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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2122-31
July 20, 2022

This Report does not require corrective action.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on May 23, 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;
- review of the District's compliance with federal IDEA regulations and state NMAC rules;

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.

- interviews with parents and guardians of students in the District, complainant, special education teacher, and assistant principal; and
- 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. For this reason, the Complaint Investigator did not investigate the following issues raised by the complainant: (1) whether the District retaliated against Complainant for participating in a lawsuit filed against the District; and (2) whether it is appropriate for union representation to attend Section 504 meetings.

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 failed to conduct child find activities and complete initial evaluations of students suspected of having disabilities to determine eligibility for special education services, in violation of 34 C.F.R. §§ 300.111, 300.301 and 6.31.2.10(D) NMAC;
2. Whether the District failed to properly develop Individualized Education Programs (IEPs), in violation of 34 C.F.R. § 300.324 and 6.31.2.11(F)(1) NMAC:
 - a. By delaying or not conducting Functional Behavior Assessments;
 - b. By not developing or implementing Behavior Intervention Plans;
3. Whether the District failed to educate special education students in the Least Restrictive Environment, in violation of 6.31.2.11(C) NMAC and 34 C.F.R. § 300.114(a); and
4. Whether the District's actions and/or omissions towards its students 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

Student #1

1. Student is a special education student classified with other health impairment.
2. During the first half of the 2021-2022 school year, Student attended the elementary school ("School") within the local public school district ("District").
3. On August 23, 2021, the IEP Team recommended conducting a Functional Behavior Assessment ("FBA") for the Student. This action was in response to defiance behaviors the Student was displaying in school.
4. The FBA was completed on October 3, 2021. Problem behaviors identified were defiance, interrupting teachers, and attempting to elope from class.
5. Another IEP Team meeting was held on October 5, 2021, to develop a Behavior Intervention Plan ("BIP") for the Student.
6. A BIP was produced at this meeting. BIP Intervention strategies included practicing appropriate classroom behaviors, taking a "timeout" from class lessons as necessary, and escort/monitoring during transitions between the regular education and special education classrooms.
7. In addition to the BIP, the IEP Team conducted an annual review of the Student's IEP.
8. The updated IEP placed Student in a regular education classroom for math, social studies, and science whereas English Language Arts (ELA) was provided in special education setting.
9. This IEP called for specialized instruction with 450 minutes per week in reading, 300 minutes per week in written language, and 120 minutes per week in math.
10. District proposed to conduct psychological evaluation of the Student at the October 5th IEP meeting. Parents declined.
11. Prior Written Notice recorded that IEP Team considered placing Student solely in general education setting with supplementary aids and services, but this was rejected due to Student's need for "individualized support" to progress in the areas of reading, writing, and math.
12. There were five annual goals in the areas of reading, math, written language, social-emotional, and behavior.
13. Progress reports from the 2021-2022 school year show the Student was making progress in their social-emotional goal of improving their social behavior skills. This goal targeted skills such as following classroom rules, adhering to teacher directives, and positive interactions with peers.
14. Progress for the reading goal was measured through Istation assessments. Student made gradual progress in their overall reading skills.

