

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2122-15
April 22, 2022**

This report does require corrective action. See pages 10-11.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on February 22, 2022, 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;
- interviews with the District Special Education Director, School Special Education Director, CYFD personnel, and the Parent;
- research of applicable legal authority.

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

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.

Issue for Investigation

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

1. Whether the District implemented the IEP for Student when they failed to provide transportation as a related service to and from the school in violation of 6.31.2.8 and 6.31.2.11(B)(4) NMAC and 34 C.F.R. §300.34 (c)(16);
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 6.31.2.8 NMAC and 34 C.F.R. § 300.101?

General Findings of Fact

1. At all times relevant to this complaint, Student was attending a high school (High School) in the District.
2. Prior to the 2020-2021 school year, Student was placed in the custody of the Children, Youth and Families Department (CYFD). Student's foster home during the 2020-2021 school year was within the boundaries of the High School that Student was attending.
3. At all relevant times to this complaint, a memorandum of understanding (MOU) was in place between District and CYFD regarding the enrollment of children in CYFD custody. However, this MOU did not explicitly address transportation of students.
4. Student's March 16, 2021, IEP provided for curb-to-curb transportation as a related service for Student. This IEP was not amended with respect to transportation while it was in effect.
5. Beginning on October 27, 2021, Student was returned to the home with Parent on a trial basis.
6. Parent did not reside within the attendance boundaries of High School.
7. Student continued to remain in the custody of CYFD until February 11, 2022, when Student by Court Order was returned to the custody of Parent.
8. The IEP in effect for the time Student was in Parent's home on a trial basis provided for curb-to-curb transportation.

9. The District did not maintain records of transportation for Student but reported that CYFD transported Student at least 50% of the time.
10. Parent reported that when Student was in her care, she transported Student almost daily except when she did not have reliable transportation.
11. Parent also reported that she needed to have neighbors transport or use Uber because she did not always have a reliable car and neither CYFD nor District would provide transportation.
12. Parent reported that Student missed a significant amount of school and was denied educational opportunity because she did not have reliable transportation to get Student to school.
13. Attendance records indicated that Student had missed 15 full days this school year between October 27, 2021 and March 8, 2022. There was no information in the record that Student missed school because of lack of transportation; the records listed them as unexcused absences.
14. Student also missed one day for an appointment.
15. Attendance records show that Student missed 23 first periods but attended all or part of the remainder of the classes that day. The attendance records did not indicate the reason for the absence. These absences may have been a result of transportation issues.
16. Parent stated that she had documentation of transporting Student that she would provide to the investigator, but no records were received.
17. Records were provided from CYFD for when they transported Student and from school.
18. These records indicated Student was transported by CYFD to and from the High School on 15 days: January 21, 24, 25, 26, 27, 28, 31 and February 1, 2, 3, 4, 7, 8, 10, 2022. On three of those days, Student was listed as absent for the entire day and missed the last period of the day on February 2, 2022.
19. Student was actually transported by CYFD personnel for 12 days.
20. According to the records from CYFD, these were the only days listed when CYFD transported Student.
21. The District offered to reimburse Parent for transporting Student, but that was declined by CYFD.
22. The District bus supervisor stated that Parent declined reimbursement for transportation; Parent disputed that statement.
23. Parent reported that CYFD did provide transportation on at least one occasion to the High School.
24. At the March 8, 2022, IEP meeting, the IEP team determined that curb-to-curb transportation would no longer be provided because Student did not live within the boundaries of the High School that Student attended.

25. Although Parent reported that transportation was not discussed or agreed to at the March 8, 2022 IEP meeting, both the IEP and PWN noted the change that transportation as a related service would no longer be provided because of District policy.
26. There was an appropriate program available at Student's neighborhood High School that would provide FAPE for Student.
27. Parent wanted Student to continue attending the same high school; Parent believed Student would suffer if Student transferred to the neighborhood High School with all the changes that Student had experienced that year.
28. Student was on track to graduate with an ability diploma in May 2022; Parent stated Student would receive transition services during the 2022-2023 school year at the neighborhood High School where Student lived.
29. District policy provided that Parents would be responsible for transportation if the Student attended a school outside of the attendance area when appropriate programming was available at a school within the Student's attendance area.
30. This policy applied to Student.
31. The District was ready, willing, and able to provide curb-to-curb transportation from Student's home to the neighborhood school, but not to the high school that was outside of the attendance area.
32. There were 77 days of school between October 27, 2021, and March 8, 2022.
33. Student attended school for 65 days from October 27, 2021 through March 8, 2022; transportation was provided either by Parent or CYFD personnel on those days.
34. Between October 27, 2021, and March 8, 2022, Parent transported Student on 49 days.
35. Student continued to make progress on goals despite the recorded absences.
36. Since the filing of this complaint, District has made efforts to address transportation of children in CYFD custody to non-neighborhood schools through requests to NMPED for assistance and discussion with CYFD related to the MOU currently in place. Because of the timing of these efforts, they do not appear to have impacted Student's transportation issues raised in this complaint.

