

NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2122-09
February 4, 2022

This report requires corrective action. See pages 7-9.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on December 6, 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 comply with its Child Find obligations under the IDEA by failing to conduct an initial special education evaluation of the Student after the Parent made verbal and/or written requests for an evaluation to the District, as required by 34 C.F.R. §§ 300.111 and 300.301-306; 6.31.2.10(A), and 6.31.2.10(D)(1)(b) NMAC.
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 identifying and evaluating IDEA-eligible students enrolled in the District
2. The Student who is the subject of this complaint investigation is currently 13 years old and resides with the Parent within the jurisdictional boundaries of the District.
3. District records indicate that during the 2020/2021 school year the Student lived, and attended a middle school, in El Paso, Texas in the 6th grade.
4. At some point prior to the beginning of the 2021/2022 school year, the Parent and Student moved back into the District.
5. On August 24, 2021, the Parent called the District's Data Entry Clerk/Registrar and scheduled an appointment for August 26, 2021, to register the Student in the District, but the Parent canceled this appointment and rescheduled for the following week. It appears that one or more additional appointments to register the Student were canceled by the Parent.
6. The Parent and the District agree that when the Parent called the District on August 24, 2021, the Parent requested an IEP for the Student in order to receive Speech Therapy services. The District admits that the Data Entry Clerk/Registrar then informed the School's

Educational Diagnostician, the IEP Facilitator, and the School Principal regarding the Parent's request for a special education evaluation for the Student.

7. District records indicate that the Student was enrolled in the District on September 7, 2021.
8. During the current 2021/2022 school year the Student is attending a Middle School in the District (the School) in the 7th grade.
9. The District reports that the Student's records from the 2020/2021 school year in Texas do not indicate whether the Student was in special education or had been tested for special education services.
10. The Student has not been referred to the District's Student Assistance Team (SAT) process during the 2021/2022 school year.
11. At the time that the Parent made her verbal request for a special education evaluation for the Student, no action was taken by the District to obtain informed consent from the Parent. The District also failed to provide the Parent with PWN regarding her request and failed to provide a copy of the Procedural Safeguards Notice to the Parent.
12. The documentation indicates that after the Parent's Complaint was filed on December 6, 2021, the District's Special Education Director directed special education staff to contact the Parent to obtain informed consent for a Speech Language evaluation.
13. On December 13, 2021, consent was signed by the Parent for the initial special education evaluation of the Student.
14. The District reports that the Student's initial evaluation took place on January 6, 2022. The evaluation has not been completed because the Parent has not submitted her Parent Questionnaire to the evaluator.
15. The District's documentation indicates that the Student received all As and Bs from the District for the Student's 2019/2020 year-end grades. The Student received a B grade in Science, Social Science, English, and Math.
16. The District's documentation does not include any grade reports from the 2020/2021 school year when the Student was enrolled in a school in Texas.
17. For Semester A of the 2021/2022 school year, the Student received passing grades in Middle School Fitness and Middle School Career Rations will but received failing grades in English and Math.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to comply with its Child Find obligations under the IDEA by failing to conduct an initial special education evaluation of the Student after the Parent made verbal

and/or written requests for an evaluation to the District, as required by 34 C.F.R. §§ 300.111 and 300.301-306; 6.31.2.10(A), and 6.31.2.10(D)(1)(b) 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 IDEA and its implementing regulations, and State Rules, use the term "child find" to describe the affirmative and continuing obligation of school districts to identify, locate and evaluate all children with disabilities residing within the district's jurisdictional boundaries who need special education and related services. 34 C.F.R. § 300.111; 6.31.2.10(A) NMAC.