15. Behavior goal progress was measured through teachers completing a daily behavior sheet which was sent home to Student's parents. District did not provide copies of behavior sheets and no progress marks were recorded in the progress report for this goal.
16. District did not provide progress monitoring records for Student's math or written language goal.
17. Special education teacher reported that reading scores through Istation rose every month that the Student took the assessment. Complainant reports that reading and math scores were "up and down" throughout the first half of the 2021-2022 school year.
18. First quarter grades were mixed. Student received a B and C in courses with their special education teacher and two F's and a D in the regular education setting.
19. Parents report issues with BIP implementation such as no escort/monitor provided while the Student transitioned between educational settings and that the Student was not afforded opportunities take timeouts from class.
20. In contrast, the Student's special education teacher stated that Student was assisted with the classroom aide or another student during classroom transitions. Special education teacher also asserted that Student was provided opportunities to take timeouts from class lessons and that this strategy was effective in helping the Student calm down.
21. Similarly, Complainant reports improvement in the Student's behaviors as the BIP was implemented with strategies such as escorted class transitions and timeout in the regular education classroom. Complainant said Student had "many positive days" in school once the BIP was implemented.
22. Assistant Principal described the BIP as properly implemented across classroom settings with any remaining behavior more attributable to conflict among Student and peers.
23. A daily behavior goal sheet was used to track behaviors and incentivize Student.
24. Special education teacher viewed Student as showing an improved capacity to being told "no" and following classroom directives as the BIP was implemented.
25. Parents perceived Student as a victim of bullying. Complainant, special education teacher, and assistant principal described Student as having mutual conflict with other students.
26. Due to this ongoing conflict among Student with other class peers, a parent conference was held on October 18, 2021. Assistant Principal stated that the District offered to switch Student to another 6th grade classroom to avoid further conflicts. Parents declined. The parties agreed to have the special education teacher work with Student more closely in completing projects and offering support at times when Student was feeling overwhelmed with class work.
27. On December 10, 2021, a disciplinary referral was filed for an incident in which the Student is alleged to have threatened to shoot the school and cut student peers' faces off. Parents deny that Student committed this misconduct.

28. While District investigated this incident, Parents decided to withdraw Student and enroll them in an online educational program. The exit date was December 16, 2021.

Student #2

29. Student attended 6th grade in the District.

30. From August 2, 2021 to February 8, 2022, Student attended an elementary school outside their attendance area. Student transferred back to their local neighborhood school on February 10, 2022.

31. Complainant alleges there were reasonable grounds to suspect Student was a child with a disability because Student displayed self-harming (cutting) and truancy behaviors that were indicative of a mental health impairment. Complainant referred Student to school counselor for additional support.

32. Student was not referred for a special education evaluation during the 2021-2022 school year.

33. Student recorded 45 absences and received D's across their academic courses in the first half of the 2021-2022 school year.

34. Complainant reported that efforts to potentially implement interventions or move to evaluate Student for special education eligibility were hampered by Student's absences and parents' unresponsiveness to communication from the District.

35. Attempts to interview Student's parents were unsuccessful. District does not have working telephone numbers for either parent. Entreaties (via email) sent from the SED investigator to the parents for an interview went unanswered.

Student #3

36. Student is a special education student classified with specific learning disability ("SLD").

37. Initial evaluation concluded that Student presents as a child with SLD and demonstrates diagnostic criteria for dyslexia.

38. On August 24, 2021, an eligibility determination team ("EDT") meeting was held at which time the Student was deemed eligible for special education.

39. An initial evaluation of Student showed relative weaknesses in the areas reading comprehension, reading rate, passage comprehension, and word reading fluency.

40. That same day the IEP team developed an IEP. Special education included 450 minutes per week in reading instruction and 300 minutes per week in written language instruction.

41. IEP team recommended a combination of regular education classroom learning as well as placement in a special education classroom for reading and written language. The

rationale for this placement decision was that Student could acquire skills in areas of deficit by receiving individualized support in a small group setting.

42. From August 5, 2021 to October 4, 2021, Student attended the School within the District. During this period Student recorded 18 absences due to COVID quarantine and recovery from a leg injury.
43. On October 5, 2021, parents transferred Student to another elementary school of the District.
44. Parent states the reason they transferred their child to another school was due to how staff at the initial School treated Student while attending the initial elementary school. Student reported to parent they felt that their staff at this school were unfairly drawing attention to their disability-related learning barriers. Parent reports that this treatment led Student to be apprehensive about going to school.
45. Upon transferring to the second elementary school, the IEP was revised via an IEP Team meeting on October 20, 2021. The new IEP called for 450 minutes per week of specialized instruction in ELA.
46. Student recorded 39 absences at the second elementary school due to COVID quarantine. Regular class attendance did not occur until second half of 2021-2022 school year.
47. The IEP goals were monitored roughly once a month with the pattern of inadequate progress continuing from November 4, 2021 to May 4, 2022.
48. Progress reports show Student made either no progress or insufficient progress towards achieving their annual IEP goals in the areas of reading and written language.
49. The notes from the progress reports show Student's learning disability constituted an ongoing barrier to learning because Student had difficulties reading aloud and completing writing assignments.
50. Lack of progress continued for the entire second half of the 2021-2022 school year.
51. The District did not convene an IEP team meeting to revise the IEP to address the lack of expected progress.
52. Student received three C's and one D in academic courses for the 2021-2022 school year.

