

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT**  
**SPECIAL EDUCATION DIVISION**  
**Complaint Resolution Report**  
**Case No. C2122-05**  
**December 20, 2021**

**This report requires corrective action. See page 10.**

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on November 4, 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.<sup>1</sup>

**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 Parent, Psychological Evaluator, Counselor, Principal, Assistant Principal and Social Worker; and
- research of applicable legal authority.

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

### **Limits to the Investigation**

Federal regulations and state rules limit the investigation of state complaints to violations that occurred not more than one year prior to the date the complaint is received. 34 C.F.R. § 300.153(c); 6.31.2.13(H)(2)(d) NMAC. Any educator ethics issues, or any alleged ADA or Section 504 disability discrimination issues, are not within the jurisdiction of this complaint investigation and, as a result, were not investigated.

### **Issues for Investigation**

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

1. Whether the District failed to identify and evaluate a child in need of special education and related services in a timely manner in violation of 34 C.F.R. § 300.111; 34 C.F.R. § 300.306; 34 C.F.R. § 300.101 and 6.31.2.10 (A, (F)(1) and 6.31.2.8 NMAC;
2. Whether the District failed in determining Student ineligible for special education services in violation of 34 C.F.R. § 300.306 and 6.31.2.10 (F)(1) NMAC;
3. 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.3.

### **General Findings of Fact**

1. At the start of the 20-21 school year, Student, who was a ten-year-old in the 5<sup>th</sup> grade, transferred into the District from out of state.
2. Student had been receiving special education services under the eligibility category of autism at the previous school.
3. Upon Student's arrival, the District implemented the IEP from the previous school and provided comparable services, including speech services, until a new IEP could be developed.
4. Student's three reevaluation was due on January 19, 2021.
5. At the September 23, 2020 IEP meeting, a review of existing evaluation data (REED) was completed and consent was signed for a comprehensive evaluation in speech and language, social communication and social emotional/behavioral. The consent also included evaluations in academics and ability testing.

6. The results of the evaluation indicated that Student was average ability and achievement scores in all academic areas were average. Speech and language skills were also age appropriate; Student no longer needed speech and language services.
7. On the BASC-3, Student's rankings in attitude to teachers, atypicality, locus of control, social stress, anxiety, depression and sense of inadequacy were clinically significant. The following scales were at risk as reported by Student: relations with parents, self-esteem, attitude to school and self-reliance.
8. The teacher identified hyperactivity, anxiety, depression, somatization, attention problems, atypicality, withdrawal, adaptability, leadership and study skills as clinically significant with aggression, conduct problems, and social skills at risk.
9. Parent reported leadership and activities of daily living as at risk, the rest were within the acceptable range.
10. The Psychological Examiner noted that Student was distraught during the evaluation; Student reported no friends and "crippling depression."
11. The report noted that further intervention was warranted in the areas of social stress, anxiety and depression.
12. There were no further assessments or follow up in those areas, although the Psychological Supervisor indicated further information was needed in those areas.
13. On the autism screening assessment, the evaluator found minimal to no symptoms of autism.
14. During the previous three-year reevaluation in January, 2018, Student was eligible for special education services under the eligibility category of autism.
15. The Speech Language Therapist who had been working with Student evaluated Student and noted that Student was transitioning well in new school, got along well with others and was making passing grades.
16. Student was able to initiate and sustain conversations and understood the rules of communication; Student's pragmatic skills were within normal limits.
17. It was noted in the evaluation report that 'based on current data obtained via observations, interviews, record review, and standardized assessments, [Student] **no longer continues to qualify** for special education services, as a student with an Emotional Disturbance.'
18. Student also did not qualify under autism or specific learning disability.
19. "Based on current and prior evaluations, [Student] seems to have difficulty with her social-emotional functioning."
20. The eligibility report stated that Student did not have educational need but there was no explanation about the impact of social-emotional functioning on learning