Discussion and Conclusions of Law

Issue No. 1

Whether the District implemented the IEP for Student when they failed to provide transportation as a related service to and from the school in violation of 6.31.2.8 and 6.31.2.11(B)(4) NMAC and 34 C.F.R. §300.34 (c)(16)?

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 school district. The IEP must be “reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances.” *Andrew 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 primary function of an IEP is to develop a plan for the child to achieve academic and functional advancement. *Andrew F. v. Douglas County School District. RE-1*, 137 S. Ct 989, 69 IDELR 171 (2017). A student’s unique needs are more than just mastery of academic subjects, but may include social, health, emotional, physical, and vocational needs of eligible students. *County of San Diego v. California Special Education Hearing Office*, 93 F3d 1458, 24 IDELR 756, 24 LRP 3746, (9th Cir. 1996). It is the responsibility of the IEP team to determine the special education and related services that a student needs to receive FAPE. *Andrew F. V. Douglas County School District RE-1*, 137 S. Ct. 988 (2017).

The IEP must be implemented as written, including all required components. See 34 C.F.R. § 300.323(c) and 6.31.2.11(B) & 6.31.2.11 (F)(1)(a) NMAC. Failure to implement material parts of the IEP may be considered a denial of FAPE. See *Sumter County School District 17 v. Heffernan*, 642 F3d 478, 56 IDELR 86, 111 LRP 30393 (4th Cir. 2011); *Van Duyn v. Baker School District 5J*, 502 F.3d 811 (9th Cir. 2007); *Houston Independent School District. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), cert. denied, 531 U.S. 817 (2000); *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003). Failing to provide needed supports and services can be a denial of FAPE. *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016). Transportation may be required if it is necessary for the Student to receive FAPE. 34 C.F.R. §300.34(c)(16). If transportation is considered a related service, it must be provided at no cost to the parent. 71 Fed. Reg. 46, 576.

Student’s March 16, 2021 IEP provided Student curb-to-curb transportation as a related service. This related service cannot be at the cost of the parents. Unfortunately, the District, CYFD nor the Parent have complete records of who transported Student and how often that occurred. Parent said it was all the time, however the District stated CYFD transported at least 50% of the time, and otherwise Parent provided transportation. CYFD records indicated Student was transported by CYFD personnel on 12 days. Student was entitled to curb-to-curb transportation for the entire time that the March 16, 2021 IEP was in effect unless there was an amendment changing the requirement for transportation as a related service when Parent regained custody of the Student. There is no record of amending the March 16, 2021 IEP. Therefore, the District was responsible for ensuring that Student had curb-to curb transportation from March 16, 2021 until March 8, 2022, the date the new IEP took effect.

It was permissible for District to make an agreement with CYFD to provide transportation to Student in lieu of District personnel providing transportation. It is the obligation of the District to ensure that Student was provided transportation to and from school at no cost to the Parent during the time period from March 16, 2021 until March 8, 2022. From October 27, 2021 through February 11, 2022, Student was in the custody of CYFD, but lived with Parent. During that time,

pursuant to the March 16, 2021 IEP, the District was responsible for providing transportation, but through a verbal agreement with CYFD, transportation would be provided by CYFD rather than District personnel. During some portion of the time from October 27, 2021 through February 11, 2022, neither CYFD nor the District transported the Student and Parent was not reimbursed when she provided transportation. Also, there may have been days when Student did not attend school because Student did not have transportation to and from the High School because Parent did not have a car available and neither CYFD nor the District transported Student. Although there are records of Student's absences it is not clear whether that absence was due to a lack of transportation. It was a violation of IDEA when District did not provide or ensure Student was provided curb-to curb transportation by either District personnel or CYFD staff. Requiring Parent to transport without reimbursement was also a violation.

The District continued to be responsible for transportation after February 11, 2022 until March 8, 2022. The March 16, 2021 IEP provided transportation as a related service until the new IEP went into effect on March 8, 2022. The March 16, 2021 IEP was not amended after custody was returned to Parent on February 11, 2022; therefore, the District was responsible for transportation of Student from February 11, 2022 until March 8, 2022. After that date, pursuant to the March 8, 2022 IEP, Student was no longer entitled to transportation as a related service. Although Parent reported that transportation was not discussed by the IEP team, both the IEP and PWN indicated that transportation would no longer be provided as a related service since Student could attend the neighborhood High School and still receive FAPE.

