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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2122-29
July 14, 2022

This report does require corrective action. See pages 10-14.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on May 18, 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 The SED 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 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;

¹ 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.

- review of the District’s compliance with federal IDEA regulations and state NMAC rules;
- interviews with District Dean of Students, three General Education Teachers, Special Education Teacher, Parents and Advocate; (Attempts were made to interview the Principal, Special Education Director and another General Education Teacher but they were unavailable or had left the District)
- research of applicable legal authority.

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

1. Whether the District failed to implement the IEP for Student when they failed to provide the accommodations and modifications provided in Student’s IEP in violation of 34 C.F.R. § 300.323 and 6.31.2.11(B)(1) NMAC; and
2. Whether the District’s actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE), 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 13 years old and in seventh grade at a middle school within the District. The eligibility category for Student was orthopedic impairment.
2. Student had spastic diplegic cerebral palsy with functionally limited lower extremity spasticity. Student has received special education services since starting school.
3. It was noted that Student was at the beginning level in reading and math.

4. Student scored at Level 1 on the district's chosen benchmark assessment in both math and reading as noted on the September 14, 2021 IEP addendum.
5. Student needed improvement in reading comprehension, text fluency, vocabulary and all areas of math.
6. On February 14, 2022, Student had major surgery which required recovery in the home.
7. Student's annual IEP meeting was held on March 4, 2022. At that meeting, there was a discussion about how Student could return to school. Student was wheelchair bound and medically could return to school, but it was agreed that Student needed a full time 1-1 educational assistant (EA) to assist Student throughout the day with various activities.
8. The District proposed EAs who were unacceptable to the family. The District agreed to pursue the hiring of another EA so Student could return to school.
9. While Student was at home, the IEP team developed an IEP to ensure Student was receiving all educational services.
10. Student would participate through Google Classroom to receive instruction in all classes.
11. Student also received occupational therapy (OT) services virtually and physical therapy (PT) services provided in the home.
12. This plan provided that the case manager would check in with Student daily during advisory period; the teachers would open Google Classroom during instruction so that Student could hear the lectures and post questions to chat; Student would join the 21st Century afterschool program for additional help and all teachers would count Student present if Student attended the Google Classroom for at least 15 minutes and would be marked engaged when homework was turned in.
13. Student did not participate in physical education (PE) pursuant to doctor's orders. However, PT services counted for credit in PE.
14. There were a number of accommodations and modifications included in Student's IEP. These included:
 - a. Extra time for homework and written assignments;
 - b. Standard accommodations for assessment;
 - c. Stand when Student needs to with assistance from EA;
 - d. Modified workload;
 - e. Full time 1-1 EA to assist Student in class particularly as scribe;
 - f. Clear directions and examples on homework;
 - g. If failing classes, set up an IEP meeting;
 - h. Use cell phone to take pictures of notes;
 - i. Speech to text software;
 - j. If Student's back hurts, be allowed to go home
 - k. If legs hurt, be allowed to stand with assistance.

15. The EA also had additional responsibilities to allow Student to attend school. These included opening doors, assisting Student with climbing stairs and/or curbs, carrying Student's backpack, talking to Student and building a bond, inquiring if Student was hurt or needed help after falls, preventing falls, assisting with difficult tasks like carrying lunch tray, collecting school supplies when time was limited and allowing Student to socialize with friends.
16. Student was to receive daily special education services in math, reading and written language. In math, the areas of need were math calculation and problem solving. In reading the areas of need were decoding, fluency, comprehension and written language.
17. Student was to receive 50 minutes daily of special education services in each of the three areas. Math services were to be provided in the special education classroom, reading and written language were to be provided in the general education classroom.
18. The IEP included OT, PT, and transition goals but no goals to address the Student's deficits in math, reading or written language.
19. In addition, Student was to receive 400 minutes of special education daily with the EA, 45 minutes each weekly for OT and PT services and 40 minutes daily for consultative services.
20. All teachers were to be informed about the plan.
21. The Parents questioned whether the teachers were informed about the plan or refused to follow it.
22. Student did not receive special education services in reading, written language or math after February 14, 2022, while Student was at home recovering from surgery.
23. The Math Teacher reported that Student still needed special education services in math even though Student earned an A grade for the year.
24. Student did not log on to the virtual math program and did no work during the second semester. Student's grade was based on the first semester's work.
25. Student reported that the morning check in time with the case manager was limited to checking in. No instructional services in math were provided during the check in.
26. Parents reported that three of the teachers never opened Google Classroom for Student which precluded Student from participating in online instruction.
27. No one at the school contacted the Parents or Student about why Student was not participating in online instruction.
28. The assumption by some of the teachers was that Student did not log in for instruction because Student was in pain and recovering from surgery.
29. During the second semester, there were field trips and other activities that Student would have been able to participate in with assistance. However, the District did not pursue opportunities for Student to participate in those activities.

