all times, with exceptions for those who are documented that it is not safe to do so because of age, medical condition, disability impact or other and health or safety considerations.”
34. The Public Health Order required mask wearing for all people, symptomatic or asymptomatic, because people do not know they have the COVID-19 virus.
35. The District removed Student from school for more than ten days because of violation of the code of conduct provision related to masks. The District did not conduct a manifestation determination or IEP meeting to address Student’s inability or refusal to wear a mask or other conduct, to determine whether Student’s conduct was a manifestation of his disability, or how Student would receive educational services.
36. From February to the end of the school year, Student went back to receiving educational services through packets.
37. Parent had the same issues with the packets as in the Fall and made repeated calls to District personnel, but the school personnel did not respond.
38. At some point during the second semester, Student received a tablet but Parent was not sure how to use it; the family had limited internet access which prevented use of the tablet for virtual classes or educational services.
39. A new IEP was developed for Student at a meeting on March 26, 2021 which Parent attended. The amount of special education and related services was reduced from 18.5 hours per week to 12.5 hours per week. There was no explanation on the IEP about why the amount of services were reduced.
40. On the March 26, 2021 IEP, it was noted in the present levels of performance that the results from the I-station tests that Student completed at home were in doubt because there was concern that someone else had completed the work.
41. Neither the District nor the parent sought additional evaluations.
42. Parent purchased materials to assist Student in academic areas since Student was unable to complete the learning packets.
43. In April, 2021, Parent consulted with a doctor and provided the District with a letter from the doctor which noted that Student needed to return to school. The letter suggested ideas on how to get Student to wear mask at school.

44. The District informed the Parent that a meeting would be scheduled to discuss the letter and Student returning to school. The District did not convene any meeting.
45. On April 22, 2021, Parent's advocate submitted a written request to the District by mail and facsimile seeking all educational records for Student from the 2019 school year to the present.
46. On May 3, 2021, the District provided an 82-page document to Parent's attorney. This document did not include all of Student's educational records.
47. The records provided by the District included: the March 26, 2021 IEP; the March 2019 assistive technology assessment; the initial occupational therapy evaluation; the psychoeducational evaluation; the September 2018 speech language evaluation, and board policy.
48. The OT logs indicated that Student had four sessions during the second semester. The speech clinician did not have any sessions with Student during the second semester.
49. The special education teacher was not sure of Student's academic performance and abilities because little to no work had been completed all year and the assessments were suspect.
50. The special education teacher reported that Student had made progress and was promoted, but there was no data provided as the basis for that progress nor were progress notes sent to Parent during the 2020-2021 school year.
51. Student's report card indicated unsatisfactory progress, but Student was promoted to the next grade.
52. Student attended in person summer school classes eleven out of the seventeen days, three days a week.
53. Student wore a mask, and did well working one-on-one with a teacher during summer services.
54. These summer services were provided to all students because of the difficulties with educational services for many students during the pandemic.
55. A review of the logs from summer services indicated that Student was working on the goals on the March 26, 2021 IEP and was making some progress. Extended school year services were not recommended on the March 26, 2021 IEP.
56. The March 2, 2020 IEP and other information was never provided to the Parent or attorney until requested by the complaint investigator and forwarded to the Parent's attorney.
57. Student was not assessed to determine if Student needed recovery services for the lack of educational services during the 2020-2021 school year.
58. Student's three-year reevaluation is due in September 2021; consent has not yet been obtained.
59. All students will be assessed at the start of the 2021-2022 school year to determine level

of progress for last year.

Discussion and Conclusions of Law

School was closed by the Governor of New Mexico for the majority of the 2019-2020 school year. On March 11, 2020, the Governor of New Mexico declared a public health emergency regarding the COVID-19 pandemic. After declaring the public health emergency, the Governor ordered all public schools to close from March 16, 2020 to April 6, 2020. On March 26, 2020, the Governor ordered all public schools to provide remote instruction to all students for the remainder of the 2019-2020 school year because of the increase in COVID-19 cases. The District, because of a large incidence of COVID-19 cases continued to provide services remotely for some students during the 2020-2021 school year.