Student #4

53. Student was enrolled in 6th grade with the District on February 22, 2022. Prior to this enrollment, Student had irregular attendance at school.
54. Guardian reports that when they enrolled Student at District elementary school Guardian told the front office that they had concerns that Student may have ADHD and would need extra help with learning.
55. Guardian states that no one from the District contacted her in response to her concerns about Student possibly having disability-related learning needs.

56. Complainant suspected that Student may have a disability and need special education due to an incident in mid-April 2022 in which Student expressed suicidal thoughts to a District teacher. Complainant referred Student to school counselor for additional support.
57. Following the suicidal ideation incident, Guardian arranged for Student to receive two-week inpatient mental health treatment that later continued in an outpatient setting.
58. Student's grandmother reported that the Principal urged Student's family to seek outside treatment providers to address the Student's mental health needs.
59. Complainant stated that District was aware of Student's hospitalization at the time Student was admitted to facility.
60. Complainant spoke with Principal of elementary school about Student needing interventions in reading and math. Principal agreed with this recommendation and directed complainant to start the Student Assistance Team ("SAT") intervention paperwork shortly before the end of the 2021-2022 school year. This referral process was not completed prior to the end of the school year.
61. Student was not referred for a special education evaluation during the 2021-2022 school year.
62. Complainant worked with Student and Guardian to complete make-up assignments.
63. Student received passing grades in all academic courses for the 2021-2022 school year.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to conduct child find activities and complete initial evaluations of students suspected of having disabilities to determine eligibility for special education services, in violation of 34 C.F.R. §§ 300.111, 300.301 and 6.31.2.10(D) NMAC.

Child find is an affirmative obligation that schools identify, locate, and evaluate children with disabilities who are in need of special education and related services. 34 C.F.R. § 300.111(a)(1)(i). Implicit in the child find duty is a requirement that schools identify children with disabilities within a reasonable time after school officials are on notice of behavior that likely indicates the presence of a disability. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 250 (3d Cir. 2012). In other words, child find is not triggered until school officials have reason to suspect a disability. *Boutelle v. Bd. of Educ. of Las Cruces Pub. Sch.*, No. CV 17-1232 GJF/SMV, 2019 WL 2061086, at *9 (D.N.M. May 9, 2019). Clear signs of a disability may include admission to an inpatient mental health facility. *Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. & Mrs. M.*, No. 3:07-CV-01484 (WWE), 2009 WL 2514064 (D. Conn. Aug. 7, 2009).

The complaint named two students, Student #2 and Student #4, as children who may be in need of special education due to behaviors suggestive of unmet mental health needs. Student #2's self-cutting behavior may point to a possible mental health impairment. Yet it is unclear from the record whether the Student's absences and poor academic performance were related to a disability or attributable to issues out of school. This ambiguity is worsened by the fact that the District (as well as this investigation) experienced difficulties in developing ongoing communication with the Student's parents to discuss and further ascertain Student's educational needs. The totality of the circumstances of Student #2's case was not sufficient to trigger the District's child find duty.

Student #4 showed signs of social and emotional problems as evidenced by an April 2022 incident in which the Student displayed suicidal ideation. After the District requested that the family arrange for mental health treatment, the Student was admitted to an inpatient facility to address their mental health needs. The District was aware of Student's hospitalization status and worked with the student's family to ensure Student completed makeup assignments. As a result, Student received passing grades in all academic courses for the 2021-2022 school year. District also sought pre-evaluation interventions by initiating a Student Assistance Team ("SAT") referral to assess the Student's need for additional assistance in math and reading. Given the information the District had at the time of the complaint, the child find duty was not triggered because Student was not displaying a sustained pattern of multiple hospitalizations, the Student's ability to obtain average grades suggests special education was unnecessary, and the SAT referral was an appropriate measure to initially consider the student for non-specialized interventions.

As to Issue No. 1, the District is not cited.