30. On at least one occasion, Student tried to get onto the Google Classroom but no one else was on it. Later, the Student found out that the class was on a field trip at the time scheduled for the Google Classroom.
31. Student was not informed that there would be no Google Classroom that day nor offered an opportunity to participate in the field trip.
32. Student's grades for PE were provided to the investigator but the IEP indicated that Student would not attend PE because of the surgery and would earn PE credit through PT services.
33. The counselor was directed to remove Student from PE and enroll in a study hall. This did not happen.
34. Student's attendance virtually was at 93% and grades earned this year were A in math, C in science, B in New Mexico history, C in English-language arts, A in computing and B in PE.
35. Parents repeatedly contacted the Principal about the lack of an EA which prevented Student from attending school.
36. The Principal proposed two EAs, both were rejected by the Parents. One was rejected because of family conflicts with the EA, the other was unable to assist Student because the EA needed assistance from Student for opening doors.
37. The Principal reported it was difficult to find an EA and proposed a series of substitute EAs so Student could return to school.
38. The District proposed that all of Student's teachers assist in getting Student from class to class and completing other tasks for Student during the teachers' planning periods.
39. This plan was rejected by Parents.
40. The job posting for the EA was listed on the website and a \$4,000 bonus was offered for filling the EA position.
41. Throughout the year, the District was only able to interview one EA candidate, who was unacceptable to the Parents.
42. For the entire school year, the District was unable to hire an EA which prevented Student from returning to school.
43. Another IEP meeting was scheduled for May 2, 2022, to develop a plan for compensatory PT services and again discuss the plan for hiring an EA.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to implement the IEP for Student when they failed to provide the accommodations and modifications provided in Student's IEP in violation of 34 C.F.R. § 300.323 and 6.31.2.11(B)(1)?

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." *Andrew F. V. Douglas County School District RE-1*, 137 S.Ct. 988, 999 (2017); see also 34 C.F.R. §§ 300.320 to 300.324. The primary function of an IEP is to develop a plan to achieve academic and functional advancement. *Andrew F.*, 137 S.Ct. at 999). 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 F.3d 1458, 1467 (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.*, 137 S.Ct. at 1001.

The IEP must be implemented as written, including all required components. See 6.31.2.11(B) and 6.31.2.11 (F)(1)(a) NMAC and 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, 484 (4th Cir. 2011); *Van Duyn v. Baker School District 5J*, 502 F.3d 811, 822 (9th Cir. 2007); *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 329 (5th Cir. 2000), cert. denied, 531 U.S. 817 (2000); *Neosho R-V School District v. Clark*, 315 F.3d 1022, 1027 n. 3 (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).

Student had major surgery on February 14, 2022 which confined Student to a wheelchair. Parents requested Student return to school with the assistance of a full time 1-1 aide. Without the EA, Student would not be able to return to school. Two EAs were proposed, one was rejected because of family conflicts and the other was unable to perform the essential task of physically assisting Student. The other proposal was for Student's teachers to assist in transitions from one class to another. This was also rejected by the Parents.

