

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2122-02
October 19, 2021**

This report requires corrective action. See pages 17-18.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on August 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 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 complaint investigator
- Review of the District's compliance with federal IDEA regulations and state NMAC rules
- Telephone interviews with the Disability Rights New Mexico advocate(s), parents; the District's Special Education Director, the District's Secondary Special Education Coordinator and service providers for students named in the complaint
- Research of applicable legal authority
- Review of Edgenuity program website

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

Limits to the Investigation

Federal regulations and state rules limit the investigation of state complaints to violations that occurred not more than one year prior to the date the complaint is received. 34 C.F.R. §300.153(c); 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 or comply with the IEPs for students who are receiving instruction through the District's online academy by adopting and implementing a policy and practice of denying services indicated on IEPs for students not attending school entirely in person in violation of 34 C.F.R. §§ 300.320-300.327 and 6.31.2.11(B) NMAC.
2. Whether the District's actions or omissions resulted in a denial of a free appropriate public education (FAPE) for students who are receiving instruction through the District's online academy in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

General Findings of Fact

1. The District has an online program. Courses and curriculum are for the online program are purchased from an outside company. The company's website states that courses, curriculum and online learning solutions feature instructional strategies, evidenced-based practices, and learning tools and scaffolds designed to support the unique needs of all learners, including students with special education needs. <https://www.edgenuity.com/special-populations/>
2. During the 2020-2021 school year, the District provided education services remotely using the online education program. The District created a detailed 2020-2021 Student Handbook that promotes the online program as one of the most innovative and education experiences available anywhere because the District believes that "every child deserves the highest quality educational opportunity regardless of circumstances." The District's stated mission is "to provide students and parents with a quality-learning environment that is flexible and maximizes student potential." The 2020-2021 Handbook for the online program explains the process for enrollment and does not distinguish any exceptions or differences for students with disabilities (SWD). *District documents Tab 8 Section 1.*
3. The District updated 2020-2021 Covid-19 Reentry Guidelines on August 19, 2020 based on requirements for reentry provided by the New Mexico Public Education, NMPED. These Guidelines state that the District will offer a choice of two learning models for the 2020-2021

school year: A hybrid learning model and a complete online school/program for students who wish to remain at home and not return to school. Students attending the general education online school will remain enrolled in the District schools and be afforded all of the benefits that the District has to offer. *District documents Tab 9 Section 1.*

4. The District's 2020-2021 plan includes a Special Education Reopening Plan with details for students attending hybrid model and the online only model. *District documents Tab 9 Section 1 and 3.*
5. The District's 2020-2021 Reentry Guidelines were updated again on February 3, 2021. This version includes details should the District return to temporary closure due to Covid-19. If temporary closures should be necessary, instruction will continue remotely. *District documents Tab 9 Section 2.*
6. Any student, irrespective of disability, may select to replace in-person learning, in whole or in part for the 2021-2022 school year by enrolling in the online program and meeting the criteria for acceptance. Options are available as follows:
 - In-person attendance at school full-time
 - Online program attendance full time
 - Part-time attendance in the online program and other electives in-person at school.
 - All students may participate in extracurricular activities*District documents Tab 8 section 2 (Online Secondary Handbook 2021-2022).*
7. The District has thirty (30) SWD with IEPs who enrolled in the online program for the 2021-2022 school year. Two (2) of these students returned to in-person learning on September 13 and 15 respectively. The other 28 students, including Students A and B are not receiving FAPE as indicated by the student's IEPs. *District document received October 14, 2021*
8. District staff documented that, for the 2021-2022 school year, District policy prohibits implementation of IEPs for students enrolled in the online options and services will only be provided when students with IEPs return to school entirely in person. There is no evidence that this policy exists. Instead, it appears to be a District decision that occurred approximately August 10, 2021. Addendums were drafted for students on August 11 and parents were summoned to meetings near the end of August so that the District could complete the addendums. *District documents Tab 6 email August 10, 2021 4:21 pm.*
9. Unwritten policy/decision prohibiting implementation of IEPs for students enrolled in the online program options contradicts the District's Student Online Program Handbooks for 2020-2021 and 2021-2022 which provide details for enrollment and attendance in the online program, including services for SWD. Parents and students relied upon the Handbooks when enrolling their students in the online program and were not informed that students choosing the online option would be required to forfeit FAPE until nearly a month after school had started and the students were attending the online options. *District documents Tab 8.*
10. The 2021-2022 Secondary Student Handbook states the following: "Students who are receiving Special Education services may enroll in the online school. Services are provided based on the student's Individual Education Plan (IEP). Students may take specified courses at the home campus of their school with permission from their advisor and the principle." *District documents Tab 8 Section 2.*
11. Following acceptance into the online program options, student's with IEPs were asked to