The US Department of Education has released several documents, including *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* on March 12, 2020; *Fact Sheet: Addressing the Risk of COVID-19 Schools While Protecting the Civil Rights of Students*, on March 16, 2020; *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* on March 21, 2020. These documents clarified that all provisions of the IDEA remained in force and further emphasized that when a school district provides educational services to all students, the school district “must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP.” *Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease Outbreak*, 76 IDELR 77 (OSERS 2020).

The PED also released various documents to assist and support school districts and charter schools as they dealt with the mandated school closures. In the *Implementation Guide for Your Continuous Learning Plan (Guide)*, special education services were addressed. The Guide provides in part:

- “Special education teachers and related service providers will continue to work on IEP and evaluation paperwork within required timelines.” p. 20.
- “Instructional Education Plans (IEPs) may NOT be universally modified.” p. 4.
- “LEAs must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP.” p. 21.

- “The IEP team will need to discuss and document within the IEP or an addendum the agreed upon alternative plan for providing the requisite special education and related services to those students through Prior Written Notice (PWN).” p. 21.
- “Any decisions regarding special education and related services for an individual child should be made by the child’s IEP Team, and should not be based on diagnoses, eligibility categories, or blanket policies.” (Emphasis original). p. 21.

The PED also released documents specifically related to the provision of special education for students with disabilities during the pandemic. On April 2, 2020, the PED issued *Frequently Asked Questions (FAQ): Providing a Free Appropriate Public Education (FAPE) through a Distance Learning Platform during a Closure to Normal School Operations due to the Coronavirus (COVID-19) Pandemic 2020*, to provide guidance to schools and districts on special education.

In July 2020, the PED issued a *Guidance for Special Education Services Reentry Guidance*, which provided in part:

- “As the schools’ service delivery models change, the schools must then ensure the student’s IEP remains appropriate and can be implemented as written. If the IEP cannot be implemented as written, then the schools will need to convene the IEP team and revise the IEP or amend the IEP without a meeting with permission and input from the parents. This continues the process that the school followed in the initial move from face-to-face instruction to complete virtual and/or distance learning.”
- The PED also provided guidance and support on the wearing of masks by all students. That guidance provides that as a general rule, mask wearing for all Students has been required at all times. However, the guidance recognizes the need to consider accommodations and other supports for students with disabilities who cannot wear masks. “For students who cannot wear a face mask and have an Individualized Education Plan (IEP) or a 504 Plan, the IEP team or 504 committee should meet to make a determination about possible accommodations based on the totality of needs, including the student’s needs and the community’s public health needs.” Furthermore, “when a student with an IEP or 504 Plan cannot wear a face mask due to a behavioral issue, then the IEP team or 504 committee should convene to develop a fully remote learning option and a plan for teaching the student to wear a face covering so the student may return to in-person learning as soon as possible.” See, e.g., *Covid-19 Response Toolkit for New Mexico’s Public Schools*, https://webnew.ped.state.nm.us/wp-content/uploads/2021/04/4.20.21_NMPED_COVID19ResponseToolkit_PublicSch042021_PublicVersion.pdf, pp.13-14.

See, e.g., *Covid-19 Response Toolkit for New Mexico Public Schools*, https://webnew.ped.state.nm.us/wp-content/uploads/2021/04/4.20.21_NMPED_COVID19ResponseToolkit_PublicSch042021_PublicVersion.pdf

Issue No. 1

Whether the District failed to implement the IEP in effect for the 2020-2021 school year while student was receiving at home services due to the COVID pandemic in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B) NMAC?