21. The evaluation report stated that there was no educational need. Additionally, the report did not address any potential educational impact because of social stress, anxiety and depression or the clinically significant areas of the BASC-3.
22. Student was earning passing grades, but was exhibiting other behaviors in the classroom that were impacting Student's educational benefit.
23. The evaluation report also stated that Student continued to exhibit difficulty with social-emotional functioning within the school environment.
24. Suggestions were made in the report for when Student was experiencing stress, worry or frustration.
25. An eligibility meeting was held on January 27, 2021 and it was determined that Student no longer qualified for special education services as a Student with a disability.
26. The team recommended and it was noted on the PWN that Student would benefit from a 504 plan because of emotional disturbance.
27. The 504 plan was never developed; instead, the team recommended a referral to health services and to the Student Assessment Team (SAT)/504 team.
28. The SAT team recommended a functional behavior analysis (FBA) and a behavior intervention plan (BIP) to assist Student.
29. As part of the completion of the FBA, the Counselor observed Student for one hour in the morning on February 1, 2021 and noted self-defeating behaviors, Student would hit head on hands and state, "I can't do it." Student was whimpering, manipulating, exhibiting attention seeking behavior, crying, ceased trying to complete work, using negative self-talk, demanding immediate attention and assistance, exhibiting impatient and irrational behavior.
30. The Counselor reported that Student used whining speech and vocabulary; Student was acting out to gain attention and stay off task.
31. The Student's negative and defeated mindset, emotions, low self-esteem and little confidence in work impacted work effort and performance.
32. Another observation was completed by the Social Worker twice on February 3, 2021, each observation was for approximately 45 minutes.
33. The Social worker noted Student was physically agitated, frustrated, fidgety, drew squiggles/drawing instead of completing math work.
34. Student appeared in emotional anguish, encouragement by Staff and other students increased stress; Student expressed frustration verbally, physically and in moans.
35. Student's actions were quite dramatic with exaggerated gesturing and using a three-year-old voice.
36. In the later interview that same day, the social worker noted anxious thinking about possible abandonment and rejection, frequent anxious behaviors.

37. The fears of abandonment were from parents and peers; Student would be rejected/abandoned if not better.
38. Student had excessive fears of future calamity and chronic worry with distorted thinking and highly stressed; Student had difficulty with self-calming or changing thought patterns.
39. The social worker commented that any feared subject created severe negative, anxious feelings. The Social Worker was concerned about the feelings of abandonment and rejection. Counseling was recommended
40. The Teacher also reported that Student did better with clear expectations and directions; with new concepts, Student felt like a failure and was stupid.
41. Redirection or encouragement could lead to further frustration or meltdowns; Student needed extra time to work through and complete tasks.
42. The teacher noted that Student could do the work, but often would not try; exhibited poor self-confidence which prevented Student from trying new tasks.
43. The Parent has requested an independent educational evaluation which was agreed to by the District; the evaluation had not been completed at the time of the report.

### **Discussion and Conclusions of Law**

#### **Issue No. 1**

Whether the District failed to identify and evaluate a child in need of special education and related services in a timely manner in violation of 34 C.F.R. § 300.111; 34 C.F.R. § 300.306; 34 C.F.R. § 300.101 and 6.31.2.10 (A, (F)(1) and 6.31.2.8 NMAC?

Districts have an ongoing affirmative duty to locate and identify students suspected of having a disability. Autism is a disability identified in IDEA, as is emotional disturbance. 34 C.F.R. § 300.111(a)(i); 6.31.2.10 (A) NMAC. Child find applies when a district suspects a child has a disability and is in need of special education services, even if the student is maintaining passing grades. 34 C.F.R. § 300.101 (c)(1).

Emotional disturbance (ED) is defined as a condition exhibiting one or more of the following characteristics "over a long period of time and to a marked degree that adversely affects a child's educational performance":

- a. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
- b. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- c. Inappropriate types of behavior or feelings under normal circumstances;

- d. A general pervasive mood of unhappiness or depression;
- e. A tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8 (a)(1).

One of the five criteria is sufficient to meet the definition of ED. 34 C.F.R. § 300.8(c)(4) (i).

A district must look for potential special education eligible students; it cannot take a back seat and wait for others to refer students for an evaluation. *Compton Unified School District v. Addison*, 54 IDELR 71 (9th Cir. 2010), *cert. denied*, 112 LRP 1321 , 132 S. Ct. 996 (2012). Districts need to be aware of signs that should trigger a suspicion that a student may be eligible for special education services. *Krawietz v. Galveston Independent School District*, 72 IDELR 205, 118 LRP 33954, 900 F3d 673 (5<sup>th</sup> Cir. 2018). *See, e.g., Cincinnati City Schools*, 115 LRP 26069, 12 ECLPR 111 (SEA OH 2015).

The eligibility team determined that Student was no longer eligible for services under the category of autism or emotional disturbance. However, the evaluation report noted that additional intervention was warranted in the areas of social stress, anxiety and depression. There was no explanation or follow up why those areas were not further assessed. Student was distraught during the evaluation and reported “crippling depression” and having no friends, yet the District determined that Student no longer qualified as a Student with an ED.

A diagnosis of ED does not automatically qualify the Student for special education services. There also must be educational need such that the student needed specialized instruction. The Psychological Intern stated there was no educational need, but she did not explain the basis for that statement. Furthermore, there was no explanation of whether there was the educational need because of the observations during the evaluation, the clinically significant scores on the BASC-3, the Student’s reports of “crippling depression” and lack of friends, or the areas warranting further intervention. The PWN stated a 504 plan was needed because of emotional disturbance, but instead a FBA and BIP were completed. If the team determined had not just relied on passing grades and considered the information from the observations conducted as part of the evaluation, that information should have been noted on the eligibility forms and PWN, and it was not. The District had sufficient red flags to know they were missing something after completing the evaluation. They had an obligation to dig deeper and, the IEE that is in process may provide that additional information. The District failed in its Child Find obligation.