- attend IEP addendum meetings where they were notified that no special education services, accommodations or modifications are available to eligible students attending the online program in whole or in part. Interviews with parents and District staff
12. Online or virtual special education services are not available to eligible students attending the online program. Interviews with parents and District staff
 13. In-person special education services listed in eligible student's IEPs are not available at school or at any other location for students enrolled in the online program. Interviews with parents and District staff
 14. In-person special education services listed in eligible student's IEPs are not available at school or at any other location for students attending the online program in part and also in-person classes at school. Interviews with parents and District staff
 15. Students attending the online program may participate in any in-person general education classes unavailable through the online program. Interviews with parents and District staff
 16. Students enrolled in the online program may participate in extracurricular activities at school. Interviews with District staff; see also online program handbook
 17. District staff stated that, according to district policy, IEPs for eligible SWD would not be implemented while the student was enrolled and attending the online program in whole or in part. Staff clarified that this policy means that services will not be offered remotely, virtually, in-person off campus or in-person on campus until the student completely leaves the online program and returns to in-person, on campus school in the entirety. Parents were not encouraged to revoke services. Instead, parents were informed that their students remain eligible and that the current IEPs would be implemented if, and when, students returned to school entirely in person. Interview with District staff
 18. Student A is eligible for special education and related services under the IDEA and New Mexico special education Rules. District documents Tab 2 section 1 and Tab 3 section 1.
 19. Student A has an IEP drafted on January 27, 2020 with an eligibility classification of Specific Learning Disability (SLD). District documents Tab 2 section 1.
 20. Student A's January 27, 2020 IEP includes goals in the following areas of need:
 - i. Transition Education
 - ii. Math
 - iii. Written Language
 - iv. Transition Employment
 - v. Fine Motor
 - vi. Social EmotionalSee District documents Tab 2 section 1.
 21. Student A's January 27, IEP includes the following related service:
 - i. Assistive technology – 30 minutes per year
 - ii. Occupational Therapy (OT) – 15 minutes per week
 - iii. Social Work Services – 15 minutes per weekSee District documents Tab 2 section 1.

22. On April 8, 2020, the District added an addendum to Student A's IEP. The addendum addressed extending the timeline for re-evaluation in light of state mandated quarantine due to the Covid-19 pandemic. District documents Tab 2 section 2.
23. On August 20, 2021, a developmental pediatric & behavioral health physician assistant provided a letter confirming that Student A is under their care for management of ADHD, Autism Spectrum Disorder, Dyspraxia, Adjustment Disorder with Disturbance of Emotion and Mixed Receptive-Expressive Language Disorder. The letter states that Student A's condition requires intensive intervention with OT and SLP and recommends frequency and duration significantly greater than indicated on the IEP. The provider explains that this therapy is critical for patients with Autism in order to facilitate transition into adult life. See District documents Tab 5.
24. Student A's annual IEP meeting was held on April 21, 2021. At this time, Student A's eligibility classification was changed from SLD to Autism. This IEP may remain in force until April 20, 2022. District documents Tab 3 section 1.
25. Student A's April 21, 2021 IEP indicates that Student A will receive special education and related services including Occupational Therapy (OT), School Counselor/Social Worker, Speech and Language Therapy (SLP), Assistive Technology. During this time, Student A was successful attending school online due to the Covid-19 pandemic. District documents Tab 3 section 1.
26. At the April 21, 2021 IEP, Student A's IEP team marked "YES," indicating that the least restrictive environment (LRE) for Student A is a placement where Student A needs extensive services 50% or more of the school week to achieve goals and objectives in the most appropriate inclusive environment. District documents Tab 3 section 1.
27. The April 21, 2021 IEP for Student A was implemented while school was entirely remote and includes an addendum explaining the Instructional Reentry Models established by the NMPED. This annual IEP was developed less than two months before the end of the 2020-2021 school year and will be in effect until April 20, 2022. District documents Tab 3 sections 1 and 2. See also Tab 9 (Reentry guidelines and plans)
28. The April 21, 2021 IEP for Student A is the IEP in effect on August 5, 2021, the beginning of the next (2021-2022) school year. District documents Tab 4 (IEP addendum dated August 11, 2021 reflects the IEP date April 21, 2021).
29. On July 28, 2021 an email from District staff to the District Special Education Director asked whether to enroll Student A in the online education program or wait until the IEP meeting. The District Special Education Director responded that Student A should be enrolled in the online program on July 28, 2021. See District documents Tab 6 (email between District staff)
30. Student A was accepted to the online program and also enrolled in some classes in-person at school. School began on August 5, 2021 with Student A in attendance. Interviews with parent and District staff, See also, District documents Tab 6 (reflecting that Student A attends the hybrid option, partially online and partially in-person)
31. Student A has an IEP addendum dated August 11, 2021. However, based on Notices of meeting (NOM) and signatures of meeting attendance, meetings did not take place until August 20, 2021 and September 1, 2021. The addendum states that Student A will attend the online program part time and some classes in-person at school and that the District denied parent's request for Student A to receive services listed on the IEP, citing district policy that

