

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2122-04
December 15, 2021**

This report requires corrective action. See pages 9-12.

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

- review of the complaint and supporting documentation from complainant;
- review of the District's responses to the allegations, together with documentation submitted by the District at the request of the PED's independent complaint investigator;
- review of the District's compliance with federal IDEA regulations and state NMAC rules;
- telephonic interviews with the Advocate, Parents, Occupational Therapist, Physical Therapist Assistant, Orientation and Mobility Specialist and Program Support Specialist; and
- research of applicable legal authority.

Limits to the Investigation

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.

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 provide meaningful parental participation in the development of the IEP for Student when staff removed goals and services from the IEP unilaterally without consent or involvement of the entire IEP team in violation of 34 C.F.R. § 300.322; 34 C.F.R. § 300.501(b) and 6.31.2.11(B)(2) and 6.31.2.13(C) NMAC;
2. Whether the District failed to provide parents a copy of the IEP drafted during an IEP meeting for Student in violation 34 C.F.R. § 300.322(f);
3. Whether the District failed to properly implement an appropriate IEP that would provide Student Orientation and Mobility (O&M) services and transportation as a related service as agreed to by the IEP team in the March 24, 2021 IEP in violation of 34 C.F.R. §§ 300.320-300.328; 6.31.2.10(D) and 6.31.2.11(B) NMAC;
4. Whether the actions or omissions of the District 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.

General Findings of Fact

1. In the spring of 2021, Student was a four-year-old prekindergarten student with a special education eligibility of orthopedic impairment.
2. Student's identified areas of need, as outlined on the March 24, 2021 IEP, were occupational therapy (OT), physical therapy (PT), bilateral coordination, school readiness and mobility.
3. Student also needed transportation as a related service.
4. The primary challenge for Student was staying safe when Student was mobile.
5. Student has a congenital disorder that caused difficulty during movement that could result in falls and/or potential injury.
6. The March 10, 2021 notice of meeting for the IEP on March 24, 2021 listed the purpose of the meeting as IEP annual review.
7. At the March 24, 2021 IEP meeting, an orientation and mobility (O & M) specialist attended the meeting and indicated that Student would benefit from O & M services.

8. All IEP team members agreed that Student needed mobility services in order to participate in educational services and to receive a FAPE.
9. An O & M goal and service time was written in the IEP and proposed and agreed to at that meeting.
10. The prior written notice (PWN) from that meeting noted that the District accepted the need for mobility support and would consult with O & M Specialist for suggestions to “assist [Student] in safely transitioning in the school environment.”
11. The Program Support Specialist indicated that the IEP team agreed that the IEP developed at that meeting was a draft IEP.
12. The District was not sure about whether O & M services could be provided. If O & M services could not be provided, the goals and services would be removed from the IEP.
13. This was Student’s annual IEP meeting and Parents stated they would not have agreed to a provisional goal and services.
14. Everyone at the meeting agreed Student needed these services.
15. The O & M goal was removed, as were the O & M services from the March 24, 2021 IEP.
16. The District acknowledged that unilateral changes to the O & M goal and services were made to the IEP after the IEP meeting without the involvement of the Parents or other IEP team members.
17. A copy of the finalized IEP was provided to Parents on April 1, 2021.
18. This IEP did not have the O & M services and goal agreed to at the March 24, 2021 IEP meeting.
19. The IEP provided 120 minutes per week of special education services for safety awareness in the general education setting; 60 minutes a week of PT and 75 minutes per week of OT plus transportation as a related service.
20. The following school year, Student would receive 90 minutes of special education services to address functional living skills instead of the 120 minutes per week, the remaining services stayed the same.
21. Parents contacted the school principal on April 15, 2021 to inquire about the O & M services.
22. The principal stated she would follow up with the specialist, but never contacted Parents about services.
23. The District, in following up on O & M services, determined that the O & M specialist could not provide the services to Student because Student was not blind or visually impaired. The District reported that providing those services to Student would put Specialist’s license in jeopardy.
24. There is no PED licensure requirement for O & M specialists that requires the limitation that the District relies upon for not providing Student with the services.