If a student with a disability elects to attend a school directly within the school system other than the neighborhood school, the child would normally attend pursuant to an intra-district school choice program, and the school district does not need to provide transportation to that school in accordance with the IDEA or Section 504 if the student attends such programs purely out of personal choice and has no disability-related need to do so. *See Fick v. Sioux Falls Sch. Dist.* 49-5, 337 F.3d 968 (8th Cir. 2003); *Timothy H. and Brenda H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999); and *Richland (WA) Sch. Dist. No. 400*, 22 IDELR 992 (OCR 1995). As in the inter-district scenario, the student may lose the transportation services he or she otherwise would be entitled to receive if the parents enroll the student in another district school. The failure of the District to either provide transportation or reimburse Parent for 49 days of transportation for Student from February 11, 2022 through March 8, 2022 was a violation.

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

Issue No. 2

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 determination of whether there has been a denial of FAPE requires consideration of two components: substantive and procedural. The question one must answer to determine the substantive standard is whether the IEP was “reasonably calculated to allow the child to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas County School District. RE-I*, 137 S. Ct. 988 (2017). The Court in *J.L. v. Mercer Island School District*, 592 F3d 938, 951 (9th Cir. 2010), held that a procedural violation may be a denial of FAPE when it resulted in the loss of an educational opportunity, infringed on parents' opportunity to participate in the development of the IEP or deprived the student of an educational benefit. All circumstances surrounding the implementation of the IEP must be considered to determine whether there was a denial of FAPE. *A.P. v. Woodstock Board of Education*, 370 F. Appx 202 (2d Cir. 2010). A failure to provide behavioral and other supports that does not allow the student to receive educational benefit may be a denial of FAPE. Dear Colleague Letter, 68 IDELR 76 (OSERS/OSEP 2016).

There were no allegations in this complaint that Student’s IEP was not reasonably calculated to allow Student to make progress. The only issue is whether the lack of transportation deprived Student of FAPE. The records indicated that Student missed 15 of days from school between the beginning of the year through March 8, 2022. Student missed 23 first periods but attended the remainder of the day. Parent alleged that the absences were because Student did not have transportation and she was unable to provide transportation. Accordingly, Parent asserts that Student was denied educational benefit and opportunity because the District failed in its obligation to provide transportation for Student as required by the March 16, 2021 IEP.

Parent did not provide any records about the reasons for Student’s absences except that she was unable to provide transportation on some days. It may have been that Student was ill or had an appointment or some other reason for Student’s absence when transportation was not impacted. Parent was also unable to provide documentation of the times that she was able to provide transportation to Student instead of CYFD providing transportation. If Student was missing school due to a lack of transportation, it would be a procedural violation rising to the level of a denial of FAPE for depriving Student an educational benefit. However, it was impossible, on the record available, to determine whether Student was denied educational benefit or opportunity. Because Student continued to make progress on goals even with the absences, no violation could be identified.

As to Issue No. 2, the District is not cited. Corrective Action is not required.

Summary of Citations

| Statutory and Regulatory Provisions | Citation |
|---|--|
| 6.31.2.8 and 6.31.2.11(B)(4) NMAC and 34 C.F.R. §300.34 (c)(16) | The District implemented the IEP for Student when they failed to provide transportation as a related service to and from the school. |

Required Actions and Deadlines

By May 13, 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 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 April 22, 2023, and reported to the PED SED no later than May 22, 2023. All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C2122-15**.

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 reimburse Parent within one month of the date of this report for transportation costs for transporting Student to and from Student's place of residence to High School for 49 days. Reimbursement will be at the District's approved rate. | May 23, 2022 | The District will provide a documentation that Parent was reimbursed for 49 days of transportation. | May 31, 2022 |
| 2. | The District will develop a plan to track and ensure that special education students who receive transportation pursuant to their IEPs are provided said transportation either by the District or through other providers other than the parents or guardians. In situations where parents agree to provide transportation, they will be promptly reimbursed for the transportation costs at the District's approved rates. The plan shall include a provision regarding the maintenance of transportation records for students entitled to transportation pursuant to their IEPs. These transportation records shall be updated regularly and copies shall be kept in the same file as students' IEPs. | May 15, 2022 | The plan to be submitted to NMPED for approval. | May 31, 2022 |
| 3. | The District will provide training to all District staff that are responsible for the development and implementation of IEPs, including related services. This | September 2, 2022 | The agenda and training materials including outlines, power points and other materials to be | August 15, 2022 |

| 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> |
|-----------------|---|-----------------------------------|--|---|
| | <p>training will focus on transportation obligations for special education students.</p> <p>This training shall be developed and provided by an independent person(s) with expertise who has not been involved in responding to this Complaint and who is approved by the NMPED.</p> <p>Attendance shall be taken and provided to NMPED within two weeks of the completion of the training.</p> | | <p>submitted to NMPED for approval.</p> <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.</p> <p>Attendance Record</p> | <p>August 1, 2022</p> <p>Within two weeks of completion of all training sessions.</p> |

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

Investigated by:

/s/

Michele K. Bennett
Independent Complaint Investigator

Reviewed by:

/s/

Miguel Lozano, Esq.
Chief Counsel, Special Education Division

Reviewed and approved by:



Deborah Dominguez-Clark
Director, Special Education Division