

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2122-03
December 16, 2021**

This report requires correction action. See pages 21-22

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on October 25, 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; 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) and 6.31.2.13(H)(2)(d) NMAC. Any educator ethics issues, or any alleged ADA or Section 504 disability discrimination issues, are not within the jurisdiction of this complaint investigation and, as a result, were not investigated.

Issues for Investigation

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

1. Whether the District failed to implement an Individualized Education Plan (IEP) that meets the Student's needs resulting from the Student's disabilities to enable the Student to be involved in and make progress in the general education curriculum, as required by 34 C.F.R. §§300.320-300.324 and 6.31.2.11(B) NMAC, specifically by:
 - a. failing to implement the Student's special education services as set forth in the Student's IEP during the 2020/2021 and 2021/2022 school years, as required by 34 C.F.R. §300.323(c)(2) and 6.31.2.11(B)(1) NMAC;
 - b. failing to allow the Parent to appropriately participate in the development and implementation of the Student's IEP, as required by 34 C.F.R. §300.322 and 300.501(b); and 6.31.2.13(C) NMAC; and
2. Whether the District's actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE) to the Student in violation of 34 C.F.R. §300.101 and 6.31.2.8 NMAC.

General Findings of Fact

1. The District is a local education agency under State law and, as such, is responsible for providing special education and related services to IDEA-eligible students enrolled in the District
2. The Student is currently seven years old and resides with the Parent within the jurisdictional boundaries of the District. During the 2020/2021 school year the Student attended an elementary school in the District in the 2nd grade. During the current 2021/2022 school year the Student attends an elementary school in the District (the School) in the 3rd grade.
3. The Student is a student with a disability who qualifies for special education services under the disability classification of Speech and Language Impairment (SLI). The Student's most recent evaluation was conducted in April 2019, when the Student was in kindergarten.

4. In July 2020, the Parent was invited to attend a virtual facilitated IEP team meeting regarding the Student.
5. On July 31, 2020, the Student's IEP team, including the Parent, met to conduct the Annual Review of the Student's IEP. A PED-contracted facilitator attended and facilitated the IEP team meeting. The Student's July 31, 2020, IEP provides, in relevant part, as follows:
 - a. The Student's primary disability is identified as SLI.
 - b. The Student Profile section includes a very long description of the Student's Academic/Learning Skills Career Awareness/Readiness, Positive Social Relationships, Motor development Skills Health Considerations and Speech input from the Student's teachers, as well as a good deal of information from the Parent. The Parent also provided information regarding the Student's Recreation & leisure, Community Participation, and Independent Living/Self Help.
 - c. It was noted that the Student has special oral and/or written communication needs.
 - d. It was noted that the Student does not require Extended School Year (ESY) services.
 - e. Annual Goals were developed for the Student with identified objectives and the Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP) in the following areas:
 - i. Reading;
 - ii. Written Language;
 - iii. Speech; and
 - iv. Mathematics.
 - f. It was noted that the Student is currently taking medication for inattentive ADHD, but the Student does not have any other significant health concerns or mobility or transportation needs.
 - g. Instructional Accommodations and/or Modifications in all academic areas were provided in the IEP as follows:
 - i. Accommodations:
 1. Preferred seating near teachers;
 2. Adult assistance with reading;
 3. Peer assistance with reading
 4. Reading materials at student's reading level;
 5. Math manipulatives provided for student;
 6. Assistance in class discussions;
 7. Reduced homework load and/or assignments;
 8. Exams of reduced length;
 9. Extended time for exams;
 10. Student needs to be assessed individually;
 11. Positive reinforcement;

- 12. Private discussion regarding behavior;
 - 13. Other: a behavior chart (token system);
 - 14. Short instructions (one or two steps);
 - 15. Opportunity to have instructions repeated;
 - 16. Frequent feedback;
 - 17. Positive reinforcement for academic skills;
 - 18. checking for understanding;
 - 19. Repeat, clarify and/or simplify directions;
 - 20. Extra time for oral response;
 - 21. Extra time for written response; and
 - 22. Student cannot be pulled from Core Subjects for Reading Intervention.
- ii. Grades will be based on regular classroom standard, effort and demonstrated mastery.
 - iii. Grades will be determined by Regular Education Teacher.
 - iv. In case of failing grade, conference with student's parents, calling case conference to allow parents and all service providers to discuss educational needs of the student, and conference with special education teacher.
- h. Special Education and Related Services were provided in the IEP as follows:
 - i. Individual and/or Group Setting Speech Services for 60 minutes per week in the Special Education Setting;
 - ii. Individual and/or Group Setting Other Inclusion: Language Arts services for 60 minutes per day in the Regular Classroom;
 - iii. Individual and/or Group Setting Other Inclusion: Mathematics services for 45 minutes per day in the Regular Classroom; and
 - iv. Individual and/or Group Setting Other Resource: Reading services for 30 minutes per day in the Special Education Setting.
 - v. It was noted that during remote learning, the Student would receive small group instruction in the Resource Setting for 30 minutes a day.
 - i. The IEP team meeting was attended by the Parent, LEA Representative, Special Education Teacher, Regular Education Teacher, a family friend, the Facilitator, Special Education Director, Diagnostician, Speech Therapist, First Grade General Ed Teacher, Reading Intervention Teacher, Second Grade General Ed Teacher and Special Education Teacher.
6. A Prior Written Notice of Proposed Actions (PWN) dated July 31, 2020, regarding the July 31, 2020, IEP, was provided to the Parent. The July 31, 2020, PWN provides, in relevant part, as follows:

- a. The IEP team proposed that the Student needs will be met in some combination of special education in Resource Setting and Inclusion Services, and General Education setting instruction with modifications, which was accepted.
 - b. The Parent proposed that the Student receive instruction in the General Education setting with services in the Resource setting. This was rejected by the IEP team.
 - c. It was proposed that progress reports will be sent to the parents every 4.5 weeks within the academic year, which was accepted.
 - d. The Parents proposed to have informal meetings with staff, if there are questions or concerns with the progress presented, based on 4.5 weeks progress reports.
 - e. After nine weeks of data collection, a review of existing educational documents will be conducted to determine if a comprehensive evaluation is needed to address the Student's needs.
7. During August and September 2020, the Student's teacher and the Parent exchanged many texts regarding the Student's struggles and successes with reading and writing. The documentation indicates that during the first 9 weeks of school the Student was participating and generally working hard.
 8. On October 9, 2020, the District prepared and provided to the Parent Progress Reports regarding the Student. The Progress Reports indicate as follows:
 - a. Reading: Sufficient Progress. The Student attended 16 out of 29 sessions and was late 10 minutes or more five of the sessions. The Student is able to read CVC words and spell them with the use of Touch Spelling, is on level 5 of Sunday (a phonics-based program that uses a structured curriculum to help students with their letters, letter sounds, initial, medial, and final sounds, and uses a technique called "touch spelling" to touch spell the sounds in words), as well as sounding out words and rhyming and blending words. The Student confuses p and b and has difficulty with CVC word patterns.
 - b. Mathematics: Sufficient Progress. The Student is still struggling with adding and subtracting correctly the new math curriculum is more difficult because it has more word problems. The Student is still working on greater than and less than.
 - c. Speech: Sufficient Progress. The Student has attended speech therapy sessions the a Google meets and she is currently at 70% accuracy on all objectives. The Student continues to require moderate assistance to formulate simple sentences.
 - d. Written Language: Sufficient Progress. The Student is currently working on writing about events using five – 10 sentences. The Student asks how to spell words that she is having difficulty with and is able to share her writings orally with the class. The Student was moved to a Level A for her spelling words to build confidence and strength in her sight word spelling and recognition skills.
 9. On November 6, 2020, the Student's Special Education teacher emailed the Parent to inform her that the Student had not attended any Sunday sessions that week and had

missed seven days over the previous two weeks and was asking for any ideas or suggestions from the Parent.

10. On November 16, 2020, the Student's Special Education teacher sent an email to the Parent indicating that she was again contacting the Parent because the Student was not coming to class. The Student attended only one session in the past four weeks and the teacher wanted to meet with the Parent for a conference. The Parent responded with her available time to meet. The following day the teacher replied and stated that if the Student would come to class on a daily basis things would be better. The Parent replied and stated that it is not the Student's fault that she lost an entire year and now she is being overwhelmed.
11. On November 20, 2020, the District prepared and provided to the Parent Progress Reports regarding the Student. The Progress Reports indicate as follows:
 - a. Reading: Insufficient Progress. The Student continues to maintain a "Level 1" on her iStation Reading Diagnostics with scores ranging from 200 to 196. The Student struggles to put individual sounds together without one-on-one assistance. The Student is still struggling with phonics. The General Education teacher indicates the Student has been distracted during the day and turned your camera often does not participate in class discussions. The Resource Teacher indicates that the Student has attended 8 out of 21 Sunday sessions and was 15 to 20 minutes late for three of those. The Parent was contacted regarding attendance issues and the conference will be set up after Thanksgiving Break. The Student has shown some regression in letter/sound recognition. The Student seems somewhat distracted when in class and needs to be redirected. The Student is reading short sentences.
 - b. Mathematics: Sufficient Progress. The Student struggles with math because she needs help reading the word problems and still makes mistakes as to identifying numbers. Manipulatives are used to make the numbers more concrete and the Student can count individual groups represented. But when asked to add those groups, even with the manipulatives, the Student usually gets an incorrect answer. During class the Student requires a lot of one-on-one assistance and discussion in order to get math problems finished. The General Education teacher is having a very difficult time with two digit adding and subtracting. The Student cannot complete any of the math work on her own.
 - c. Speech: No report.
 - d. Written Language: Insufficient Progress. The Student is struggling with writing sentences independently due in part to her inability to spell words. The Student is at a Level 1 in all three months of assessment so far. The Student receives a modified spelling list in class. Student cannot write coherently independently at this point. The General Education teacher indicates that the Student has been distracted during the day and turns off her camera does not participate in class discussions. When asked to copy or write something from the screen, the Student often asked if she has to copy all of it.