25. On August 19, 2021, Parents contacted the Exceptional Services Director about the unilateral change to the IEP without Parent involvement. The Director stated an investigation would be conducted and Parents would receive a call back the following day.
26. On September 3, 2021, an IEP addendum meeting was scheduled.
27. That IEP meeting was rescheduled because District wanted the O & M Specialist and other related service providers present to discuss goals.
28. On September 16, 2021, the IEP team met again. Parents proposed the same goal and services from the March 24, 2021 IEP. The District stated the Occupational Therapist and Physical Therapist could provide those services rather than an O & M Specialist.
29. Parents requested that the O & M services and goal be reinstated to the IEP.
30. The District would not restore the goal and services on the March 24, 2021 IEP, but would work to identify Student's needs and orientation and mobility strategies that would assist Student.
31. It was proposed that the orientation and mobility services could be provided by the OT and PT.
32. The OT and PT were not comfortable with providing services without extensive additional training and could not provide the services within the community.
33. Student has not received any O & M services, except through ongoing PT and OT services.
34. Student has not received transportation services all year; the District stated that they were unable to obtain bus drivers so parents were provided mileage reimbursement.
35. Parents were not asked nor were they involved in the decisions regarding transportation services.
36. The IEP and PWN were silent about reimbursement for transportation or that the O & M goal was provisional.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to provide meaningful parental participation in the development of the IEP for Student when staff removed goals and services from the IEP unilaterally without consent or involvement of the entire IEP team in violation of 34 C.F.R. § 300.322; 34 C.F.R. § 300.501(b) and 6.31.2.11(B)(2) and 6.31.2.13(C) NMAC?

One of the fundamental principles of IDEA is meaningful parental participation at IEP meetings. Parents have the right to participate in meetings concerning the identification, evaluation, and educational placement of the child and provision of FAPE. 34 C.F.R. § 300.501; 6.31.2.11(B)(2) and 6.31.2.13(C) NMAC. Parents are necessary members of the IEP team and are entitled to

participate in the development of the IEP. 32 C.F.R. § 300.322. Parental participation is more than just attendance at the meeting. Parents are required members of the IEP team and decisions about a student's educational program should not be made outside of the IEP meeting. *Deal v. Hamilton County Board of Education*, 42 IDELR 109, 104 LRP 59544, 392 F3d 840 (6th Cir. 2004). cert. denied, 110 LRP 4699, 546 U.S. 936 (2005), on remand, 46 IDELR 45 (ED TN 2006); 49 IDELR 123 (6th Cir. 2008); *R.L. v. Miami-Dade County School Board*, 63 IDELR 182, 114 LRP 30126, 757 F3d 1173 (11th Cir. 2014). Amending an IEP without a meeting or parental involvement could be a denial of FAPE. *Okeechobee County School Board*, 118 LRP 56383 (SEA FL 2018).

At the March 24, 2021 IEP meeting, all members of the IEP team agreed Student needed O & M services to ensure Student stayed safe while moving from location to location at school. There was nothing stated at that meeting or in the PWN that this was a draft IEP or that the District needed to verify whether services could be provided before adding to the IEP or implementing the services. The O & M Specialist was invited to discuss options knowing about Student's specific needs related to Student's disability. There was no question that Student needed the services because of falls with potential injuries. If there was an issue about whether the O & M specialist could provide the services or those needs would be met through other means, that should have been noted on the IEP or the meeting continued. The services and goals were included in the IEP with the Parent's participation; the same goal and services were removed from the IEP without the Parents' involvement. The unilateral removal of the goal and services from the IEP without the involvement of the IEP team denied the Parents meaningful parental participation.

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

Issue No. 2.

Whether the District failed to provide parents a copy of the IEP drafted during an IEP meeting for Student in violation 34 C.F.R. § 300.322(f)?

Federal law requires that Parents receive a copy of the IEP prepared at the IEP meeting. 34 C.F.R. § 300.322. Parents attended the March 24, 2021 IEP meeting with the understanding that this IEP meeting was Student's annual IEP meeting and the decisions made at that meeting about Student's services would be the services provided during the period of the IEP. The entire IEP team agreed Student needed O & M services to receive a FAPE. If the O & M Specialist could not provide those services without jeopardizing Specialist's licensure, it was the obligation of the District to find an alternative way to meet Student's O & M needs. There was nothing mentioned or discussed at that IEP meeting about the issue of the Specialist's licensure in provision of services. The entire IEP team agreed that Student needed the services and that is why a goal was developed and services included in that IEP. The Parents were entitled to a copy of the IEP prepared and agreed to at the March 24, 2021 IEP meeting, not the IEP where goals and services

were unilaterally removed from the IEP without the Parents or the remainder of the IEP team's involvement. This was a procedural violation of Part B of IDEA.