students will not receive special education services unless they are enrolled entirely in-person. District documents Tab 4 section 1.

32. Parents were concerned about Student A coming back to school entirely in-person and have chosen the online program option also taking some classes at school in person as a transition from entirely on-line back to in-person for the following reasons:
 - i. Parents are concerned that Student A missed out on 9th Grade School, the district school for freshman that is intended to help all students transition from 8th grade to High School.
 - ii. Student A's disabling condition was recently changed from SLD to Autism and ADHD. Student A also experiences significant anxiety and is anxious about returning to school in-person.
 - iii. The Covid-19 pandemic is still happening and there is a possibility that schools might close again in the entirety. Parents think that the part time program will provide more consistency should schools close again and allow Student A to transition back to school in-person after being online only for more than a year.
 - iv. Parents would like Student A to receive IEP services by extending in-person time at school and receiving the services in-person at school at a time determined by the school.
 - v. Parents are willing to add additional classes in-person gradually and especially if Student A is receiving the special education and related services that will contribute to success.
 - vi. The District team told Student A's mother that no IEP services will be available in-person or on-line/virtually to any students participating online, in whole or in part. This decision was made by the District team stating that it is District policy. District documents Tab 4 (addendum) and parent and District interviews.
33. Student B is eligible for special education and has IEPs with a primary area of exceptionality of Hearing Impaired and mention of Specific Learning Disability. District documents Tab 2 section 3.
34. Student B has an IEP dated February 6, 2020 and an addendum for Students who are Deaf or Hard of Hearing – Communication Considerations. Another addendum dated April 20, 2020 is included for the purpose of a continuous learning plan to address parent concerns about special education services during the school closure. The April 20, 2020 meeting took place virtually since schools had changed to remote learning during the last term of the 2019-2020 school year due to the Covid-19 pandemic. District documents Tab 2 sections 3-6.
35. Student B has an IEP dated January 14, 2021. Students did not attend school in-person during the 2020-2021 school year due to the Covid-19 pandemic. Student B's profile for the January 14, 2021 IEP indicates that Student B is doing well with academic/learning skills, utilizes email and zoom chat to communicate with teachers when he has questions and that the online program allows Student B to move freely in classes and complete assignments and quizzes with high accuracy. See District documents Tab 3 section 6-8.
36. Student B's January 14, 2021 IEP provides goals in the following areas of need:
 - i. Hearing/Transition Education
 - ii. Transition Employment/Social-Emotional
 - iii. PragmaticsSee District documents Tab 3 section 6.
37. Student B's January 14, 2021 IEP team marked "YES" indicating that the least restrictive environment (LRE) for Student B needs services a majority of the school day/week in the form

of supported integration or direct services to achieve the goals and objectives in the most appropriate inclusive environment. See District documents Tab 3 section 6.

38. Student B's January 14, 2021 IEP includes an addendum for Students who are Deaf or Hard of Hearing – Communication Consideration and another addendum providing written notice of the NMPED Instructional Models for Reentry due to the Covid-19 pandemic. District documents Tab 3 section 7 and 8.
39. May 13, 2021, an IEP meeting was held for Student B. The purpose of the meeting was to create an IEP addendum documenting continuation of the testing timeline. Student B attended school entirely online during the 2020-2021 school year, including implementation of the IEP, but testing that needed to take place in person was unable to be completed due to the Covid-19 pandemic. The team of ten (10) individuals from the LEA, two (2) interpreters, a consultant for New Mexico School for the Deaf, parent, student and a friend who is also an interpreter were present. District documents Tab 3 section 9.
40. Student B has another addendum dated August 11, 2021. The topic of this addendum meeting was to address parent's request of Student attending the online program for the 2021-2022 school year. There is no evidence that the meeting took place on August 11, 2021. Notice of meeting and signature of participation documents show that two meetings took place – the first on August 19, 2021 and the second on September 1, 2021. Teachers present reported that Student B was an excellent student who attended zoom and other remote meetings as scheduled and participated effectively. Student B was accepted into the online program due to health issues that prevent in-person attendance. Also, being in and then out of school due to Covid-19 closures is difficult for Student B who does not do well with change. The addendum goes on to state that all students are offered the opportunity to attend school in-person with all services listed on their IEPs, that the online program does not include special education services and, since the parent has selected to have Student B attend the online program, no special education services will be offered. The addendum states that if, and when, Student B comes back face-to-face, services will return as stated in the IEP. The addendum also states that the parent requested that speech therapy be provided remotely and that the District team refused to provide any special education services due to District policy. District documents Tab 4 section 2.
41. Parent and District staff both report that Parents provided a release of information so that the District's nurse could speak with Student B's outside health care providers. Interview with parent and District staff.
42. Student B's parent does not agree that in-person learning is appropriate and reported that a school staff member of Student B's IEP team had just passed away due to Covid-19. Student B's parent reported that Student B has a heart condition, present since birth, and that condition places Student B at increased risk from potential side effects from the Covid-19 vaccine as well as increased risk from contracting the Covid-19 virus. Because of this