12. On December 14 and 18, 2020, the District prepared and provided to the Parent Progress Reports regarding the Student. The Progress Reports indicate as follows:
- a. Reading: Insufficient Progress. Student has attended 18 out of 31 sessions and was late 10 minutes or more to five of those. The Student is able to read CVC words and spell them with the use of “touch spelling.” The Student is able to identify beginning sounds of words and does well with rhyming and blending words. The Student is able to identify letter sounds for letters provided in Sonday levels one – seven. The Student struggles with p, b and d and continues to have difficulty with CVC word patterns. The General Education teacher indicates the Student continues to need one-on-one help completing reading and writing assignments. The Student’s December score for ISI P was 183, which is a Level One. She has maintained this level all semester. The Student continues to need assistance in all subsets of vocabulary, reading comprehension, spelling and text fluency.
 - b. Mathematics: Insufficient Progress. The Student continues to struggle in all areas. The Student struggles to complete any assignments without one-on-one help. The Student will indicate she has completed the assignments but when asked to share there are very limited responses or none at all. When help is offered, the Student says she will complete it by herself and logs off the meeting. Student is unable to complete assignments during independent work time. The General Education teacher indicates the Student requires one-on-one assistance to complete assignments. The Student still struggles to navigate the online classroom platform. The Student is functioning at a Grade K level in the subsets of numbers, operations, measurement & data and algebra. The Student scored Grade 2 in the subset of geometry. The Student will continue to need one-on-one guidance in order to be able to complete assignments with accuracy and to stay focused during class work assignments.
 - c. Speech: Sufficient Progress. The Student has attended speech therapy sessions with some absences due to a death in the family. The Student has a tendency to generate short sentences and shows low confidence but she responds favorably to correction. The Student is currently at 75% overall.
 - d. Written Language: Insufficient Progress. The General Education teacher indicates that she is concerned that the Student is still having a very difficult time navigating the classroom. She does not seem to be retaining the information the classes learning. Student seems to seek a smaller one-on-one setting and is often not turned into class during the whole discussion. The Teacher believes the Student would benefit from a smaller group setting. The Student has been on Level 1 for the whole semester. The Student is struggling with spelling. When writing sentences from dictation, the Student forgets to capitalize. The Teacher suggests the Student take the assessment one-on-one separately from the whole class and share her screen to make sure she is attempting to

do the assessment. The General Education teacher indicates the Student needs a lot of assistance navigating the Google classroom often takes her a while to complete assignments because she continues to need one-on-one assistance. Student requires prompting to keep working and moving forward enough to needs help with spelling of words.

13. On January 25, 2021, the Student's Special Education teacher sent an email to the Parent indicating there was still a continued concern with the Student's attendance to her Sunday sessions. The Student did not attend any sessions during the previous 9 weeks. The Parent responded that she appreciated the communication. She indicated that the session time is not a good time for the Student because she does not do well in the mornings until her medication kicks in. The Parent suggested that the Student be pulled out from another elective or even after school. The Parent asked for any other suggestions. The Special Education Teacher offered to have the Student do two sessions a week of Sunday opposite the days the Student attended tutoring, but the Parent stated that she wanted to keep the sessions to four days a week.
14. On January 26, 2021, the Student's General Education teacher sent an email to the Parent to address some concerns with the Student. The Teacher was concerned that the Student is not completing assignments independently. The Student will often only type one or two words or not do the assignment at all. When the Student is expected to complete an assignment on her own, she turns off the camera and fails to complete the assignment. Math assignments are given at the end of the day and the Student is given 30 minutes of class time complete them. The Student often receives time the following class session to complete the work and still it remains unfinished. The teacher requested the Parent to talk to the Student about the importance of completing assignments. The Parent replied that she already talked to the Student but she would let her husband know since he is the one home with the Student most of the day. The Parent indicated the Student is struggling with virtual instruction and she needs direct help. The Parent asked if the team was proposing changes to the Student's IEP, specifically regarding the morning intervention time.
15. January 28, 2021, the General Education teacher responded to the Parent to answer her questions. She indicated the School Board was meeting to address the return to in person instruction. She indicated that in order to make changes to the IEP, the team would need to meet virtually or in person to discuss everyone's concerns regarding the Student. She indicated she was working to get a meeting scheduled and asked for the Parent's availability. The Parent responded with her availability. The Special Education Teacher responded that she would like to set up a staffing with the Parents come up with a plan for the Student.
16. On February 2, 2021, the General Education teacher sent an invitation to the Parent for a meeting on February 8, 2021.