The IDEA is meant to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) designed to meet their unique needs. FAPE is administered through an IEP developed by the IEP team and implemented by the district. The IEP must be “reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas County School District Re-1*, 137 S. Ct. 988, 994 (2017). See also 34 C.F.R. §§ 300.320 - 300.324. Students with disabilities are students evaluated “as having [specified disabilities] which adversely affects educational performance, and who, because of those disabilities, need special education or special education and related services.” 6.31.2.10(D) and 6.31.2.11(B) NMAC; see also 34 C.F.R. § 300.8(a)(1). The IDEA mandates that districts are obligated to provide specially designed instruction, provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability. 34 C.F.R. § 300.39(a)(1). Specially designed instruction is adapting, as needed the content, methodology or delivery of instruction catered to the student’s unique needs to allow that student access to the general curriculum and make progress. 34 C.F.R. § 300.39(b)(3). A student’s unique needs are more than just mastery of academic subjects but may include social, health, emotional, physical, and vocational needs of eligible students. *County of San Diego v. California Special Education Hearing Office*, 93 F.3d 1458 (9th Cir. 1996).

The IEP must be implemented as written, including all required components. See 34 C.F.R. § 300.323(c). It is well established that failure to implement material parts of the IEP, however, may be considered a denial of FAPE. See *Sumter County School District 17 v. Heffernan*, 642 F.3d 478(4th Cir. 2011); *Van Duyn v. Baker School District 5J*, 502 F.3d 811 (9th Cir. 2007); *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), cert. denied, 531 U.S. 817 (2000); *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003). A five-month delay in the implementation of the IEP was a denial of FAPE. *Turner v. District of Columbia*, 61 IDELR 126 (D.D.C. 2013). Failing to provide needed supports and services can be denial of FAPE. *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016). It is the responsibility of the school district

to meet and revise a student's IEP, "as appropriate, to address any lack of expected progress." In *Questions and Answers on Andrew F. v. Douglas County School District Re-1*, 71 IDELR 68 ((EDU 2017)).

This record is replete with examples where this Student was deprived of educational services from the District. For the entire 2020-2021 school year, this Student, who had significant needs, requiring 18.5 hours of special education and related services per week, was provided limited educational services. The IEP was not implemented; student did not receive the services outlined in the IEP except through packets which Parent reported were at grade level when Student's educational performance was at a pre-K level. Parent contacted the local school every two weeks to ask for assistance with the educational packets and expressed concerns that Student was not receiving an education. District personnel never returned calls or reached out to ascertain why Student was not completing and returning the packets. They never convened an IEP meeting to revise the IEP when Student was not making progress.

While this was a rural district with limited internet availability and a high incidence of COVID cases, that does not relieve the District of the obligation to educate students. Packets may have been the way the District decided to provide special education and related services in this rural area. The District had an obligation, however, to ensure that the use of packets was an effective way for Student to receive an education. Many students in the District, including Student, had limited or no internet access, therefore, it was imperative that the District ensure that the packets were being received, completed, returned and graded to monitor all students' progress and make modifications to the IEP if the students were struggling with the content or methodology. The occupational therapist (OT) tried to ascertain how the Student was doing by attempting to send emails to Parent. Since the District did not have a reliable email for Parent, there was no email contact with this family. The OT followed up with the special education teacher about how the Student was doing and completion of the packets; the teacher reported that Student did not turn in any packets second quarter. Neither the teacher nor OT made further contact with family. Student received speech services one time during the 20-21 school year. The speech clinician's logs noted that materials were sent home only once in the packets. Student received some speech services during summer services.

The implementation failures continued during the second semester. When the District returned to hybrid services, Student was in school two days before the District removed Student from school because Student would not wear a mask. The education plan, thereafter, was to return to the educational packets with Student, even though that had not been an effective plan for the first semester. The District never convened an IEP meeting to determine why Student was not making progress on goals when the District was aware that Student was

not completing any of the packets or logging on to the virtual classes. The District did not convene an IEP meeting to determine how remote services would be provided after the removal for failure to wear a mask. Rather than meet to discuss how to teach Student to wear the mask in school, the District disciplined Student for not wearing a mask at school and returned Student to an ineffective education in the form of packets for the remainder of the school year.