The requirements of Child Find apply to, among others, students who are suspected of being a student with a disability and who need special education and related services, even though they are advancing from grade to grade. 34 C.F.R. §§ 300.101(a), 300.111(c)(1); 6.31.2.10(A) NMAC. The obligation to evaluate arises when there is a reason to suspect a disability and reason to suspect that the disability is adversely affecting a child's educational performance so that the child needs special education services. The threshold for "suspicion" is relatively low. The key is not whether the child is actually qualified, but whether the child should be referred for an evaluation. *Department of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Hawaii 2001); *School Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 942 (E.D. Va. 2010). In an opinion from the Ninth Circuit, which is persuasive, if not precedential authority, the court held that a disability is suspected when the district is put on notice that symptoms of disability are displayed by the child. *See Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9th Cir. 2016). Notice may come in the form of expressed parental concerns about a child's symptoms, expressed opinions by informed professionals, or less formal indicators, like the behaviors in and out of the classroom. *Id.* at 1121.

The Federal regulations and State Rules provide that a parent (or a public agency) may initiate a request for an initial special education evaluation to determine if the child is a child with a

disability. 34 C.F.R. § 300.301(b); 6.31.2.10(D)(1)(b) NMAC. The public agency must provide prior written notice to the parents either accepting or rejecting the parental request for evaluation. 34 C.F.R. §§ 300. and 300.503; 6.31.2.10(D)(1)(c)(iv) NMAC. The parent can challenge this decision by requesting a due process hearing. 6.31.2.10(D)(1)(c)(iv) NMAC. It is important to note that neither the Federal regulations nor the State rules require that a parental request for a special education evaluation be in writing.

Upon receipt of a request for an evaluation by a parent, a public agency must respond within a reasonable timeframe. The IDEA and its implementing regulations provide that a public agency must provide a copy of the procedural safeguards notice upon parent request for evaluation, C.F.R. §300.504(a)(1), and must provide PWN regarding the public agency's proposal or refusal to conduct the requested special education evaluation, C.F.R. §300.503(a). The public agency must also **promptly** request parental consent to evaluate a child to determine if the child needs special education and related services whenever a child is referred for an evaluation. 34 C.F.R. §§ 300.300(b) and 300.309(c) (emphasis added). The IDEA and State Rules do not specify a specific time within which parental consent must be obtained. However, delay by a district in seeking parental consent acts to circumvent the timelines for evaluation, and it is not acceptable for a district to wait several months before seeking consent for an evaluation. 71 Fed. Reg. 46540 (2006). *See, e.g., District of Columbia Pub. Schs.*, 12 ECLPR 109 (SEA D.C. 2015) (finding that the district denied a first-grader FAPE when it failed to provide his parent with referral and consent forms in response to her oral evaluation request in a timely manner). Thus, school districts "would be well-advised to request parental consent for evaluations as soon as possible." *Denver Pub. Sch. Dist.* 77 IDELR 57 (SEA CO 2020) (citing *Letter to Anonymous*, 50 IDELR 258 (OSEP 2008)). The fact that a school may have been implementing interventions with the student during this time, or that a school was experiencing many referrals for evaluation, are not valid excuses for the delay.

State Rules provide that an initial evaluation shall be conducted within 60 calendar days of receiving parental consent for evaluation. 6.31.2.10(D)(1)(c)(i) NMAC. Each public agency shall follow evaluation procedures in compliance with applicable requirements of 34 C.F.R. § 300.304 and other department rules and standards to determine: (1) if the child is a child with a disability under 34 C.F.R. § 300.8; and (2) to determine the educational needs of the child. 34 C.F.R. § 300.301(c)(2).

The above facts clearly indicate, as admitted by the District, that the Parent made a verbal request for an evaluation of the Student on August 24, 2021. However, the Parent did not enroll the Student in the District until September 7, 2021. Thereafter, the District did not request the Parent's consent for an initial special education evaluation of the Student until, at

the earliest, December 6, 2021, more than three months from the date the Parent first requested an evaluation. While it is true that the regulations and rules do not contain a specific time within which a public agency must seek and obtain parental consent for an evaluation, it is concluded that waiting three months to obtain consent violates the IDEA's requirement to act promptly. It is concluded that the District failed to promptly request the Parent's consent to evaluate the Student. It is further concluded that the District failed to respond with prior written notice to the Parent's verbal request for an initial special education evaluation of the Student. It is further concluded that the District failed to provide the Parent with a copy of the Procedural Safeguards Notice at the time of the Parent's verbal request for an initial special education evaluation for the Student. While it is true that the District did conduct an evaluation of the Student within 60 days of obtaining the Parent's consent, the fact that the District delayed too long in obtaining the Parent's consent justifies the conclusion that the evaluation eventually conducted by the District violated the IDEA's timing requirements for conducting an initial special education evaluation.