17. On February 8, 2021, School staff met with the Parent. The Parent stated that doing Sunday at School and Wilson Foundations at tutoring was confusing for the Student. The School principal suggested that the Student attend Reading Intervention since they use the same program. The Parent agreed to have the Student attend Reading Intervention two times per week. Following the meeting, the Special Education teacher sent an email to the Reading Intervention teacher indicating that the Parent thought it would be essential for the teacher and the Student's private tutor to communicate with each other and reinforce what each other is doing to help the Student with reading.
18. On February 12, 2021, the District prepared and provided to the Parent Progress Reports regarding the Student. The Progress Reports indicate as follows:
 - a. Reading: No Progress Code. A meeting was held with the Parent on February 8, 2021 to discuss ways to help the Student in the area of reading. The Student began working with the Wilson Foundation phonics program with her tutor, and on pre-screener war at the Wilson 1, Unit 3, day 1 and 2.
 - b. Mathematics: Insufficient Progress. The Student's grade in mathematics is a D. The Student is continuing to work on addition and subtraction of one-digit numbers with cubes. The class is currently working on two-digit numbers with regrouping. The Student will not complete assignments on her own and she has not completed multiple assignments which has resulted in her low math grade. The Student requires reminding to stay focused and on task.
 - c. Speech: Sufficient Progress. The Student has good attendance at Google meets. Student is able to explain an idea in a complete sentence when the topic is of interest. The Student sits back at times and appears to be afraid of being wrong, and she is encouraged to try her best not to worry about right or wrong. The Student remains at 75% for answering "why" questions.
 - d. Written Language: Insufficient Progress. The General Education teacher indicates that the Student has a C in ELA, and continues to have a difficult time with writing. Student is unable to write sentences on her own, but completes class assignments with one-to-one assistance.
19. On March 1, 2020, the Student's General Education teacher sent an email to the Parent indicating that the Student had a very difficult time the previous two weeks and was not listening to directions and arguing about completing her work. Student was turning off her camera and not doing her assignments. The teacher informed the Parent that the Student needed to complete missing assignments in social studies, ELA and math. The parent responded and indicated that student was taking her medication and the Parent didn't have an explanation for the Student's behavior. The Parent stated that Student may need small group and asked if the School was using breakout rooms or afterschool tutoring. The Parent also indicated that the Student has limited capacity to evaluate her behavior and

understand her strengths and weaknesses and does not demonstrate effective time management and work completion. The Parent asked about revisiting the Student's IEP and the team recommending additional strategies. The Parent wondered whether the Student needs the inclusion teacher for bell-to-bell support.

20. On March 19, 2021, the District prepared and provided to the Parent Progress Reports regarding the Student. The Progress Reports indicate as follows:
 - a. Reading: No Progress Code. The Student continues to struggle in all areas. The Student has a difficult time completing any assignments without one-on-one assistance. Student is unable to write a single sentence during morning writing. Student will sit at the table and not work until asked multiple times. The Student has been in Reading Intervention since February 12. The Student is significantly below grade level. The Student's areas of need are phonological/phonemic awareness, decoding/encoding, sight words, reading fluency, reading comprehension and vocabulary. On the Student's digraph review Unit 3, lessons 1-4, the Student got a 100%. The Student attended two sessions of hybrid learning and she was more focused and was able to complete more work than during a day in remote. The Student will continue face-to-face for the rest of the school year.
 - b. Mathematics: Insufficient Progress. The Student continues to struggle in all areas. The Student has a very difficult time completing any assignments without one-on-one help. The Student is unable to complete the addition and subtraction with regrouping unassisted. The Student's assignments are modified to allow her to focus on work at her ability level but she continues to struggle with second-grade concepts.
 - c. Speech: Sufficient Progress. The Student forgets sometimes to login virtually. The Student is always polite and puts her best effort. She continues to work on answering "wh" questions which require a review and at times binary choices to respond as she seems to be afraid of being wrong. The Student is always reminded that it is okay to make a mistake.
 - d. Written Language: Insufficient Progress. The Student continues to struggle in all areas. Student has a very difficult time completing any assignments without one-on-one assistance. Student writes two or three words and can only do this with assistance spelling every word. The Student is given 10 high-frequency words for weekly spelling test. Student has not passed the last two tests.
21. On April 21, 2021, the Special Education teacher sent a Notice of IEP for the annual review of the Student's IEP scheduled for May 5, 2020. The Parent agreed to attend the IEP meeting on May 5, 2020.
22. On May 5, 2021, the Student's IEP team, including the Parent, met to conduct the Annual Review of the Student's IEP. The Student's May 5, 2021, IEP provides, in relevant part, as follows:
 - a. The Student's primary disability is identified as SLI.

- b. The Student Profile section includes a very long and very detailed description of the Student's Academic/Learning Skills, including recent assessments in all areas. The indicated Concerns/Recommendations are: Reading Comprehension, Reading fluency, Reading Phonics, Reading Phonemic Awareness, Language Arts grammar, Language Arts Composition, Language Arts Spelling, Math computation, and Mass Problem Solving. The Profile also includes Career Awareness/Readiness, Positive Social Relationships, Motor development Skills Health Considerations and Speech input from the Student's teachers, as well as a good deal of information from the Parent. The Parent also provided information regarding the Student's Recreation & leisure, Community Participation, and Independent Living/Self Help.
- c. It was noted that the Student has special oral and/or written communication needs.
- d. It was noted that the Student does not require ESY services.
- e. Annual Goals were developed for the Student with the Student's PLAAFP in the following areas:
 - i. Reading;
 - ii. Written Language;
 - iii. Speech; and
 - iv. Mathematics.
- f. It was noted that the Student is currently taking medication for her ADHD, but the student does not have any other significant health concerns or mobility or transportation needs.
- g. Instructional Accommodations and/or Modifications in all academic areas were provided in the IEP as follows:
 - i. Accommodations:
 1. Preferred seating near teachers;
 2. Minimize the visual distractions;
 3. Adult assistance with reading;
 4. Peer assistance with reading
 5. Reading materials at student's reading level;
 6. Math manipulatives provided for student;
 7. Reduced homework load and/or assignments;
 8. Student will receive additional time for testing which will not exceed 50% of the allotted time;
 9. Positive reinforcement;
 10. Short instructions (one or two steps);
 11. Opportunity to have instructions repeated;
 12. Visual aids (flashcards, etc.);
 13. Positive reinforcement for academic skills;