Issue No. 2

Whether the District failed to properly develop Individualized Education Programs (IEPs), in violation of 34 C.F.R. § 300.324 and 6.31.2.11(F)(1) NMAC:

- a. By delaying or not conducting Functional Behavior Assessments; and**
- b. By not developing or implementing Behavior Intervention Plans.**

A Functional Behavior Assessment ("FBA") is the process by which an LEA determines why a student engages in behaviors that impede their learning and how the student's behavior relates to their environment. LEAs are strongly encouraged to conduct an FBA for any special education student who exhibits problem behaviors before said behaviors result in disciplinary action. 6.31.2.11(F)(1) NMAC.

A Behavior Intervention Plan (BIP) is a set of intervention strategies that are used to address behaviors that impede a student's learning. 34 C.F.R. § 300.530(f); 6.31.2.11(F)(1) NMAC. If a school district fails to address behaviors that impede a student's ability to learn, then such a failure may constitute a denial of a free appropriate public education. *R.B. v. Downingtown Area Sch. Dist.*, 509 F. Supp. 3d 339, 347 (E.D. Pa. 2020).

Here, the District arranged to conduct an FBA for Student #1 shortly after the start of the 2021-2022 school year. The District's FBA recommendation was an appropriate response to a rise in the Student's disruptive behaviors in class. The FBA was completed and reviewed within approximately six weeks. This evidence supports a finding that the District timely conducted an FBA to address Student #1's disability-related behavioral needs.

A BIP was developed for Student #1 at an IEP team meeting on October 5, 2021. The BIP was implemented for the remainder of the school year. Parents reported that the BIP was not implemented appropriately because the District did not have the staffing and resources available to monitor Student and carry out interventions as written in the BIP. This evidence is rebutted by multiple witnesses. The special education teacher stated that Student was afforded supervision during classroom transitions and timeouts to decompress. Complainant confirmed Student had an aide to monitor transitions and timeout was offered in Student's regular education classroom. Assistant Principal attested to coordination among District staff in implementing the BIP across class settings. District staff also sent home a behavior check list to parents as part of monitoring Student's behavior. The weight of the evidence demonstrates that the District implemented the interventions as required by Student #1's BIP.

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

Issue No. 3

Whether the District failed to educate special education students in the Least Restrictive Environment, in violation of 6.31.2.11(C) NMAC and 34 C.F.R. § 300.114(a).

The least restrictive environment mandate requires school districts to educate special education students with their non-disabled peers to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5)(A). The two-part *Daniel R.R.* test for determining whether a school district has complied with the LRE requirement is: (1) whether education in a regular education classroom with the use of supplemental aids and services can be satisfactorily achieved; and (2) if placement in a regular education classroom cannot be achieved, whether the school district has mainstreamed the child to the maximum extent appropriate. *T.W. v. Unified Sch. Dist. No. 259, Wichita, Kan.*, 136 F. App'x 122, 127 (10th Cir. 2005); *see also Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989). In applying the first prong of this test, courts consider additional

non-exhaustive factors including: (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; (3) the child's overall educational experience in regular education, including non-academic benefits; and (4) the effect on the regular classroom of the disabled child's presence in that classroom. *G.W. v. Boulder Valley Sch. Dist.*, No. 16-CV-00374-PAB-SKC, 2019 WL 4464130, at *14 (D. Colo. Sept. 18, 2019).

Student #1's IEP dated October 5, 2021 featured a combination regular education and special education programming. Student was in a regular education setting for science, social studies, and math. Specialized instruction in reading, written language, and also math was provided in a special education classroom. The IEP team considered keeping Student in the general education setting with supplemental aids and services but determined that the student's disability-related learning needs required part-time placement in a special education setting. Student was mainstreamed in all other academic, nonacademic, and extracurricular activities in which nondisabled peers associated. Here the District properly weighed the benefits of mainstreaming versus the educational improvements Student could attain in a special education setting.

Student #3 has a similar combination of learning across regular education and special education classrooms. Student's placement in a special education setting was meant to address Student's deficits in the areas of reading and writing. This placement remained largely intact when Student transferred to another elementary school within the District. Student was in regular education classroom for all other academic courses. The placement decision was supported by the initial evaluation which captured Student's relative weakness in reading. Therefore, the limited placement in a special education setting was a reasonable determination because it promoted the educational benefits student would receive in a special education classroom while otherwise mainstreaming Student to the maximum extent appropriate.

