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NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
SPECIAL EDUCATION DIVISION  
Complaint Resolution Report  
Case No. C2122-33  
July 29, 2022

**This Report requires corrective action. See pages 17–20.**

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on June 1, 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.<sup>1</sup> 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;

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<sup>1</sup> 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 the Parent, Advocate, Middle School Assistant Principal, and Middle School Teacher; 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.

### **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 properly develop and implement an Individualized Education Program (IEP), in violation of 6.31.2.10(D) and 6.31.2.11(B) NMAC; 34 C.F.R. §§ 300.320-300.328:
  - a. by delaying or not conducting a Functional Behavior Assessment
  - b. by not implementing a Behavior Intervention Plan
  - c. by not providing supplementary aids and services
2. Whether the District failed to comply with disciplinary procedures for students with disability-related behavioral needs, in violation of 6.11.2.11(B) NMAC and 34 C.F.R. § 300.530(e);
3. Whether the District failed to provide an opportunity to Complainant to participate in meetings with respect to the educational placement of Student, in violation of 6.31.2.13(C) NMAC and 34 C.F.R. § 300.501(c);
4. Whether the District failed to provide Student with an IEP and educational program that allowed for the Student to be educated in the Least Restrictive Environment, in violation of 6.31.2.11(C) NMAC and 34 C.F.R. § 300.114(a); and

5. 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 6.31.2.8 NMAC and 34 C.F.R. § 300.101.

### **General Findings of Fact**

1. Student is a rising seventh grade student who is eligible for special education under the category of Other Health Impairment ("OHI").

#### **1:1 Aide**

2. While Student was in fifth grade at elementary school an annual IEP review meeting occurred on January 11, 2021.
3. At this meeting, the IEP team recommended an IEP that called for "SE Medical/Safety Support in Gen Ed" listed under Statement of Special Education and Related Services.
4. This service meant 1:1 aide<sup>2</sup> support which was provided to Student for the remainder of fifth grade. The frequency of the service was listed at 1650 minutes per week.
5. Parent reports that 1:1 aide assisted with Student with redirecting behavior, completing classroom assignments, practicing coping strategies, and taking breaks.
6. Student's placement in fifth grade was a Level I program ("Level I") designed to provide social emotional support.
7. Upon transitioning to sixth grade at middle school for 2021-2022 school year, the Student continued in a Level I program but did not receive a 1:1 aide.
8. Middle School Assistant Principal stated that 1:1 aide was not provided to Student at the start of 2021-2022 school year because Student's IEP did not explicitly list this as a service.
9. The January 11, 2021 IEP refers to "1.1 EA" or "1.1 support" twenty-two times.
10. During the first half of the 2021-2022 school year, Parent was unaware that 1:1 aide was not provided to Student while at middle school.
11. Parent reports that lack of 1:1 aide for first semester of sixth grade led to behavioral regression in Student such as task refusal and inability to express emotions in class.

#### **January 10, 2022 IEP Meeting**

12. An IEP annual review meeting was held on January 10, 2022.
13. Parent alleges in the complaint that they received insufficient notice of this IEP meeting because it was scheduled shortly after the start of second semester of the 2021-2022

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<sup>2</sup> The terms aide, educational assistant, and paraprofessional are used interchangeably.

school year. Parent subsequently stated in their interview that she agreed to the date and time of the January 10, 2022 IEP meeting.

14. At this meeting District participants recommended changing Student's placement to the Level II program ("Level II") for additional social emotional supports and services.
15. Upon learning that Student was not initially provided 1:1 aide in sixth grade, Parent proposed reinstating the 1:1 service and conducting an FBA/BIP (Functional Behavior Assessment/Behavior Intervention Plan) before placing Student in Level II.
16. Parent told IEP team members that 1:1 aide was necessary to support Student in the lesser restrictive Level I Program.
17. Assistant Principal denies that Parent requested FBA/BIP at the January 10, 2022 IEP meeting.
18. Notwithstanding those differing accounts, the Prior Written Notice for this IEP meeting recorded IEP team's recommendation to conduct a new FBA/BIP after Student was placed in the Level II program.
19. Advocate reported that decision to place Student in Level II Program was already decided by Assistant Principal and other IEP team members prior to conducting the IEP meeting.
20. Advocate stated that Assistant Principal refused to consider conducting FBA/BIP before changing Student's placement and that Student was being penalized for District' failure to provide 1:1 aide during first half of 2021-2022 school year.
21. Advocate asserted that completing an FBA/BIP while Student continued attending Level I was appropriate because behavioral data could be collected to develop BIP and determine Students' least restrictive environment ("LRE").
22. Assistant Principal reported that all other IEP team members, besides Parent and Advocate, were in consensus about recommending a change in placement to Level II to address Student's deficits in social emotional skills and provide Student with more individualized instruction with a small student-teacher ratio.
23. Assistant Principal explained to Parent that Level II was considered a temporary placement for Student in order to provide intensive supports that would enable Student to return to a lesser restrictive setting.
24. Parent alleged that while Student was in Level II program Student may have not had access to assembly or other group activities in school that integrated student with nondisabled peers. Parent further states that Student had to earn privilege to eat lunch among the general student body.
25. Assistant Principal stated that Student was provided full access to nonacademic activities in the Middle School such as assembly and after-school program.
26. Principal explained that earning lunch privileges was part of a lunch reward program via the AIM curriculum (a behavior analytic curriculum for social emotional development in