situation, Student B has not received a Covid-19 vaccine and the family is very careful to protect Student B from the risk of exposure. Interview with Parent.

43. Parent provided a note, dated September 29, 2021, from a health care provider stating that after reviewing Student B's medical history and current conditions with family it was advised that Student B attend home school to reduce possible exposure during the pandemic. There is no evidence that the note was provided to the District, nor was the note requested by the district. Note received October 14, 2021.
44. District staff reported that Student B would only be attending the online program until he recovered from pallet surgery. However, Student B's parent reported that the surgery in question took place during the summer of 2020, more than 12 months ago and Student B had been recovered for quite some time. Interview with Parent and District staff; see also District documents Tab 4 section 2 - proposed actions (Student B is attending online program due to health issues that prevent him from attending school in person).
45. Student B's parent requested that speech therapy listed on the IEP be provided remotely and provided detailed reasons for student to receive IEP services. The District team denied this option, citing District policy that services would only be provided if Student B returned to school in-person. District documents Tab 4 - addendum proposed actions.
46. Throughout the month of July 2021, Student B's parent had a series of email conversations with District staff requesting information about options for the 2021-2022 school year, in light of the ongoing Covid-19 pandemic. See District documents Tab 6.
47. Through a series of emails, the District conveyed the following information to Student B's parent.
 1. American Sign Language (ASL) is only offered in person. Student B may attend the online program and attend ASL in person.
 2. As per District decision, there will be no teacher interaction in the online program. One District staff member reported that she did relay to Parent that there was a possibility that a paraprofessional could zoom with Student B but no final decision had been made.
 3. The plan going forward is that services will be offered in-person.
 4. If a student who receives special education services wishes to enroll in the online program, then the District would convene have an IEP meeting and discuss what would be most beneficial for that student.
 5. If the IEP team feels that it is best for Student B to attend in person, Parent may choose to keep Student B in the online program with the understanding that services will be halted until he returns face to face. Once Student B returned face-to-face, we would have an IEP and return services as they were before going to the online program for the 2021-2022 school year.
 6. In the majority of the cases, it is most beneficial for students to be in person,

especially if the services are provided in that setting.

District documents Tab 6.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to implement or comply with the IEPs for students who are receiving instruction through the District's online academy by adopting and implementing a policy and practice of denying services indicated on IEPs for students not attending school entirely in person in violation of 34 C.F.R. §§ 300.320-300.327 and 6.31.2.11(B) NMAC.

Discussion and Conclusions

The IDEA and New Mexico Special Education Rules require local education agencies, LEAs, to provide eligible students with a free appropriate public education, FAPE. 34 C.F.R. §300.101 and 6.31.2.8 NMAC. FAPE must be tailored to the unique needs of a particular child. *Bd. of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 181 (1982); *Andrew F. v. Douglas County School Dist. RE-1* 137 S.Ct. 988, 994 (2017). The IEP is the centerpiece of the IDEA's delivery system for eligible students. It is a comprehensive plan tailored to meet the unique and individual needs of the student and is developed by the student's IEP team, including teachers, school officials and parents. *Andrew F.*, 137 S.Ct. at 994. This complaint is filed on behalf of all SWD enrolled in the Districts 2021-2022 online program and includes specific details for two specific students, Student A and Student B.