As to Issue No. 3, the District is not cited.

Issue No. 4

Whether the District's actions and/or omissions towards its students 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.

A student eligible for special education is entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. School districts are obligated to provide FAPE for each student eligible in their district. 6.31.2.9(A), 6.31.2.11(l)(2) NMAC. If an IDEA procedural violation occurs, that violation will constitute a denial of FAPE only if it: (1) resulted in a substantive harm to the child or their parents; (2) deprived an eligible student of an IEP; or (3) resulted in the loss of an educational opportunity. *Boutelle v. Bd. of Educ. of Las Cruces Pub. Sch.*, No. CV 17-1232

GJF/SMV, 2019 WL 2061086, at *7 (D.N.M. May 9, 2019). The substantive legal standard for determining whether a District has offered a student FAPE is whether an IEP is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017).

At the start of the 2021-2022 school year, Student #1 displayed a pattern of defiance behaviors that impeded in their learning. In response, the District recommended an FBA at an IEP team meeting on August 23, 2021. This recommendation led to the creation of a BIP which was adopted at another IEP team meeting on October 5, 2021. The implementation of the BIP was coordinated across the regular education and special education classroom settings. Appropriate behavior interventions such as aided classroom transitions and time away from class lessons were in place. When peer conflict issues persisted, the District convened a parent conference to discuss switching Student to another regular education classroom to prevent any further student conflicts. Upon the conclusion of this meeting, it was agreed that special education teacher would work more closely with Student. The District took appropriate steps to address Student's behavioral needs by pursuing an FBA/BIP and then adopting strategies to proactively address Student's academic difficulties so that Student did not feel overwhelmed.

There was convincing evidence that Student was making behavioral progress. The special education teacher described Student #1 as showing a greater tolerance with being told "No" and following teacher directives. Complainant framed Student's improvement as having mostly "positive days" during the period of BIP implementation. Progress reports recorded sufficient progress for Student improving their social behavior skills in a classroom setting. Student's mixed grades are inconclusive on the issue of FAPE because they only contain marks from the first quarter due to Student's withdrawal from the District in mid-December. For these reasons, both the District's actions to modify Student's IEP with a BIP and behavior goals as well as evidence of behavioral progress are indicative that Student received a free appropriate public education.

The evidence gathered for Student #2 was insufficient to determine whether a special education evaluation was warranted. Without more concrete evidence showing Student demonstrated clear signs of a disability, the District child find duty was not triggered and therefore Student #2 was not denied FAPE.

The District fulfilled its mandate to educate Student #3 in the least restrictive environment. Student. The academic benefits of placing Student in a special education setting to address deficits in reading and writing were balanced with inclusion in a regular education setting for all other academic courses. The Student's educational placement was based on their individual needs and therefore the District did not deny Student FAPE on the basis of least restrictive environment.

The record of evidence for Student #4 does not support a finding that Student was denied a free appropriate education. Student was able to complete make-up assignments during her period of inpatient and outpatient treatment. As a result, Student earned average grades for the 2021-2022 school year. Guardian confirmed that the one-to-one help Student received while out of school helped Student advance through their coursework. This evidence demonstrates that Student #4 was not denied FAPE because Student made educational progress with interventions provided by the District. *See e.g., J.N. as next friend of M.N. v. Jefferson Cnty. Bd. of Educ.*, 421 F. Supp. 3d 1288, 1300–01 (N.D. Ala. 2019), *aff'd sub nom. J.N. next friend of M.N. v. Jefferson Cnty. Bd. of Educ.*, 12 F.4th 1355 (11th Cir. 2021) (child find violation did not result in a denial of FAPE).

As to Issue No. 4, the District is not cited.

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

Investigated by:

/s/ Michael Gadomski

Michael W. Gadomski, Esq.

Complaint Investigator

Reviewed by:

/s/Miguel Lozano

Miguel Lozano, Esq.

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Reviewed and approved by:



Deborah Dominguez-Clark

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