The District failed to implement the IEP during the 2020-2021 school year in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B) NMAC.

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

Issue No. 2

Whether the District failed to convene an IEP meeting to determine if additional accommodations or services were needed because student refused to wear mask and inappropriate behaviors and was returned to virtual educational services in violation of 34 C.F.R. § 300.324(a)(2), 34 C.F.R. 300.324(b)(2), and 6.31.2.11(F) NMAC?

The IDEA mandates that districts are obligated to provide specially designed instruction, provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability. 34 C.F.R § 300.39(a)(1). Furthermore, it is the responsibility of the school district to meet and revise a student's IEP, "as appropriate, to address any lack of expected progress." In *Questions and Answers on Andrew F. v. Douglas County School District Re-1*, 71 IDELR 68 (EDU 2017). Even with the health and safety concerns due to COVID-19, Districts must ensure that students are receiving educational benefit and that may require additional supports and services. A District must ensure that students receive the special education and related services they are entitled to as specified on the IEP. Students with disabilities must have equal access to educational opportunities provided to general education students. *Hernandez v. NM*, 77 IDELR 185, 120 LRP 31673, 494 F. Supp. 3d 1044 (D.N.M. 2020). In determining how special education services are provided remotely during the pandemic, a district must address whether the method of delivering instruction will enable the child to receive FAPE. If is not effective, then alternative methods must be considered. *L.V. v. New York City Department of Education*, 77 IDELR 13 (SDNY 2020).

The District did not convene an IEP meeting between March 2, 2020 and March 26, 2021 to discuss how to ensure that Student was making educational progress and that he had equal access to educational opportunities during the COVID-19 pandemic. The District was aware

that Student's only reliable access to education was the educational packets which were not completed or returned consistently. Parent repeatedly contacted District personnel about difficulties with the packets and lack of internet access but the concerns were ignored. The District should have convened an IEP meeting when they were put on notice that Student had not completed and returned the packets and ascertain what could be done to ensure Student was receiving an education.

Moreover, the procedural safeguards including disciplinary procedures set out in IDEA and New Mexico law still applied during the COVID-19 pandemic. *Questions and Answers for K-12 Public Schools in the Current COVID-19 Environment*, 77 IDELR 139 (OCR 2020) and *COVID-19 Questions and Answers in Implementation of IDEA Part B Provision of Services*, 77 IDELR 138 (OSEP 2020).

When a student with a disability has exhibited behavior that would result in suspension or expulsion, certain procedures must be followed. If a student was removed from school for disciplinary reasons for more than 10 school days, this was a change of placement. 34 C.F.R. § 300.536. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the district must conduct a manifestation determination review to evaluate whether the student's misconduct is a manifestation of the student's disability. 34 C.F.R. § 300.530.

Student, after remote learning with educational packets at home for the first semester of the 2020-2021 school year, finally returned to hybrid educational services at the school. After two days, the District sent Student home to go back to educational packets because Student would not wear a mask at school. Student was eight years old and had not been wearing a mask at home working on educational packets. The District did not hold a manifestation determination review or an IEP meeting to discuss options or additional supports that could be provided to ensure Student wore a mask at school. It simply sent Student home for the remainder of the school year for violating District policy. This was disciplinary action and certain procedures were required when Student was removed from school for more than ten days. District failed to provide any of the required procedural safeguards when they sent Student home for not wearing a mask.