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

**Issue No. 2.**

Whether the District failed in determining Student ineligible for special education services in violation of 34 C.F.R. § 300.306 and 6.31.2.10 (F)(1) NMAC?

When determining eligibility, the student must meet the definition of a disability under IDEA or New Mexico law and must need specialized instruction as a result of the disability. 34 C.F.R. § 300.8(a)(1) and 6.31.2.10 (F)(1) NMAC.

The District in its own reports listed several areas of concern with this Student. The evaluation report stated that further interventions were warranted in the areas of social stress, anxiety and depression. No follow up was done with that information. Three observations were completed during the completion of the FBA with a number of concerns noted that were atypical behaviors for a 5<sup>th</sup> grade Student and raised significant concerns about Student's mental health to suggest counseling to the Parents. Student's behaviors and thoughts had a direct impact on Student's learning, even if Student was earning passing grades. Student had been receiving special education services under the category of autism, but was no longer eligible after the latest evaluation. The District noted that Student had ED because a 504 plan was recommended in the PWN, but there was insufficient information in the reports to determine if Student demonstrated educational need because of the ED and, therefore required specialized instruction. The red flags noted in the reports without careful analysis of the educational impact of those red flags did not demonstrate the proper decision making was used in determining Student ineligible for special education. These concerns would suggest that Student's eligibility could not be determined based on the information the District had available. More information was required to determine Student's continued eligibility.

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

**Issue No. 3**

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?

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 (9<sup>th</sup> 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 had been eligible for special education services when Student moved into District. Student was determined eligible under the category of autism and speech. Following the completion of a reevaluation, the District determined Student ineligible for special education. There was no IEP or 504 plan, but a FBA was completed and BIP developed. Student continued to have passing grades. If Student was entitled to special education services, but was improperly determined ineligible then Student was denied educational benefit and a loss of an educational opportunity. Based on the actions and omissions of the District during the reevaluation and eligibility determination of this Student, these procedural violations rose to the level of a denial of FAPE.

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

**Summary of Citations**

<b>Statutory and Regulatory Provisions</b>	<b>Citation</b>
6.31.2.8 NMAC	The District failed to identify and evaluate a child in need of special education and related services in a timely manner.
6.31.2.10 (F)(1) NMAC	The District failed in determining Student ineligible for special education services.
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 6, 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 Ave.  
Santa Fe, NM 87501  
Telephone: (505) 490-3918  
[Elizabeth.Cassel@state.nm.us](mailto: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 December 20, 2021, and reported to the PED SED no later than January 5, 2023.** All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C2021-05**.

**Corrective Action Plan**

<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED SED</u></b>	<b><u>Document Due Date</u></b>
1.	<p>The District will hold a facilitated IEP meeting as soon as the IEE is completed to review the IEE and a REED to determine if Student is eligible for special education services. If additional assessments are required to make that determination, consent will be obtained and further needed assessments completed in a timely manner with an EDT as soon as possible thereafter.</p> <p>The Facilitator shall be independent of the District and shall be selected from the PED list of approved facilitators. The District shall pay for the cost of the Facilitator.</p> <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>	February 1, 2022	The District will provide a copy of the REED, PWN and other documents reviewed in the determining Student's eligibility to the PED SED.	February 15, 2022

<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED SED</u></b>	<b><u>Document Due Date</u></b>
	The District shall invite the evaluator to the FIEP meeting to allow for interpretation and discussion of the results of the IEE. If necessary, the District shall pay the evaluator for attendance at the FIEP meeting.			
<b>2.</b>	The District will provide training by an independent trainer approved by PED to all District special education staff evaluators, and related services providers in the areas of determination of eligibility in the areas of autism and emotional disturbance and how to adequately document eligibility determinations.	<b>March 1, 2022</b>	<p>The resume or CV of the person(s) proposed to provide the training and a draft of the proposed training to be submitted to NMPED for approval <u>on or before February 1, 2022.</u></p> <p>The agenda and training materials including outlines, power points and other materials to be submitted to NMPED for approval <u>on or before February 15, 2022.</u></p> <p>A recording of the training, as well as attendance sheets documenting staff and others attending</p>	<b>March 15, 2022</b>

<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED SED</u></b>	<b><u>Document Due Date</u></b>
			the training on or before March 15, 2022.	

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

Investigated by:

*/e/ Michele K. Bennet*

Michele K. Bennett, 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