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

Issue No. 3

Whether the District failed to properly implement an appropriate IEP that would provide Student Orientation and Mobility (O & M) services and transportation as a related service as agreed to by the IEP team in the March 24, 2021 IEP in violation of 34 C.F.R. §§ 300.320-300.328; 6.31.2.10(D) 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 (2017). See also 34 C.F.R. §§ 300.320 to 300.324.

The IEP must be implemented as written, including all required components. See 34 C.F.R. § 300.323(c). Failure to implement material parts of the IEP may be considered a denial of FAPE. See *Sumter County School District 17 v. Heffernan*, 642 F3d 478, 56 IDELR 86, 111 LRP 30393 (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). Failing to provide needed supports and services can be a denial of FAPE. Dear Colleague Letter, 68 IDELR 76 (OSERS/OSEP 2016).

The notice of meeting for the March 24, 2021 IEP indicated the purpose of the meeting was an annual review of Student's IEP. Parents attended that meeting with the understanding that they were developing Student's annual IEP. All members at that meeting, which included the O & M Specialist, agreed that Student needed O & M services in order to receive FAPE. A goal and services were included in that IEP. At the conclusion of that meeting, the Parents and other team members understood that O & M services would be provided to Student. Yet, that goal and services were unilaterally removed from the March 24, 2021 IEP because the O & M specialist was unable to provide the services. That does not diminish the Student's need for those services or the IEP team's obligation once the IEP team has determined those services were needed and would be provided to Student. If the District determined that the O & M Specialist was unable to provide those needed services, then the IEP team should have been reconvened to determine what services would be provided that would meet Student's O & M needs. Absent that, the District had an obligation to provide O & M services as outlined on the March 24, 2021 IEP. They did not, but removed the goal and services from the IEP.

The IEP team determined that transportation was a needed related service for Student. Student was unable to access the educational curriculum without transportation. The District has an obligation to provide that transportation for Student. While it is challenging to find bus drivers and the District has attempted, but been unable to obtain bus drivers, that does not relieve the District from providing transportation so that Student can access the educational program. Providing reimbursement for transporting Student is not a viable option unless the Parents agreed to that arrangement or the IEP determined that Student did not need transportation services. Neither of those events occurred and, therefore, District failed to implement the IEP in its entirety as written. O & M and transportation services were material components of Student's IEP. The failure to provide those services was a denial of FAPE and violation of Part B of IDEA.

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

Issue No. 4.

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 and related services are entitled to a FAPE. 34 C.F.R. § 300.101; 6.31.2.8 NMAC. Districts are obligated to provide a FAPE to students within their jurisdiction who have been determined eligible for special education services. 34 C.F.R. § 300.17. The type of services to be provided are determined by the IEP team. 34 C.F.R. § 300.320. The educational program for a student must be one that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas County School District. RE-I*, 69 IDELR 174, 117 LRP 9767, 137 S.Ct. 988 (US 2017). The services outlined on the IEP were determined by the IEP team as necessary to allow that student to make progress in the general education curriculum. See 34 C.F.R. § 300.320. Procedural violations can also rise to the level of a denial of FAPE. The court in *J.L. v. Mercer Island School District*, 55 IDELR 164, 110 LRP 60810, 592 F3d 938, 951 (9th Cir. 2010), held that a procedural violation may be a denial of FAPE when it results in the loss of an educational opportunity, infringes on parents' opportunity to participate in the development of the IEP or deprives the student of an educational benefit. *Id.* at 953.

Student's IEP was unilaterally changed to exclude needed O & M services for Student. The IEP team determined Student needed transportation as a related service, yet Student has not received either of those services since last March 24, 2021, the date of her annual IEP, almost five months ago. While there were challenges for the District in meeting Student's needs and providing FAPE, the District failed to provide the needed services for Student to "make progress in light of [Student's] services"; this was a substantive denial of FAPE. The analysis does not end there. Student was also denied a FAPE on procedural grounds. Parents were denied meaningful

parental participation when the O & M goals and services were removed from the IEP by a District staff member without the involvement or consent of the other team members including the Parents. This was a procedural violation that rose to the level of a denial of FAPE.