- 14. checking for understanding;
 - 15. Repeat, clarify and/or simplify directions;
 - 16. Extra time for oral response;
 - 17. Extra time for written response;
 - 18. Give additional support for Writing by providing Sentence Frames/Structures;
and
 - 19. Have Student use the tapping strategy during reading and writing.
- ii. Grades will be based on regular classroom standard, effort and demonstrated mastery.
 - iii. Grades will be determined by Regular Education Teacher.
 - iv. In case of a failing grade, conference with special education teacher, conference with student's parents, call a case conference to allow parents and all service providers to discuss educational needs of the student, and call an IEP meeting to discuss placement.
- h. Special Education and Related Services were provided in the IEP as follows:
 - i. Individual and/or Group Setting Speech Services for 60 minutes per week in the Special Education Setting;
 - ii. Individual and/or Group Setting Other Inclusion: Language Arts services for 300 minutes per week in the Regular Classroom; and
 - iii. Individual and/or Group Setting Other Inclusion: Mathematics services for 225 minutes per week in the Regular Classroom.
 - i. The IEP team meeting was attended by the Parent, LEA Representative, Special Education Teacher, Regular Education Teacher, Administrator, Diagnostician, Case Manager, Reading Intervention Teacher, and Speech Language Pathologist (SLP).
23. A PWN dated July 31, 2020, regarding the July 31, 2020, IEP, was provided to the Parent. The July 31, 2020, PWN provides, in relevant part, as follows:
- a. The IEP team proposed that the Student needs will be met in some combination of special education in Resource Setting and Inclusion Services, and General Education setting instruction with modifications, which was accepted.
 - b. Speech Therapy continues but the Student's severity is in the mild to moderate range overall.
 - c. It was proposed that progress reports will be sent to the parents every 4.5 weeks within the academic year, which was accepted.
 - d. The Parents proposed to have informal meetings with staff, if there are questions or concerns with the progress presented, based on 4.5 weeks progress reports.
 - e. The team proposed that the Student attend the K-6 Plus Program and Jump Start during the 2021 summer, which was accepted.

- f. The team proposed that the Student continue to receive Reading Intervention and Math Intervention services, which was accepted.
 - g. The team agreed not to pull the Student from core instruction to attend Reading and Math Intervention.
24. On May 5, 2021, after the Student's IEP team meeting, the Parent sent an email to School staff thanking them "for developing such a good IEP for [the Student]. It truly paints a picture of her strengths and weaknesses. I am so thrilled that she has come this far in spite of the many challenges with virtual instruction."
25. On May 5, 2021, the Parent gave the School permission to pull the Student out of Physical Education once a week for Math or Reading Intervention.
26. On May 28, 2021, the District prepared and provided Progress Reports to the Parent regarding the Student. The Progress Reports indicate as follows:
- a. Reading: No Progress Code. The Student's annual review of the IEP was held on May 5, 2021. This IEP has not been implemented long enough to report on new goals. The Student has done better being face-to-face and she is doing much better in class. Student is asking questions and seems a little more confident when completing her assignments.
 - b. Mathematics: No Progress Code. The Student's annual review of the IEP was held on May 5, 2021. This IEP has not been implemented long enough to report on new goals. The Student has done better being face-to-face and she is doing much better in class. Student is asking questions and seems a little more confident when completing her assignments.
 - c. Speech: Sufficient Progress. The Student has been very engaged in speech therapy since she started participating face-to-face. She enjoys answering "wh" questions about a short story that she reads out loud with assistance. With binary choice, she can identify irregular verbs at 70% overall.
 - d. Written Language: No Progress Code. The Student's annual review of the IEP was held on May 5, 2021. This IEP has not been implemented long enough to report on new goals. The Student has done better being face-to-face and she is doing much better in class. Student is asking questions and seems a little more confident when completing her assignments.
27. On September 10, 2021, the District prepared and provided Progress Reports to the Parent regarding the Student. The Progress Reports indicate as follows:
- a. Mathematics: No Progress Code. The Student struggles with her work. Teacher has to sit with her to do her work. The Student has a B due to the teacher sitting next to the Student and helping her. The Student requires more assistance in a smaller group setting.