There were many opportunities prior to the removal when District should have convened an IEP meeting to address the concerns with Student and educational services. Instead, the District took disciplinary action for a violation of a code of conduct. After ten days of removal, the District should have held a manifestation determination review, but did not. There was a change of placement which requires an IEP meeting and a plan to ensure that Student still received educational services to make progress in the general curriculum. That did not happen

either; instead, the District went back to the educational packets and Parent purchased educational materials to ensure Student received an education. The District reported that Student had not turned any packets in the entire second quarter, but Parent reported they were returned to the school. Even after the District noted that Student was not completing or returning the packets, they continued with the packets and did not consider other options to ensure Student received an education. District's omissions were a violation of 34 C.F.R. § 300.324(a)(2); 34 C.F.R. 300.324 (b)(2); 6.31.2.11(F) NMAC.

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

Issue No. 3

Whether the District failed to monitor student's progress and provided progress notes to parent to determine whether recovery services were warranted while student was receiving educational services through a virtual hybrid format during the COVID pandemic in violation of 34 C.F.R. § 300.320 (c) (2) and 6.31.2.13 (D) NMAC?

Both IDEA and New Mexico regulations required regular progress notes outlining Student's progress on IEP goals. 34 C.F.R. § 300.320(c)(2); 6.31.2.13(D) NMAC. The measurement of progress is necessary to determine if Student was receiving a FAPE. 34 C.F.R. § 300.320. The IEP must provide how progress is measured and when and how periodic progress reports would be provided. 34 C.F.R. § 300.320.

Student's IEP provided that Parent was to receive quarterly written progress reports. Parent continually tried to contact District staff regarding the packets and Student's progress but was not provided guidance or support about the Student's education. The District's failure to support and work with Parent prevented Parent from fully participating in the Student's educational program. Parent never received progress notes on any of Student's IEP goals. The special education teacher reported that Student never completed or returned the educational packets that were sent home biweekly. Student returned to school for in person services in January of 2021. However, after only two days, Student was sent home because Student would not wear a mask. For the remainder of the 20-21 school year, Student's educational services were provided by educational packets. On the March 26, 2021 IEP, it was noted that the I-Station assessments results completed at home were questioned because the team did not believe Student completed the test. No further assessments were completed. The District staff interviewed could not state where Student was academically or what progress had been made on goals because of the limited information they had about Student this past year. Student participated in summer services three days a week, for a total of eleven days during the

month of June. These were not ESY services, but were services provided to all Students in District. During summer services, Student worked on and progress was noted on IEP goals. All Students will be evaluated in the fall of 2021 to ascertain students' academic levels after the challenging 2020-2021 school year. Student has not been evaluated to determine if recovery/compensatory services were needed. Student's three year reevaluation will be due in September, 2021. The District's failure to prepare and send progress notes or determine Student's progress or lack thereof and lack of meaningful parental participation was a violation of 34 C.F.R. § 300.320(c)(2) and 6.31.2.13(D) NMAC.

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

Issue No. 4

Whether the District failed to provide the parent with a copy of student's educational records after receiving a written request for such records in violation of 34 C.F.R. § 99.10 and 6.31.2.13(B) NMAC?

Parents have the right to inspect and review educational records for their child that are collected, maintained, or used by the District. 34 C.F.R. § 99.10. The District does not have the right to limit access to a student's educational records. Districts must provide access to educational records within a reasonable amount of time and at least within 45 days after the request. 34 C.F.R. § 99.10(b).

Parent's advocate, on April 22, 2021, sent a written request to District by both facsimile and mail seeking all educational records for Student from the 2018-2019 school year to the present. The District provided some educational records in a timely manner on May 3, 2021 to Parent's advocate, but many educational records were not included, such as the March 2, 2020 IEP, the IEP in effect for the majority of the 2020-2021 school year. The complaint investigator requested the same records as the Parent's advocate but the District did not provide any records or written response until after the District's attorney was contacted on July 23, 2021 about the District's failure to comply with the records request. After the complaint investigator contacted District's attorney on June 23, 2021, the District's attorney submitted records from summer services. After the interview with the District staff and attorney on July 30, 2021, the District sent the complaint investigator a copy of the IEP, speech therapy and occupational therapy logs, and documentation of the records request and compliance. It is not clear whether the Parent has received all educational records for Student. The District never provided the records requested, and to the extent that some records were eventually provided, they were

not provided to Parent in a timely way. This is a violation of 34 C.F.R. § 99.10 and 6.31.2.13(B) NMAC.