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

Summary of Citations

Statutory and Regulatory Provisions	Citation
6.31.2.13(C) NMAC	The District failed to provide meaningful parental participation in the development of the IEP for Student when staff removed goals and services from the IEP unilaterally without consent or involvement of the entire IEP team.
34 C.F.R. § 300.322(f)	The District failed to provide parents a copy of the IEP drafted during an IEP meeting for Student 34 C.F.R. § 300.322(f).
6.31.2.10(D) and 6.31.2.11(B) NMAC	The District failed to properly implement an appropriate IEP that would provide Student Orientation and Mobility (O&M) services and transportation as a related service as agreed to by the IEP team in the March 24, 2021 IEP.
6.31.2.8 NMAC	The District's actions and/or omissions towards Student resulted in a denial of a free appropriate public education (FAPE) to the Student

Required Actions and Deadlines

By January 5, 2022, 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
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 July 15, 2022, and reported to the PED SED no later than July 31, 2022. All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C2122-04**.

Corrective Action Plan

<u>Step No.</u>	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
1.	The District will hold a Facilitated IEP meeting to determine how to meet Student's O & M and transportation needs and develop a plan to implement those services. The Facilitator shall be independent of the District and shall be selected from the PED list of approved facilitators.	<u>January 14, 2022</u>	The District will provide a copy of the invitation to the IEP meeting, the new IEP, PWN, plan for implementation of services, and other relevant documents to the PED SED. .	<u>January 21, 2022</u>

<u>Step No.</u>	<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>The IEP meeting shall be held on a date and time that is convenient for the parent. The parent will be provided with a copy of the IEP and PWN at the conclusion of the FIEP meeting.</p> <p>The District shall ensure that the related service providers (PT, OT and O & M) are in attendance at the Facilitated IEP meeting.</p> <p>The District also shall ensure that an LEA representative who can commit the District to transportation is available at the Facilitated IEP meeting.</p>			
2.	If, for any reason, the District is unable to provide Student with needed O & M services or their equivalent as required by the new IEP, the District shall, with Parents' approval, contract with a private provider to provide O & M services or their equivalent to Student.	January 14, 2022	Written confirmation of arrangements for provision of O & M services or equivalent to Student that has been communicated to parent.	January 21, 2022
3.	<p>The District shall provide Student with 10 hours of compensatory O & M service or the equivalent.</p> <p>The plan for these compensatory services will be addressed at the Facilitated IEP meeting in Step 1 of this CAP.</p> <p>The schedule for compensatory services should be developed in collaboration with the parent and can include the summer months.</p>	December 14, 2022 (provision of services completed) January 14, 2022 (plan for compensatory services developed)	Documentation of provision of compensatory services. Plan for compensatory services	December 31, 2022 January 21, 2022

<u>Step No.</u>	<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>The parent can decline the compensatory services for her child.</p> <p>The plan for compensatory services shall be documented in the PWN for the IEP meeting.</p> <p>If needed for Student to access the compensatory services, the District shall provide transportation for Student to and from the services, or through mileage reimbursement for the parent if she agrees.</p>			
4.	<p>The District will provide training to all District staff responsible for the development and implementation of IEPs, including related services. This training will focus on development and implementation of IEPs, amendments of IEPs, obligations of District in implementing IEPs and meaningful parental participation.</p> <p>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>	March 1, 2022	<p>The resume or CV of the person(s) proposed to provide the training and a detailed draft of the agenda for the proposed training to be submitted to NMPED for approval on or before February 1, 2022.</p> <p>The agenda and training materials including outlines, power points, and other materials, used in the training to be submitted to NMPED.</p>	February 1, 2022 March 7, 2022
5.	The District shall reimburse parent for the cost of transporting Student to and from school from March 24, 2021 to the present.	March 1, 2022	Documentation reflecting that parent has been reimbursed for	March 7, 2022

<u>Step No.</u>	<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>Reimbursement shall be at the District's approved mileage rate for the number of miles traveled on each day that Student was transported to school by parent.</p> <p>Parent shall submit documentation requested by the District to support this reimbursement requirement. The District shall promptly provide parent with reimbursement thereafter.</p>		<p>mileage, or has waived reimbursement.</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, Esq.
Independent Complaint Investigator

Reviewed by:

/s/ Debra Poulin

Debra Poulin, Esq.
Chief Counsel, Special Education Division

Reviewed and approved by:

/s/ Deborah Dominguez-Clark

Deborah Dominguez-Clark
Director, Special Education Division