During the spring of 2020, Covid-19 emerged as a global pandemic, resulting in the emergency closure of schools. The District, like all LEAs, rallied to find ways to continue to provide students, including SWD, with an education in the face of incredible challenges. For the most part, education was taking place in remote learning situations including packets, zoom and other virtual or online methods. The 2020-2021 school year brought continuation of the Covid-19 pandemic. The District, like other LEAs, worked diligently with their states to develop education options while trying to keep people safe and healthy. See Statement of Facts (SOF) # 2 (Online Student Handbook 2020-2021). Following guidance from the NMPED and other state agencies, the District developed a color-coded plan for reentry. Statement of Fact #s 3, 4 and 5. The plan for reentry includes specific plans to provide FAPE to eligible students and is included in addendums to student's IEPs. SOF #4, 27 and 38.

The District returned to an in-person model to begin the 2021-2022 school year, implementing precautionary measures including requiring the wearing of masks and plans to move back to hybrid or remote models if necessary. SOF #s 3, 4 and 5. For the 2021-2022 school year, all students have the following general education options:

- Students may attend school full time in-person.
- Students may apply to the online program utilizing coursework from an outside provider.

- Students may choose the online program and come to school in-person for classes not offered through the online provider.
- All students may participate in extracurricular activities. SOF #s 6 and 10.

All of these options are available to all students, including SWD. The one unwritten exception is that special education services will not be provided to any SWD who participates in the online program, in whole or in part. SOF #s 6-17. This exception was not included in the Student Handbook explaining options, expectations and enrollment and was not revealed to parents of SWD until after the students were accepted and attending the online program. SOF #s 6, 11, 31, 32, 40, 42, 44 and 45.

The IDEA and NMAC require each LEA to have, in effect at the beginning of each school year, an IEP for each eligible student. 34 C.F.R. § 300.323(a); 6.31.2.11(B) NMAC. Thirty (30) SWD enrolled and started school in the District's online program, on August 5, 2021, for the 2021-2022 school year. The District has currently has twenty-eight (28) eligible students enrolled in its online program and two (2) students withdrew from the online program returned to in-person learning on September 13 and 15. SOF #s 1 and 7. Students A and B had IEPs in effect and ready to be implemented at the commencement of the 2021-2022 school year. SOF #s 18, 24-30 and 33-39.

IEPs must be reasonably calculated to enable the student to make educational progress in light of the student's unique and individual circumstance. *Andrew F*, 137 S.Ct. at 999. The IDEA and NMAC also prescribe that the District must implement the IEP with all required components. 34 C.F.R. §300.323(c); 6.31.2.11(B) NMAC. Students A and B followed the instructions provided by the District and enrolled in the online program. SOF #s 6, 7, 10, 11. Each had successfully participated in the online program with IEPs implemented during the 2020-2021 school year. SOF # 19-28 and 34-39.

The first day of school for the District commenced on August 5, 2021. Students A and B were present in the online program but their IEPs were not implemented. Only after Student A and Student B had been accepted into the online program and school began with Student's A and B attending online were they and their parents informed that IEP meetings would be scheduled to determine the appropriateness of the online program in light of their status as SWD. SOF # 28-32 and 35-42, 44, 45. The timeline is confusing because addendums to Students IEPs are dated August 11 but Notices of Meeting (NOM) and meeting participant signature sheets indicate that the meetings did not take place until August 19, 20 and September 1. SOF # 31 and 40.

Although all families were offered general education online school options, Parents of Student A and Student B, presented detailed information explaining why they chose to enroll in the online options. SOF #s 6, 31, 32 and 40, 41, 42, 44, 45, 46.

Student A's parents discussed success their student experienced in the online program, including special education services during the 2020-2021 school year. Parents explained that, due to the pandemic, Student A had missed the opportunity to attend Freshman school, a transitional year moving into high school and the fact that Student A's classification had recently been changed to Autism. Student A planned to attend the online program part time and come to school in-person

part time as a transition to returning to school in-person full time. Student A's parents expressed concerns about his anxiety and fears of coming back to school after remote learning for more than a year and also anxiety and fear of inconsistency should the pandemic require schools to return to close or return to remote learning in some fashion. Student A planned to be at school, in-person, part time and expressed willingness to receive special education services at school, in-person, on a schedule determined by the school and clarifying that District transportation would not be requested or needed. SOF #s 31 and 32. The District proposed that attending school in-person was better and that no other options were able to be considered because District policy dictated that IEPs would not be implemented for students attending the online program. SOF #s 8, 9, 11-17, 31, 40, 41, 42, 44, 45. Student A had been successful in the online program full time, including IEP implementation for the 2020-2021 school year. However, for the 2021-2022 school year, Student A was accepted into the online program but according to district's new unwritten policy, would not receive any services indicated on the IEP until returning entirely to in-person attendance. SOF #s 25 and 31.

