

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2122-06
December 2, 2021**

This report requires corrective action. See pages 9-11.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on October 12, 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 Parent and Special Education Director; and
- research of applicable legal authority.

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

Limits to the Investigation

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

Issues for Investigation

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

1. Whether the District failed to properly implement the Individualized Education Programs (IEP) for Student by not providing accommodations, modifications, or sharing special education information with Teachers in violation of 34 C.F.R. §§ 300.320-300.328, 6.31.2.10(D) NMAC, and 6.31.2.11(B) NMAC;
2. Whether the District failed to reevaluate Student in a timely manner in violation of 34 C.F.R. § 300.303(b) and 6.31.2.10(D)(2) NMAC;
3. Whether the actions and/or omissions of the District towards special education eligible Student resulted in a denial of a FAPE in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC?

General Findings of Fact

1. At the time of the filing of the complaint, Student was fifteen years old and in the tenth grade.
2. Student was eligible for special education services under the category of other health impaired (OHI).
3. Student had a complex neuroprocessing deficit which impacted Student's learning and retention of materials.
4. Student's primary areas of need were reading, math and written language.
5. An updated neuropsychological evaluation was completed on March 29, 2021; a copy of the report was provided to the Case Manager prior to the annual IEP meeting.
6. Student's three-year reevaluation was due on August 12, 2021.

7. The first day of school was August 13, 2021.
8. The IEP team has not yet completed a review of existing evaluation data (REED) or determined if additional assessments are required for the reevaluation of Student.
9. Student's annual IEP was completed on August 24, 2021. Parent finally received a copy of the IEP on September 21, 2021 without a prior written notice (PWN).
10. The notice of that IEP meeting was sent as a Google Meet invitation without listing attendees or any of the procedural safeguards in the standard notice of meeting.
11. Information from the neuropsychological report was included in the annual IEP.
12. Although comments from teachers were noted on the IEP, present levels of academic performance were not included in the August 24, 2021 IEP.
13. Student's IEP provided extensive accommodations and modifications including extra time for assignments, shortened written directions, reduced or modified assignments, notes, anchor charts, oral responses and modified grades with earning a passing grade if Student attempted work.
14. Student had goals in math, executive functioning, written language, reading and, transition.
15. Student was to receive 2.25 hours per week of special education services for reading, math and written language, 45 minutes per subject.
16. Student also was in a special education study hall, if additional assistance was needed and to work on executive functioning and transition needs.
17. Since the beginning of this school year, Parent had been concerned about what services Student was receiving and repeatedly contacted District staff including the Principal, Case Manager and Student's Teachers about Student's special educational services.
18. Parent questioned whether the Teachers were aware of Student's IEP and special education services, accommodations and modifications listed on the IEP.
19. One of Student's Teachers was out of the country this fall and when Parent asked a question about math services for Student, the Teacher responded with how the teacher worked with Down syndrome Students. Student was not a Down syndrome student.
20. Other Teachers used the wrong name for Student.
21. Parent requested special education service logs for all reading, written language and math services.
22. The service logs that were eventually provided were incomplete, did not document what goals were being addressed and indicated that Student did not receive all services outlined on the IEP.
23. The investigator requested all service logs for this Student.
24. Some of the service logs indicated that the services provided to Student were observation of Student in physical education class and a lengthy review of the student

handbook or discussion of the Preliminary Scholastic Aptitude Test (PSAT), not related to Student's IEP goals.

25. There were no service logs provided in written language. It is unclear what, if any, services were provided in the area of written language. Student was to receive 45 minutes of services per week for written language. Therefore, beginning with the week of August 16, 2021 through November 19, 2021, Student was denied 585 minutes of special education services in written language.
26. The service logs for reading indicated that Student was denied 395 minutes of special education services in reading.
27. Student was denied 365 minutes of special education services in math since the second week of school.
28. Based on the service logs, there were some weeks that Student received no services, other weeks Service Provider noted Student was absent but Provider was available to provide services.
29. Student reported to Parent that many of the accommodations and modifications such as teachers' notes were not being provided to Student.
30. Parent, in checking online grade tracker, noted that Student was failing in some subjects, but Parent had not been notified as required by the IEP.
31. Parent questioned validity of grades; Parent noted that many of Student's daily grades on assignments were 100, but when Student took the test on the same materials, the grade would be low 60s.
32. Parent also requested documentation whether the accommodations and modifications outlined in the IEP were being provided.
33. The District was unable to document that the accommodations and modifications were being consistently provided, if they were being provided at all.
34. Parent repeatedly asked about Student's reevaluation. The District reported that the neuropsychological evaluation report was not received by email at the District until November, 2021.
35. Although Student received the quarterly report card, progress notes were not included but were provided weeks later. The progress notes specified progress on goal but comments were about overall progress in the subject area rather than on Student's specific goal.
36. Finally on November 19, 2021, Parent was told that a meeting would take place to go over Student's service logs. When Parent arrived, the meeting was to be a REED and IEP meeting, not a review of service logs.
37. The meeting notice was again on a Google Meet invite, not a formal notice of IEP meeting.