- b. Reading: Sufficient Progress. The Student currently has a 2.8 (C+) average in Reading class. The Student is reading at a level 1 on iStation. The Student is reading level 8E (beginning of 1st grade) books in guided reading. The Student tries her best on assignments but struggles to complete them independently because she cannot read the grade level text. The Student does better on assignments that are done in small groups or partners.
 - c. Written Language: No Progress Code. The Student requires teacher support to complete all assignments. If the teacher steps away to help other students she will not move on in her writing. The Student is encouraged to sound words out and tap them out but needs teacher support and encouragement to do so.
 - d. Speech: No Progress Report.
28. On October 11, 2021, the District prepared and provided Progress Reports to the Parent regarding the Student. The Progress Reports indicate as follows:
- a. Mathematics: No Progress Code. The Student behaves very well and is very polite and respectful. She gets along well with her peers and teachers. The Student has a difficult time starting and completing her math assignments. She requires lots of support, visuals, help and has difficulty working independently. The Student requires adult assistance in order to complete her classroom assignments. The Student's iReady Overall Score is 384 Kinder are (Grade Level Range is 449-516).
 - b. Reading: No Progress Code. The Student behaves very well and is very polite and respectful. She gets along well with her peers and teachers. The Student has a difficult time with her reading and reading assignments. She requires lots of support, visuals, help and has difficulty working independently. The Student requires adult assistance in order to complete her classroom assignments. The Student's iStation Overall Score for October Assessment is 205, Level 1. The Student has consistently scored a Level 1 every month since August 2021.
 - c. Written Language: No Progress Code. The Student behaves very well and is very polite and respectful. She gets along well with her peers and teachers. The Student has a difficult time with her Writing assignments. She requires lots of support, visuals, help and has difficulty working independently. The Student requires adult assistance in order to complete her assignments.
 - d. Speech: Sufficient Progress. The Student is soft-spoken and is getting to be more willing to respond even though she might be wrong. She is working on understanding a variety of questions and requires support at 78% acc. At times, she requires help for possessive pronouns. Continue with current plan.
29. The documentation from the District includes Documentation of Inclusion Services for Math, Reading and Writing for the entire 2020/2021 school year. This report details and describes the Math, Reading and Writing inclusion services provided to the Student by the

Special Education Teacher in the Regular Education classroom during remote learning. The Math, Reading and Writing Inclusion Services described for the 2020/2021 school year appear to substantially comply with the services provided in the Student's July 31, 2020, IEP.

30. The Inclusion Services provided by the Special Education Teacher to the Student during the 2020/2021 school year were substantially in the form of direct services.
31. The documentation from the District includes a School Based Service Capture detail for the Speech services provided to the Student during the 2020/2021 school year. This report details and describes the Speech services provided to the Student by the SLP during remote learning. The Speech services described in the Service Capture appear to substantially comply with the services provided for in the Student's July 31, 2020, IEP.
32. The documentation from the District does not include any Documentation of Inclusion Services for Math, Reading and Writing for the Student for the 2021/2022 school year prior to the week of October 4, 2021. The Student's Special Education teacher who provides the Math, Reading and Writing Inclusion Services to the Student reports that she "started working with [the Student] the week of October 4, 2021." The teacher reports that she is "making sure that all [the Student's] accommodations/modifications are being met in the classrooms.
33. The District's Special Education Director reports that prior to October 4, 2021, the District was providing Inclusion Services to the Student through a "collaborative model in which the Special Education Teacher meets with the General Education Teachers on a regular basis to discuss progress and how to adapt/accommodate instruction in the general education classroom setting." The documentation does not include any evidence that the District provided the number of minutes of Inclusion Services required in the Student's May 5, 2021, IEP through this "collaborative model."
34. The documentation from the District includes Documentation of Inclusion Services for Math, Reading and Writing for the Student beginning the week of October 4, 2021. This report details and describes the Math, Reading and Writing inclusion services provided to the Student by the Special Education Teacher in the Regular Education classroom after October 4, 2021. The Math, Reading and Writing Inclusion Services provided after October 4, 2021, do appear to substantially comply with the services provided for in the Student's May 5, 2021, IEP.
35. The documentation from the District includes a School-based Service Capture detail for the Speech services provided to the Student during the 2021/2022 school year. This report details and describes the Speech services provided to the Student by the SLP. The Speech services described in the 2021/2022 Service Capture appear to substantially comply with the services provided for in the Student's May 5, 2021, IEP.

36. When the Parent became aware that the Student was not receiving her Inclusion Services in the General Education classroom, the Parent expressed her concerns to School staff and requested a meeting with the School to share her concerns and obtain information regarding the services and service minutes being provided to the Student.
37. On October 12, 2021, the Parent met with School staff to discuss the Student's progress and express her concerns related to the collaborative inclusion model being utilized with the Student. The School is now providing "push-in" inclusion services for the Student.
38. The Student's grades for the 2020/2021 school year are as follows: Science-B; Social Science-B; ELA-C; Math-C; PE-A; Music-A; and Visual Arts-A.
39. During the 2020/2021 school year, the Student was marked absent a total of 18 times and was marked tardy a total of 34 times.
40. The Student's grades for the first quarter of the 2021/2022 school year are as follows: Science-B; Social Science-B Math-B; PE-A Music-B; Visual Arts-A; Reading-B; and Writing-B.
41. During the first quarter of the 2021/2022 school year, the Student was marked absent a total of 2 times and was marked tardy a total of 3 times.
42. The District's calendar indicates that School began in the District on August 2, 2021. Between August 2, 2021, and October 3, 2021, School was in session for 32 school days.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to implement an Individualized Education Plan (IEP) that meets the Student's needs resulting from the Student's disabilities to enable the Student to be involved in and make progress in the general education curriculum, as required by 34 C.F.R. §§300.320-300.324 and 6.31.2.11(B) NMAC, specifically by:

- a. failing to implement the Student's special education services as set forth in the Student's IEP during the 2020/2021 and 2021/2022 school years, as required by 34 C.F.R. §300.323(c)(2) and 6.31.2.11(B)(1) NMAC;
- b. failing to allow the Parent to appropriately participate in the development and implementation of the Student's IEP, as required by 34 C.F.R. §300.322 and 300.501(b); and 6.31.2.13(C) NMAC.