Student B's parents chose the general education online program, in part, because Student B has a health condition that could put him at risk for complications of Covid-19 and potential side effects of the Covid-19 vaccine. SOF #s 40, 41, 42, 43. Student B also successfully attended the online program during the 2020-2021 school year. SOF # 40. Student B also enrolled and was accepted into the online program for the 2021-2022 school year. SOF # 7. After acceptance into the online program, Student B's parents were also notified that a meeting would be held to determine the appropriateness of the online option for Student B. SOF # 40 (including NOM dated August 19 and September 1, 2021). Student B's health condition is noted as a reason that prevents in-person attendance. SOF #s 40-44. School commenced on August 5th with Student B in attendance and his IEP was not and still is not implemented. SOF #s 40-45.

Parents explained the precautionary measures that the family takes to keep Student B safe and expressed concern that the precautionary measures in place at school are not enough to keep Student B safe. SOF #42. Parents also provided a signed release of information so that the District's school nurse could communicate with Student B's health care providers. SOF # 41. Still, the District determined that, due to District policy, Student B's IEP would not be implemented until full time enrollment, in-person, at school. SOF #s 40 and 45.

The IEP is the centerpiece of the IDEA's delivery system for eligible students. It is a comprehensive plan tailored to meet the unique and individual needs of the student and is developed by the student's IEP team, including teachers, school officials and parents. *Andrew F*, 137 S.Ct. at 994. Eligible students who enrolled in the general education online option for the 2021-2022 school year have IEPs appropriately developed and in place prior to enrolling in the online option for 2021-2022. SOF #s 24-28 and 35-40. In spite of the fact that Students A and B attended school online and IEPs were implemented for the 2020-2021 school year, Student A, Student B and other SWD are denied services indicated on their IEPs because they choose to enroll in the online general education options available to all students for the 2021-2022 school year.

Despite the District's ability to provide special education services in a remote setting during the 2020-2021 school year, Student Handbooks professing the high quality education available through the online program, detailed plans for reentry for SWD and online courses purchased through an outside provider marketing the ability to provide exceptional curriculum for SWD, there is no evidence that the District considered any options other than full time in-person attendance at school for all eligible SWD in order to implement IEPs. SOF #s 1-6, 10, 17, 31, 32 and 40-45. The district's decision was made after students were accepted to the general education online option but without any notice to or input from any parents. SOF #s 31, 32 and 40-45. Essentially, parent's input during IEP addendum meetings fell upon deaf ears and the meetings appear to be a mere formality intended to legitimize the District's predetermination to refuse to implement the IEPs for SWD enrolled in online options or to force parents into withdrawing from online options and attending school entirely in-person.

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

Issue No. 2

Whether the District's actions or omissions resulted in a denial of a free appropriate public education (FAPE) for students who are receiving instruction through the District's online academy in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

Discussion and Conclusions

Predetermination

Team members must enter the IEP team meeting with an open mind and must meaningfully consider the parents' input. *See, e.g., R.L. and S.L. v. Miami-Dade County Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014); *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 F. App'x 342 (9th Cir. 2007), *aff'd*, 54 IDELR 73 (9th Cir. 2010)(unpublished) (holding that the superintendent's announcement at the start of an IEP meeting that the team would discuss the student's transition to public school showed that the district predetermined the student's placement).

Predetermination occurs when members of the IEP team make decisions in advance of the IEP meeting without parents' participation or input. To avoid engaging in predetermination, IEP teams generally must not only discuss the parents' objections, but they also must consider alternatives to their recommended placement. *Reed Union School District*, 52 IDELR 240 (SEA CA 2009) (the district maintained that it discussed the placement with the parent and specifically addressed the parent's concerns that the school was far away from the student's home and daycare provider. However, the ALJ pointed out that the special education director -- the IEP team member most knowledgeable about placement options -- failed to discuss any alternative placements.)

Here, after students were enrolled, accepted and attending the general education online program, parents were called to meetings to discuss student's chosen online options. Parents of students with IEPs were required to have their choices revisited after the fact. Parents of Student A and Student B provided detailed concerns and reasons for enrolling their students in the District's online option even though the option was available to all District students as an alternative to in-person attendance. SOF #s 31, 32 and 40-45. The District did not consider any other options and refused to implement student's IEPs unless students withdrew from the online program and enrolled entirely in-person at school, stating that district policy required this action. No such written policy was provided or otherwise available for review. SOF #s 1-6, 10, 17, 31, 32, 40 and 45.