In lieu of returning to school, the District agreed to open Google Classroom in each class. Student would be able to participate in classroom instruction, be able to ask questions and participate

with peers while remaining at home. This plan was not consistently implemented by all of Student's teachers. At least three of Student's teachers never or rarely opened the Google Classroom. Parents contacted the Principal about the unavailability of the Google Classroom. The Principal stated they would share these concerns with all of Student's teachers, but inconsistent use of Google Classrooms continued until after the Complaint was filed. Other teachers would open the Google Classroom, but if for some reason the Google Classroom was unavailable such as during a field trip or unavailability of the teacher, Student would not be told in a timely manner. Student was not placed in a study hall instead of PE but received PE grades when Student was not physically able to participate. Student's grades and credit in math were based on the first two quarters work because Student did not log on or complete assignments after February 14, 2022.

Student was to receive 150 minutes daily of special education services in reading, written language and math in addition to the 400 minutes of EA services, 45 minutes per week for both OT and PT services and 40 minutes per day of consultative services. The Special Education Teacher was to provide fifty minutes in math daily, but it was unclear if or how those services were provided because the morning meeting was limited to a check in with Student. There was no evidence that Student regularly received the 100 minutes of reading and written language specialized instruction in the general education classroom because Student could not always access the Google Classroom. The District failed to follow up with Student or Parents about why Student was not on Google Classroom or what other options were available to provide services to Student. There were no special education goals listed in reading, math or written language so it is unclear what Student was to be working on in those areas if Student had been receiving services. The District did not pursue options to allow Student to participate in activities at the school such as field trips or dances.

The District stated it was unable to hire an EA that was acceptable to the parents. However, after agreeing to an IEP that including virtual learning, the District did not ensure that Student was receiving educational services including special education services during the period of virtual learning. Student's grades and attendance during virtual learning indicate Student was passing classes and had 93% attendance but FAPE often requires more than just earning passing grades. The plan, as developed by the IEP team, would have allowed Student to receive educational services while at home, but the District failed to adequately implement that plan.

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 6.31.2.8 NMAC and 34 C.F.R. § 300.101?

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.” *Endrew 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).

The District noted that Student was making progress on OT and PT goals. However, the Student was also to receive special education services in reading, math and written language. There were no goals in the IEP nor services provided in the Student’s areas of need. Without goals in reading, math and written language, the IEP was not reasonably calculated to allow the Student to make progress. This was a substantive denial of FAPE.

There were also procedural violations on the March 4, 2022 IEP. There were material failures in implementing that IEP. Student was not allowed to join the Google Classroom in all classes which denied Student access to instruction and an opportunity to ask questions. Student did not receive specialized instruction in reading, math and written language as required by the IEP. Student was not placed in a study hall instead of PE. Student was able to return to school by the time the IEP was written on March 4, 2022, but because of the lack of a qualified EA, the Student could not return to school safely because of Student’s physical limitations. The school failed to

create and implement a sufficient plan which resulted in a loss of educational opportunity for Student and was a denial of FAPE.

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

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. § 300.323 and 6.31.2.11(B)(1) NMAC	The District failed to implement the IEP for Student when they failed to provide the accommodations and modifications provided in Student's IEP.
6.31.2.8 NMAC and 34 C.F.R. § 300.101	The District's actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE) to the Student.

Required Actions and Deadlines

By July 28, 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 Division.

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 July 14, 2023 and reported to the PED SED no later than July 28, 2023. All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C2122-29**.