Therefore, it is concluded that the District failed to comply with its Child Find obligations under the IDEA by failing to timely conduct an initial special education evaluation of the Student after the Parent made verbal and/or written requests for an evaluation to the District.

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

The Federal regulations and State rules provide that violations of the IDEA may be based on either substantive or procedural violations. However, proving a procedural violation is only a first step to obtaining relief. In *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1125-26 & n.4 (10th Cir. 2008), the court held that "procedural failures under IDEA amount to substantive failures only where the procedural inadequacy results in an effective denial of a FAPE."; quoting *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996). Congress provided in the 2004 amendments to the IDEA and in subsequent IDEA regulations that to find a denial of FAPE based on a procedural violation, the procedural violation must have: (1) impeded the student's right to a FAPE, (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a

FAPE to the student, or (3) caused a deprivation of educational benefits. 34 C.F.R. § 300.513(a)(2).

The District’s unreasonable delay in obtaining consent for the evaluation significantly impeded the Student’s right to a FAPE and, if the Student is determined eligible for special education and related services, could have caused the student to suffer a deprivation of educational benefits for several months.

Therefore, 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. §§ 300.111 and 300.301-306; 6.31.2.10(A), and 6.31.2.10(D)(1)(b) NMAC; C.F.R. §§ 300.300, 300.503(a), and 300.504(a))(1).	The District failed to comply with its Child Find obligations under the IDEA by failing to provide the procedural safeguards notice, PWN, obtain timely consent for an evaluation from the Parent, and to conduct an initial special education evaluation of the Student after the Parent made verbal and/or written requests for an evaluation to the District.
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 February 11, 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
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, 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 February 4, 2023 and reported to the PED SED no later than February 11, 2023. All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C2122-09**.

Corrective Action Plan

<u>Step No.</u>	<u>Actions Required by Department</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
[1]	The District Special Education Director is required to meet with the Educational Diagnostician, IEP Facilitator, and Principal assigned to Student’s school to review this Complaint Resolution Report to ensure that they understand the violations and procedures in place to correct the violations. The District Special Education Director may include other school site staff	02/18/2022	Written confirmation that this meeting took place and a list of those in attendance	2/25/2022

	in this meeting as he determines is necessary.			
[2]	If not already completed, the District must complete the Student's evaluation and schedule a meeting of the Eligibility Determination Team within two weeks of the date of this Report.	02/18/2022	A copy of the Student's EDT Report and IEP, if developed, and PWN documenting the EDT and Eligibility Determination Team discussion.	02/25/2022
[3]	<p>If, as a result of the Eligibility Determination Team meeting, Student is determined to be eligible for special education, the District shall ensure that at Student's first IEP, compensatory education for Student for the period of September 1, 2022 to the date of Student's first IEP is discussed and provided based on information about Student's needs identified in the evaluation and/or IEP.</p> <ul style="list-style-type: none"> • The plan for compensatory services shall be developed in Student's first IEP team meeting if he is determined to be IDEA-eligible, with parent 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 	2/25/2022	A copy of Student's IEP, if developed, and PWN documenting the IEP team discussion and determinations about compensatory education.	3/4/2022

	<p>and progress or to Student shall be provided to Parent.</p> <ul style="list-style-type: none"> • The discussion and plan for compensatory education shall be documented in the Prior Written Notice for the IEP. 			
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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:



Deborah Dominguez-Clark

Director, Special Education Division