The IDEA provides that any party may present a complaint with respect to any matter relating to the identification, evaluation, educational placement, or provision of FAPE to a disabled student. 20 U.S.C. §1415(b)(6).

Students with disabilities who are eligible under the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. §300.1(a), and 6.31.2.7(B)(19) NMAC. “Central to IDEA is the requirement that local school districts develop, implement, and annually revise an individualized education program (IEP) calculated to meet the eligible student’s specific educational needs. 20 U.S.C. § 1414(d).” *Thompson R2-J School Dist. v. Luke*, 540 F.3d 1143, 1144 (10th Cir. 2008). The “IEP is a written statement that sets forth the child’s present performance level, goals and objectives, specific services that will enable the child to meet those goals, and evaluation criteria and procedures to determine whether the child has met the goals.” *Ass’n for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1043 (10th Cir. 1993). The goals must enable the child to be involved in and make progress in the general academic educational curriculum and meet each of the child's other educational needs that result from the child's disability. 34 C.F.R. § 300.320(a)(2)(ii).

The IDEA and State rules require districts to ensure that students’ IEPs are implemented by each regular education teacher, special education teacher, the related services provider, and any other service provider responsible for its implementation. 34 C.F.R. § 300.323(d). Although school districts should strive to follow IEPs as closely as possible, the IDEA does not require perfect adherence to a child's IEP. Minor discrepancies between the services provided and the services called for by the IDEA do not give rise to an IDEA violation. *Van Dun ex. rel. Van Dun v. Baker Sch. Dist. 5J*, 502 F. 3d 811, 821 (9th Cir. 2007).

The IDEA provides that each public agency must ensure that "as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323 (c)(2). It should be noted that the phrase "as soon as possible" does not mean immediately. The IDEA permits some delay in the implementation of the IEP. *Board of Educ. of Montgomery County v. Brett Y.*, 28 IDELR 460 (4th Cir. 1998) (holding that 30 days to implement an agreed-upon IEP was consistent with IDEA regulations); and *D.D. v. New York City Bd. of Educ.*, 46 IDELR 181 (2d Cir. 2006) (noting that the IDEA permits some delay in implementing an IEP but also requires a specific inquiry regarding the causes of and reasons for the delay). In a situation where the student is being denied a significant portion of the services prescribed by the IEP, a failure to timely implement may rise to a denial of FAPE. *Wilson v. District of Columbia*, 56 IDELR 125 (D.D.C. 2011). *See also Sarah Z. v. Menlo Park City Sch. Dist.*, 48 IDELR 37 (N.D. Cal. 2007) (A two-week lapse in services did not deprive the student of FAPE.).

There is nothing in the IDEA Federal regulations or State Rules that prevents a district from developing an IEP with a direct, indirect or a combination of direct and indirect, service delivery model, but the IEP must be clear about what model is being proposed by the District so that parents are appropriately informed. If a district intends some or all of the service minutes in an IEP to be indirect (consultation, collaboration, etc.) a failure to disclose this in the IEP would violate the parent's opportunity to meaningfully participate in the development of the IEP. *See, e.g., N.L. v. Knox Cnty. Schs.*, 315 F.3d 688, 693 (6th Cir. 2003). *See also, Nova Classical Acad. #4098*, 114 LRP 4094 (SEA MN 05/20/13) (A charter school denied a 2nd grader a FAPE when it failed to provide direct service minutes for a seven week period.), and *Jill W. ex rel. Dale W. v. State of Hawaii, Dep't of Educ.*, 112 LRP 48264 (D. Hawaii 09/25/12) (The ED failed to disclose that inclusion services would be indirect consultation.)

In her Complaint, the Parent has alleged that the District failed to implement the Student's special education inclusion services during the 2020/2021 and 2021/2022 school years. The Student's July 31, 2020, IEP does not indicate that any of the special education service minutes provided for in the IEP would be indirect services. The documentation indicates that the Student substantially received all of the Student's IEP inclusion services in the regular education remote learning classroom by the Special Education Teacher. Based on the facts set forth above, it is concluded that the District did substantially implement the Student's special education services during the 2020/2021 school year. It is further concluded that these were direct services to the Student. The Student's May 5, 2021 IEP also does not indicate that any of the Student's inclusion services are indirect services and does not state they would be provided in a "collaborative model," or any other words that would indicate an indirect or combination service model. Based on the fact that the Student's previous services were direct services and that there was no indication in the IEP that the services would be indirect or collaborative, it is concluded that the May 5, 2021 IEP called for direct services to the Student. The facts clearly indicate that prior to October 4, 2021, the District provided the Student's inclusion services in an indirect "collaborative model" rather than providing direct services. This was corrected by the District beginning the week of October 4, 2021, after the Parent objected to the lack of direct services being provided to the Student. The documentation also clearly indicates that during the 2021/2022 school year the Student continued to struggle with Math, Reading and Writing, which should have indicated to the District that the collaborative model for providing the Student's special education services was not working.