As to Issue No. 4, the District is cited. Corrective action is required.

Issue No. 5

Whether the actions or omissions of the District resulted in a denial of a free appropriate public education (FAPE) for 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 free appropriate public education (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 determination of whether there has been a denial of FAPE requires consideration of two components: substantive and procedural. The question one must answer to determine the substantive standard is whether the IEP was “reasonably calculated to allow the child to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas County School District. RE-I*, 137 S. Ct. 988, 994 (2017). The Court in *J.L. v. Mercer Island School District*, 592 F.3d 938, 951 (9th Cir. 2010), held that a procedural violation may be a denial of FAPE when it resulted in the loss of an educational opportunity, infringed on parents' opportunity to participate in the development of the IEP, or deprived the student of an educational benefit. All circumstances surrounding the implementation of the IEP must be considered to determine whether there was a denial of FAPE. *A.P. v. Woodstock Board of Education*, 370 F. Appx 202 (2d Cir. 2010). A failure to provide behavioral and other supports that does not allow the student to receive educational benefit may be a denial of FAPE. Dear Colleague Letter, 68 IDELR 76 (OSERS/OSEP 2016).

On this record, the student received little, if any, educational services, including special education and related services, for the 2020-2021 school year. Without the provision of special education services, Student failed to make progress on goals and the District was unable to provide progress notes or documentation that Student made progress. There was a substantive denial of FAPE.

In addition, there were procedural violations on this record: (1) the District may have been trying to educate Student through the packets, but the failure to monitor and determine Student’s progress or lack thereof and meeting as an IEP team to address the problem deprived the student of an educational benefit; (2) the District, in this case, did not ensure this Student was learning, nor did they consider other options to allow Student to receive educational

benefit or to remain at school. Instead, the District sent Student home to learn with the same methodology that had been ineffective the first semester; (3) the District also failed to follow the disciplinary procedures set out in IDEA when they disciplined Student for a violation of the Code of Conduct, did not hold a manifestation determination meeting, or an IEP meeting to develop a plan for how Student would receive educational benefit while Student was learning remotely; (4) the District failed to contact and to work cooperatively with Parent to ensure that Student was receiving a FAPE and denied parent meaningful parental participation in the development and implementation of the IEP.

For all of these reasons, the District denied this Student a FAPE on both substantive and procedural grounds in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

As to Issue No. 5, the District is cited. Corrective action is required.

Summary of Citations

Statutory and Regulatory Provisions	Citation
34 C.F.R. §§ 300.320-300.328; 6.31.2.11(B) NMAC	The District failed to implement the IEP in effect for the 20-21 school year while student was receiving remote instruction due to the COVID-19 pandemic.
34 C.F.R. § 300.324(a)(2); 34 C.F.R. 300.324(b) (2); 6.31.2.11 (F) NMAC	The District failed to convene an IEP meeting after Student was removed from school, to have a manifestation determination meeting or determine if additional accommodations or services were needed because student refused to wear mask which was a violation of the code of conduct.
34 C.F.R. § 300.320(c)(2); 6.31.2.13(D) NMAC	The District failed to monitor student’s progress or provide progress notes to parent to determine whether recovery services were warranted while student was receiving educational services through a virtual hybrid format during the COVID-19 pandemic.
34 C.F.R. § 99.10; 6.31.2.13(B) NMAC	The District did not provide the parent with a copy of student’s educational records after receiving a written request for such records.