Predetermination significantly impedes parental participation in the IEP development process and constitutes a denial of FAPE. Any policy or decision refusing to implement the IEPs of students choosing general education online options for the 2021-2022 school year contradicts the District's handbook that is available to parents when they are considering enrolling in the online program. SOF #6. No such policy was in place when students attended the online program during the previous school year or when students enrolled in the online program for the 2021-2022 school year and no evidence exists that this policy anything more than an unwritten informal decision that was made after students enrolled, were accepted in the online option school had begun. SOF #s 1-6, 10, 17, 31, 32, 40, 42, 44 and 45.

While District IEP team members may prepare for an IEP meeting, the difference between "preparation" and "predetermination" is the district's willingness to listen to the parents' concerns. Here, when presented with parent's input, the District did not consider any other alternatives, just a resounding "no" accompanied by citing the decision as district policy. SOF #s 20, 31, 32, 40, 42 and 45. Parents' input was completely disregarded and District staff cited unwritten, undisclosed policy contradicting existing written information for the decision. These actions on the part of the District deprived Parents of meaningful participation and denied students FAPE.

IEP Implementation

Once an IEP is written and an appropriate placement determined, unless the student is not available, the district is obligated to provide the student with the special education and related services listed in the IEPs. The obligation includes provision of all supplementary aids and services and program modifications that the IEP team has identified as necessary for the student to advance appropriately toward the established IEP goals, to be involved in and progress in the general curriculum, and to participate in other school activities. 34 C.F.R. §§ 300.323. The parties do not question whether, during the 2020-2021 school year, Students A and B, attended the online program with IEPs implemented. For the 2021-2022 school year, all

District students, irrespective of disability, were able to enroll in the online option either full time or part time and attend elective classes and extra-curricular activities in-person at school. SOF #6. For the 2021-2022 school year, behind closed doors, the District decided to refuse to implement the IEPs of SWD unless the students return to school entirely in-person. SOF # 6 (Online Secondary Handbook 2021-2022). This decision was not revealed until students, relying on existing written guidance, had already enrolled in the online option and began the school year. SOF #s 9, 10, 11, 17. The District's action is a significant deviation from student's IEPs, undermines the IEPs as written and results in a denial of FAPE. *E.C. v. U.S.D. 385 Andover*, 76 IDELR 212 (D. Kan. 2020).

FAPE Standard

The IEP is the centerpiece of the IDEA's delivery system for eligible students. It is a comprehensive plan tailored to meet the unique and individual needs of the student and is developed by the student's IEP team, including teachers, school officials and parents. *Andrew F*, 137 S.Ct. at 994. Once goals have been developed, the team considers the student's placement. The least restrictive environment mandate demands that students be educated in regular classroom settings to the maximum extent appropriate. 34 C.F.R. § 300.114 (a). Since all students may choose to attend school in-person, the online program or a blend of online and in person, each of these options constitute general education on the continuum of placement options. SOF #s 6 and 10.

In this case, the parties do not question whether students who selected online options for the 2021-2022 school year have IEPs that were appropriately developed and in place prior to enrolling in the online program. Likewise, the parties do not question whether student's IEPs were implemented online during the 2020-2021 school year, including a plan for reentry should pandemic conditions permit. Here, the District has resumed in-person learning at school for the 2021-2022 school year and continued general education online options for students who are not ready to return to in-person learning as well as a plan to reverse the course based on pandemic conditions. SOF #6. Then, after accepting thirty (30) students with IEPs into the online program and beginning school, the District decided that student's IEPs would not be implemented if the students were enrolled in the online options and scheduled meetings to create addendums to the student's IEPs documenting the decision. SOF #s 7-17. The District's unwritten policy or decision that IEPs for SWD are only able to be implemented when SWD attend school entirely in-person suggests that the District believes the same IEPs did not provide FAPE during the previous year. SOF #s 20-28 and 34-39.

Each LEA has an affirmative obligation to provide FAPE to eligible students. 34 C.F.R. §§300.101 and 107; 6.31.2.8 NMAC. The IDEA does not provide an avenue for an LEA to develop an IEP intended to provide FAPE and then undermine the student's right to receive those services.

Adding an IEP addendum refusing to implement a student’s IEP removes any possibility that the IEP is reasonably calculated to enable progress in light of the student’s particular circumstances and denies FAPE.