Therefore, based upon the foregoing facts and legal authorities, it is concluded that the District did fail to implement an Individualized Education Plan (IEP) that meets the Student's needs resulting from the Student's disabilities to enable the Student to be involved in and make

progress in the general education curriculum by failing to implement the Student's special education services as set forth in the Student's IEP during the 2021/2022 school year.

As to Issue No. 1(a), the District is cited. Corrective action is required.

The Parent has also alleged in her Complaint that the District failed to allow her to appropriately participate in the development and implementation of the Student's IEPs. The IDEA Federal regulations and State Rules provide that each LEA must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child. 34 C.F.R. § 300.322 and 300.501(b); and 6.31.2.13(C) NMAC. The documentation indicates that the Parent was notified of, and invited to, the IEP team meetings held on July 31, 2020, and May 5, 2021, as well as many other meetings with School staff regarding the Student. The documentation does not indicate that the Parent was denied a meaningful opportunity to participate in meetings regarding the Student. Therefore, it is concluded that the District did not fail to allow the Parent to appropriately participate in the development and implementation of the Student's IEP.

As to Issue No. 1(b), the District is not cited. Corrective action is not required.

Issue No. 2

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

It has been concluded, above, that the District failed to implement the Student's May 5, 2021, IEP, which is a substantive violation of the IDEA. It is concluded that the length of the substantive violation in this case is from August 2, 2021, to October 3, 2021, a total of 32 school days. The Student's May 5, 2021 IEP provides for 300 minutes per week of inclusion services for ELA, which equals 1 hour per day, and 225 minutes per week of inclusion services for Math, which equals 45 minutes per day. However, the documentation does also indicate that the Special Education Teacher did provide some indirect service minutes that benefited the Student. Moreover, the Student's grades in Math, Reading and Writing for the first quarter of the 2021/2022 year were all Bs, which improved from all Cs in the last quarter of the 2020/2021 school year. The Parent questions the validity of these grades received by the Student, but the documentation does not support the Parent's claim that the grades were

inflated by the School. Therefore, based upon the District’s failure to provide direct special education services to the Student, it is concluded that the District’s actions and/or omissions towards the Student resulted in a denial of a FAPE to the Student.

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

Summary of Citations

Statutory and Regulatory Provisions	Citation
34 C.F.R. § 300.323(c)(2) and 6.31.2.11(B)(1) NMAC.	The District failed to implement the Student's special education services as set forth in the Student's IEP during the 2021/2022 school year.
34 C.F.R. § 300.101 and 6.31.2.8 NMAC.	The District’s actions and/or omissions resulted in a denial of a FAPE to the Student.

Required Actions and Deadlines

By January 4, 2021, the District's Special Education Director must assure the PED in writing that the District will abide by the provisions of this Corrective Action Plan (CAP). The PED requests that the District submit all documentation of the completed corrective actions to the individual below, who is assigned to monitor the District’s progress with the Corrective Action Plan and to be its point of contact about this complaint from here forward:

Dr. Elizabeth Cassel
 CAP Monitor
 Special Education Division
 New Mexico Public Education Department
 300 Don Gaspar Ave.
 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, please contact Dr. Cassel.

Please carefully read the entire CAP before beginning implementation. One or more steps may require action(s) in overlapping timeframes. All corrective action must be completed no later than December 16, 2022, and reported to the PED SED no later than December 30, 2022.

All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C2122-03**.

Corrective Action Plan

Step No.	<u>Actions Required</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
[1]	The District is required to provide training regarding the development and appropriate documentation of the service delivery model determined for students with disabilities in IEPs developed by the District.	02/25/2022	A copy of the name and qualifications of the expert to provide the training, as well as the proposed agenda for the training, for approval by SED.	01/17/2022
	This training shall be provided to all District special education staff and school administrators.		A copy of the invitation(s) to all required participants of the training(s) required herein, and a copy of the agenda or syllabus for the training(s).	02/18/2022
	This training shall be provided by a special education expert to be approved by the SED.		An attendance list signed by each person who attended the training(s).	03/04/2022
	An agenda for the training shall be approved by the SED.			03/04/2022

			A copy of a recording of the training presented to District staff.	
[2]	The District is required to provide compensatory education to the Student as follows: (1) the Student will be provided with 24 hours of Special Education Language Arts inclusion services; and (2) the Student will be provided with 18 hours of Special Education Math inclusion services.	07/29/2022	A copy of the Student’s revised IEP and PWN documenting the IEP team discussion and provision of compensatory education, including the compensatory education plan for the Student.	01/14/2022
	The Student’s IEP team must meet to discuss and agree upon a schedule for providing the compensatory education service hours to the Student. The plan for compensatory education must include the Parent’s input, including regarding the timing and delivery of the compensatory education services.	01/07/2022	Documentation of the provision of the compensatory education to the Student whether provided by the District or another agency/person.	08/05/2022

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

Investigated by:

/e/ Wallace J. Calder

Wallace J. Calder, Esq.

Independent Complaint Investigator

Reviewed by:

/e/ Debra Poulin

Debra Poulin, Esq.

Chief Counsel, Special Education Division

Reviewed and approved by:
/e/ Deborah Dominguez-Clark
Deborah Dominguez-Clark
Director, Special Education Division