38. When Parent objected to the meeting, the District then scheduled the meeting for the following Monday, November 22, 2021 to review the REED and develop an IEP.
39. Parent declined to attend that meeting.
40. Since that time, the Special Education Director has taken over Student and a meeting was scheduled for December 2, 2021 to review existing evaluations and obtain consent for additional evaluations to complete the reevaluation.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to properly implement the Individualized Education Program (IEP) for Student by not providing accommodations, modifications, or sharing special education information with Teachers in violation of 34 C.F.R. §§ 300.320-300.328, 6.31.2.10(D) NMAC, 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 F.3d 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). A five-month delay in the implementation of the IEP was a denial of FAPE. *Turner v. District of Columbia*, 61 IDELR 126 (D.D.C. 2013). Failing to provide needed supports and services can be denial of FAPE. Dear Colleague Letter, 68 IDELR 76 (OSERS/OSEP 2016).

There are numerous examples on this record of how the IEP was not implemented as written. It was difficult to determine Student’s needs and goals because the IEP did not include present levels of academic performance. After parent’s repeated requests for service logs and documentation of the accommodations and modifications provided to Student, the information provided demonstrated that the District did not implement Student’s IEP. The amount of

services provided did not correspond to the services required by the IEP, nor were the services described related to the goals outlined on the IEP. Based on District's own records, Student was denied a minimum of 1345 minutes of special education services in reading, math and written language. Moreover, the lack of documentation suggested that Student's accommodations or modifications were never provided or provided inconsistently. Parent's report that teachers were not aware of Student's name, disability and services suggested that the IEP was not properly implemented. Teachers and other providers need to know that information in order to properly implement the IEP. Denying Student access to special education services and accommodations and modifications is a material defect and a denial of FAPE for this Student.

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

Issue No. 2.

Whether the District failed to reevaluate Student in a timely manner in violation of 34 C.F.R. § 300.303(b) and 6.31.2.10(D)(2) NMAC?

The requirements for reevaluations are set out in 34 C.F.R. § 300.303. Students who are IDEA eligible must be reevaluated on or before the third anniversary of their last evaluation. 6.31.2.10(D)(2)(e) NMAC. Part of the process of any reevaluation is to complete a review of existing evaluation data (REED). 6.31.2.10 (D)(2)(a) NMAC. Parents are to be included in the REED process. 6.31.2.10(D)(2)(a)(ii) NMAC. If it is determined that a reevaluation was not required, the parents must be informed through a prior written notice (PWN). 34 C.F.R. § 300.503; 6.31.2.10 (D)(2)(a) NMAC.

Student's reevaluation was due on or before August 12, 2021. At the IEP meeting on August 24, 2021, the required reevaluation was not discussed. The neuropsychological evaluation report was provided to the District prior to that meeting and information was included in the IEP, but a REED was not completed at that time. On November 19, 2021, the District attempted, with inadequate notice, to hold a meeting with Parent to complete the REED and determine if additional assessments were needed. Parent declined that meeting and a meeting to complete the REED and determine if additional assessments are needed was scheduled for December 2, 2021. The District did not reevaluate Student in a timely manner in violation of Part B of IDEA and 6.31.2.10 (D)(2) NMAC.

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

Issue No. 3

Whether the District's actions and/or omissions towards 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?

Students who are eligible for special education services are entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. Districts are obligated to provide a FAPE to students within their jurisdiction who have been determined eligible for special education services. 34 C.F.R. § 300.17. The 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 had been making some progress in courses during the first quarter of the 21-22 year, but it was unclear from the progress notes whether Student was making progress on IEP goals. The failure to implement material portions of the IEP is a substantive denial of FAPE. Student was denied the special education services and other supports outlined on the IEP. Those services were needed for Student to access and receive benefit from the educational program. Although the progress notes eventually provided demonstrate that Student had made some progress in courses this school year, the continued denial of supports and services and the delay in the reevaluation deprived Student of an educational opportunity.