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

Summary of Citations

Statutory and Regulatory Provisions	Citation
<p>NMAC 6.31.2.11(B) 34 C.F.R. 300.323(c)(2)</p>	<p>Failure to implement IEPs: The District failed to implement IEPs for SWD who enrolled in online general education options offered to all students for the 2021-2022 school year.</p> <p>Denial of FAPE: The IDEA does not provide a mechanism for Districts to deny FAPE to students by adding an addendum to the IEP. The District denied FAPE to SWD who chose to enroll in the online program by refusing to implement appropriately developed IEPs unless the students withdrew from the online program and returned to school entirely in person.</p>
<p>NMAC 6.31.2.8 NMAC 6.31.11(B)(2) 34 C.F.R. 300.101 34 C.F.R. 300.107 34 C.F.R. 300.320</p>	<p>FAPE and Parent participation/Predetermination: Parents were denied meaningful participation in the IEP process when the District allowed SWD to enroll in the District online program, a general education option available to all students, and then, after school had started, called parents to an IEP meeting to inform them that, due to an undisclosed policy that contradicted existing information, IEPs would not be implemented unless the students withdrew from online program and returned to school entirely in person. The fact that addendums to the IEPs are</p>

Statutory and Regulatory Provisions	Citation
	dated well in advance of the Notices of Meeting and actual dates of the meetings and that the District completely disregarded detailed information provided by parents, failed to consider any other options and cited district policy that remains unwritten and undisclosed is contributes additional evidence of predetermination and a denial of FAPE.

Required Actions and Deadlines

By October 26, 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
 300 Don Gaspar Avenue
 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 Deborah Dominguez-Clark, Director of the Special Education Bureau.

Please carefully read the entire CAP before beginning implementation. One or more steps may require action(s) in overlapping timeframes. All corrective action must be completed no later than October 18, 2022, and reported to the PED SED no later than October 30, 2022. All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C2122-02**.

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 identify the class (parents of each SWD who is or was enrolled in the online program for the 2021-2022 school year, including SWD who withdrew from the online program in order for the student to receive special education and related services indicated on the IEP) and notify them of the violation and their rights.	November 5, 2021	<p>The District will provide NMPED with a list of all SWD who are or were enrolled in the online program for the 2021-2022 school year and evidence of notification.</p> <p>The District will provide NMPED with detailed information showing the current educational enrollment for all SWD who were denied special education and related services because of enrollment in the online program.</p> <p>The District will provide a detailed log of all special education, related services, supports and accommodations that were not provided to each of the student's identified.</p>	November 12, 2021
2.	<p>The District will reconvene IEP team meetings for eligible students who are or were enrolled in the online program and determine how the IEPs will be appropriately implemented while allowing students to continue in the online program.</p> <p>For each of the students, the District shall provide parents with the detailed</p>	<p>November 24, 2021</p> <p>November 24, 2021</p>	<p>The District will provide NMPED with documentation of IEP implementation for all SWD enrolled in the online option.</p> <p>The District will provide NMPED with documentation, in the</p>	<p>December 1, 2021</p> <p>December 1, 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>
	log of the services that were not provided prior to the IEP meeting and shall offer compensatory services to the student consistent with those services not provided. The parents shall have the ability to accept or reject all or part of the services. If the compensatory services are accepted, the IEP team shall develop a plan for delivery of those services, taking into account parents' requests and student's existing schedule.		<p>form of a Prior Written Notice, about the compensatory education for each student. The Prior Written Notice shall contain the description and amount of service not provided, the acceptance or rejection of all or part of the services by the parents, and an agreed upon plan for the delivery of any compensatory services.</p> <p>The District will submit documentation of the delivery of compensatory educational services via a log recording the types of service, date of service and amount of hours of service for each identified student.</p>	October 30, 2022
3.	The District will advise all district staff in writing that students with IEPs participating in the on-line academy are entitled to receive special education and related services, accommodations and supports.	October 30, 2021	The District shall provide NMPED with a copy of the written information submitted to its staff, along with a description of the method of dissemination.	November 5, 2021
4.	The District special education leadership and staff will receive training on IEP implementation, predetermination and the FAPE standard. Training will include specifics of the violations in this complaint and how to avoid the violations going forward. The trainer will be an independent trainer who must be approved by NMPED. The District must ensure that the independent trainer is provided with a copy of this Complaint Resolution Report prior to developing the training materials and agenda.	December 10, 2021	<p>The District will provide the CV and/or resume of the proposed independent trainer to NMPED for approval.</p> <p>The District must also provide documentation of completion training, including dates, times and attendees and a copy of the materials used.</p>	November 5, 2021 December 15, 2021

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

Investigated by:

/s/ Lisa Arbogast

Lisa Arbogast, M.Ed., J.D.

Complaint Investigator

Reviewed by:

/s/ Debra Poulin

Debra Poulin, Esq.

Chief Counsel, Special Education Division

Reviewed and approved by:

A handwritten signature in cursive script, appearing to read "Deborah Dominguez-Clark".

Deborah Dominguez-Clark

Director, Special Education Division