Statutory and Regulatory Provisions	Citation
34 C.F.R. § 300.101; 6.31.2.8 NMAC.	The actions or omissions of the District resulted in a denial of a free appropriate public education (FAPE) for student.

Required Actions and Deadlines

By September 10, 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
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 documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C2021-18**.

All corrective action must be completed no later than August 27, 2022, and reported to the PED SED no later than September 1, 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 shall convene an IEP meeting as soon as possible but no later than October 1, 2021 to determine the supports and services needed for Student. This IEP shall include the plan to address the compensatory services required in Step of this CAP and any recovery services as determined by the comprehensive evaluation.	October 1, 2021	The IEP and all supporting documents shall be provided to NMPED	October 15, 2021
2.	<p>The District will provide 400 hours of compensatory education to Student for the services missed during the 2020-2021 school year. These compensatory services are above and beyond those required in the new IEP to be developed for the 2021-2022 school year.</p> <ul style="list-style-type: none"> • The 400 hours of compensatory education shall include direct related services by qualified speech and language and occupational therapists and instruction by a special education teacher. The District shall provide: <ul style="list-style-type: none"> ○ 80 hours of speech and language therapy, ○ 40 hours of occupational therapy, and ○ 280 hours of specialized instruction. • The plan for compensatory services shall be developed in collaboration with the parent, with parents having input into the arrangements for provision of the services. 	July 27, 2022	<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 plan for compensatory education, logs from provision of services, and documentation that the compensatory services have been completed.</p>	<p>Interim submission every 9 week SY reporting period, with final submission</p> <p>August 27, 2022</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>
	<ul style="list-style-type: none"> • All components needed to complete compensatory services shall be provided to Parent with a weekly follow-up by District to ensure that the plan is being implemented or if additional needs or issues arise that prevent Student from receiving special education services. • Due to the number of compensatory hours required, the plan for providing services to the student should consider provision of services during the school year and summer, and if necessary to ensure that student can access or benefit from the hours, the August 27, 2022 can be extended. • The plan for compensatory services shall include in-person services if needed to address the student’s needs. Any in-person services must comply with public health directives and PED Reentry Guidance. • If transportation is required as part of the services, the District shall provide transportation for the student or provide a per diem reimbursement for mileage for transportation if necessary and the parent is able to transport the student. 			
3.	The District shall train District staff responsible for enrollment, District administrators, and special education staff on the development and implementation of IEPs, FERPA requirements, procedural safeguards,	December 1, 2021	The agenda and training materials including outlines, power points and other materials to be submitted to NMPED for approval prior on or before October 1, 2021.	October 1, 2021

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>
	<p>discipline, the complaint process and the District’s obligations to provide information in response to the complaint process, and requirements related to meaningful parental participation. Attendance will be taken and provided to NMPED within two weeks of the completion of the training.</p> <p>This training shall be developed and provided by an independent person(s) with expertise who has not been involved in responding to this Complaint and who is approved by the NMPED.</p>		<p>The resume or CV of the person(s) proposed to provide the training and a draft of the proposed training to be submitted to NMPED for approval on or before September 15, 2021.</p>	<p>September 24, 2021</p>
4.	<p>The District shall obtain consent for Student’s triannual evaluation and ensure that Student receives a timely evaluation.</p>	September 1, 2021	<p>Signed consent for evaluation and multi-disciplinary reports</p>	October 15, 2021
5.	<p>District shall designate a Corrective Action Plan Monitor to coordinate all corrective action activity required for Student in this CAP. District shall inform Parent, through a formal letter, of the designation of a CAP Monitor and provide contact information. The CAP monitor shall be available to discuss the implementation of this CAP until it has been completed.</p>	September 10, 2021	<p>District shall identify the designated CAP Monitor in the initial assurances letter required above.</p> <p>Notice Letter provided to Parent.</p>	<p>September 10, 2021</p> <p>September 17, 2021</p>

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

Investigated by:

/s/Michele K. Bennett

Michele K. Bennett

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