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.	As described above, the District will submit a written assurance to the Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan (CAP).	July 28, 2022	Written Assurance Letter/Email	July 28, 2022
2.	The District Special Education Director and the school principal shall meet with the SED Education Administrator assigned to the District and the SED CAP Monitor to review the Complaint Resolution Report, the Corrective Action Plan, and any other measures that the District plans to take to ensure that the violations are corrected and do not recur. The District Director has the discretion to include other District or school administrators or	August 5, 2022	Notes from meeting prepared by District	August 12, 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>
	personnel in this meeting. The District Director shall be responsible for arranging this meeting with SED.			
3.	The District Special Education Director will meet with the student’s special education teacher, general education teachers, 1-1 aide, related service personnel and school principal to review the Complaint Resolution Report to ensure that those persons understand the complaint, the violations that were found, and the corrective actions that will be taken to address the violations.	August 12, 2022	Notes from meeting prepared by District	August 19, 2022
4.	<p>The District will convene a facilitated IEP meeting for Student before the start of the 22-23 school year. The FIEP meeting shall address:</p> <ul style="list-style-type: none"> • the plan for Student to transition back to school at the beginning of the 2022-2023 school year; • additional supports and services needed for student; • creation of goals and progress monitoring in math, reading, written language and all other areas of need for special education; • plan for the provision of compensatory education required by step 6 of this CAP, and 	August 12, 2022	Invitation to IEP meeting, IEP, Prior Written Notice, Agenda for FIEP team meeting	15 days after the FIEP meeting is held

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>
	<ul style="list-style-type: none"> • an effective communication system for Student and Parent. <p>The Facilitator shall be independent of the District and shall be selected from the PED list of approved facilitators. The Facilitator shall be paid for by the District.</p> <p>The FIEP 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> <p>The District shall ensure that the FIEP team includes, but is not limited to, parents, special education teacher, general education teacher, 1-1 aide and related services providers (PT, OT, SLP, etc.).</p>		Confirmation of arrangement with Facilitator from PED approved list of Facilitators	Within 3 days of making arrangements for facilitator.
5.	<p>The District shall arrange to provide training to District staff (including special education teachers, special education administrators, and related service personnel), on the following special education topics:</p> <p>(1) developing and implementing an IEP containing appropriate goals with corresponding instruction and services;</p>	September 15, 2022	<p>Confirmation of the date of the training</p> <p>Confirmation of attendees at the training and plan for addressing provision of training to those staff not in attendance</p>	<p>September 1, 2022</p> <p>September 30, 2022</p>

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>(2) IDEA procedural requirements; and</p> <p>(3) steps to take when staffing limitations prevent implementation of IEP as written.</p> <p>The training shall be provided by a person with expertise in special education who was not involved in responding to this complaint and who is approved by NMPED.</p>		<p>Submission of proposed trainer and trainer's resume and proposed presentation for NMPED approval.</p>	<p>August 5, 2022</p>
<p>6.</p>	<p>The District shall provide 100 hours of compensatory education services to Student. The compensatory education plan may include specialized instruction in the areas of math, reading or written language. The distribution of the 100 hours to any or all of these subject areas shall be determined by Student's IEP Team.</p> <p>The District shall develop the plan for compensatory education services at the Facilitated IEP meeting(s) referenced above in Step 4.</p> <p>The plan for compensatory services shall be documented in the PWN(s) for the Facilitated IEP meeting(s).</p> <p>These compensatory services are</p>	<p>All services must be completed by July 14, 2023</p>	<p>Prior Written Notice containing plan for compensatory services</p> <p>Documentation of delivery/provision of compensatory education services, including logs of services and progress reports</p>	<p>August 15, 2022</p> <p>Monthly from date of compensatory services plan until the compensatory education hours are completed.</p>

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>above and beyond the services required by Student’s IEP. The schedule for compensatory services should be developed in collaboration with the parent and can include the summer months.</p> <p>If the District, due to staffing or other limitations, is unable to provide the needed IEP and compensatory services as outlined in Student’s IEP and the compensatory services plan, the District is required to contract with a private provider to ensure those services are provided.</p>			

This report constitutes the New Mexico Public Education Department's final decision regarding this complaint. If you have any questions about this report, please contact the Corrective Action Plan Monitor.

Investigated by:

/s/ Michele K. Bennett

Michele K. Bennett

Complaint Investigator

Reviewed by:

/s/ Miguel Lozano

Miguel Lozano, Esq.

Chief Counsel, Special Education Division

Reviewed and approved by:

A handwritten signature in cursive script, appearing to read "Deborah Dominguez-Clark".

Deborah Dominguez-Clark

Director, Special Education Division