Parent repeatedly requested documentation of the services and supports Student was to receive through the IEP. Those logs that were provided were incomplete or inaccurate. Documentation of the accommodations and modifications were never received. Parent had consistently asked about Student's reevaluation, due August 12, 2021, yet still not completed. There were delays in providing a copy of the completed IEP; a PWN was never provided. The Google Meet invites were not sufficient notice outlining attendees and procedural safeguards. Progress notes were delayed and were incomplete regarding progress on individual goals. Parent was entitled to all of that information. This and the District's delays in honoring parent's

requests for service logs, documentation of supports and timely completing the reevaluation deprived parent of meaningful parental participation in Student’s educational program and 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

Statutory and Regulatory Provisions	Citation
6.31.2.11(B) NMAC	The District failed to properly implement the Individualized Education Programs (IEP) for Student by not providing accommodations, modifications, or sharing special education information with teachers.
6.31.2.10(D)(2).	The District failed to reevaluate Student in a timely manner.
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 December 16, 2021, the District's Special Education Director must assure the PED in writing that the District will abide by the provisions of this Corrective Action Plan (CAP). The PED requests that the District submit all documentation of the completed corrective actions to the individual below, who is assigned to monitor the District’s progress with the Corrective Action Plan and to be its point of contact about this complaint from here forward:

Dr. Elizabeth Cassel
 Corrective Action Plan Monitor
 Special Education Division
 New Mexico Public Education Department
 300 Don Gaspar Avenue Santa Fe, NM 87501
 Telephone: (505) 490-3918
Elizabeth.Cassel@state.nm.us

The file on this complaint will remain open pending the PED’s satisfaction that the required elements of this Corrective Action Plan are accomplished within the deadlines stated. The District is advised that the PED will retain jurisdiction over the complaint until it is officially closed by this agency and that failure to comply with the plan may result in further consequences from the PED.

Each step in this Corrective Action Plan is subject to, and must be carried out in compliance with, the detailed procedural requirements of the IDEA 2004 and the implementing federal regulations and State rules. If the District needs brief extensions for the steps in the Corrective Action Plan, contact Deborah Dominguez-Clark, Director of the Special Education Bureau.

Please carefully read the entire CAP before beginning implementation. One or more steps may require action(s) in overlapping timeframes. All corrective action must be completed no later than December 10, 2022, and reported to the PED SED no later than December 31, 2022.

All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C2122-06**.

Corrective Action Plan

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
1.	The District will complete the REED and determine if additional assessments are necessary, obtain required consent and complete those assessments as soon as possible. The District will include Parent in the REED.	December 31, 2021	The District will provide a copy of the new eligibility report, PWN, and plan to update the IEP, if necessary, to the PED SED.	January 31, 2022
2.	The District will review all policies and procedures regarding procedural safeguards, development and implementation of IEPs, service logs and progress notes, reevaluations and amend, if needed, said policies. The amended policies and procedures will	March 1, 2022	A copy of the amended policies/procedures and the minutes from the Board meetings where action was taken on proposed policies. These documents will be provided to the PED SED.	March 15, 2022

	be submitted to the local governing body for approval.			
3.	<p>The District shall train District administrators, and special education staff on the development and implementation of IEPs, procedural safeguards, reevaluations, and service logs, cooperation with and support to families, and the policies and procedures developed in response to Step 2.</p> <p>The resume or CV of the person(s) proposed to provide the training to be submitted to NMPED for approval. The agenda and training materials including outlines, power points and other materials to be submitted to NMPED for approval.</p>	<p>April 15, 2022</p> <p>March 1, 2022</p>	<p>A recording of and documentation used in the required training. Attendance records showing the staff who attended and any who did not attend the training as required.</p>	<p>April 30, 2022</p> <p>March 1, 2022</p>
4.	<p>The District will provide 2000 minutes of compensatory education to Student for the special education services denied to Student and the failure to provide accommodations and modifications between the start of the 21-22 school year and the date of this report. These compensatory services are above and beyond those required in the August 24, 2021 IEP.</p> <ul style="list-style-type: none"> Parents shall be provided a copy of Procedural Safeguards Notice as part of this process. 	December 2, 2022	<p>Documentation of provision of compensatory services provided to Student, including service logs, progress reports, and other information about special education and supportive services provided to Student.</p>	Interim reports must be provided every 9 weeks

	<ul style="list-style-type: none"> • The plan for compensatory services shall be developed in and IEP team meeting, with parents having input into the arrangements for provision of the services and with consideration being given to student’s ability to benefit from the services. • The District shall provide a monthly report of a compensatory services provided and progress or to Student shall be provided to Parent. • If problems arise in the delivery or benefit of compensatory education services, the District shall convene the IEP team to address the issues. 	February 1, 2022	The plan for compensatory education, including a prior written notice containing the plan.	February 15, 2022
5.	The District shall convene an IEP meeting as soon as possible but no later than February 1, 2022 to determine the supports and services needed for Student. This IEP shall include the plan to address the compensatory services required in Step 3 of this CAP and any change in services as determined by the comprehensive evaluation.	February 1, 2022	The IEP and all supporting documents shall be provided to NMPED.	February 15, 2022

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

Investigated by:

/s/ Michele K. Bennett

Michele K. Bennett

Independent Complaint Investigator

Reviewed by:

s/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