- students attending Level II). Student earned points to access lunch with nondisabled peers but also opted periodically to eat lunch inside away from the larger student body.
27. Principal said that there was a total of ten students in the Level II program during the 2021-2022 school year.
  28. Teacher reported that Level II had two educational assistants (aides) in the classroom.
  29. In response to state complaint filed by Parent on behalf of Student, District submitted a response in which it states that Middle School within the District “does not appear to have adequately considered alternatives to supporting [Student] in the lesser restrictive [Level I] setting before convening the IEP team to consider moving [Student] to the [Level 2] setting.”
  30. The response continues: “[Middle School] did not seem to have effectively utilized the [FBA] and [BIP] process to support [Student]...FBAs and BIPs are appropriate at any level of intervention and should be effectively utilized before restricting a student’s environment.”

### **January 31, 2022 IEP Meeting**

31. Student’s IEP was amended at another IEP meeting on January 31, 2022.
32. The IEP was amended to permit Student to continue attending music therapy in Level I.
33. Assistant Principal explained that the timeslot for music therapy overlapped with Level I ELA, so Student’s class schedule was revised to enable Student’s participation in music therapy.
34. At this meeting, Parent requested returning Student to Level I for some classes to monitor behavior and observe interactions with other peers.
35. IEP team declined to revert Student’s placement back to Level I due to District’s prevailing view that Student’s ongoing social emotional needs required a lower staff-to-student ratio to acquire social-emotional and life skills.
36. Similarly, Parent request for 1:1 aide was declined because IEP team determined Student received sufficient adult supervision with existing resources in Level II.

### **FBA/BIP**

37. The District went forward with conducting an FBA which was completed on March 1, 2022.
38. Middle School Teacher collected behavioral data for FBA.
39. Teacher reports that primary target behavior was task refusal which manifested in Student responding “no” to classroom instructions, putting their head down on the desk,

walking around classroom, tearing up or crumpling paper assignments, property destruction, and aggression towards school staff or peers.

40. District determined that a BIP was warranted based on information collected via the FBA.
41. The BIP was developed at a meeting with Parent on April 11, 2022.
42. Teacher stated that they recommended updating the BIP so that it would more effectively address Student's current behaviors in school.
43. Interventions focused on Student developing replacement behaviors in the form of verbalizing frustration and requesting delayed access to educational task.
44. Parent stated that BIP was ineffective because Student continued to display behaviors in school.
45. In contrast, Assistant Principal and Teacher saw behavioral improvements with the BIP's implementation.
46. Assistant Principal said BIP was helpful because it resulted in less disciplinary referrals for Student.
47. Teacher observed that Student displayed less work refusal, willingness to produce more work in class, consistent learning effort, and increased engagement in class material once the BIP was implemented.

### **Discipline & Suspensions**

48. For the 2021-2022 school year, Student received eight days of out-of-school suspension and one day of in-school suspension.
49. District reported that Student was in the ISS classroom for their in-school suspension. ISS classroom afforded Student access to other students, their sponsor teacher, their social worker for counseling, and Student received instruction and work assignments with support from educational assistants.
50. The majority of disciplinary incidents (four) occurred in the first half of the 2021-2022 school year while the other two incidents transpired in the second half.
51. Student behaviors resulting in disciplinary action included eloping from class, work refusal, crumpling paper assignments, and aggression towards staff and peers.
52. Parent claimed they had to pick up Student approximately fifteen times during second half of 2021-2022 school year due to continued behaviors.
53. District contact log records show that Student was only picked up in relation to formal disciplinary referrals.

### **Educational Progress**

54. Student improved their grades throughout the 2021-2022 school year.

55. At the end of the first semester, Student received Fs in Math and Social Studies, Ds in Science and Art, and Bs in Language Arts and Study Skills. These grades reflect the time Student was placed in Level I.
56. Student finished the year with Bs in Language Arts, Social Studies, and Science, and Cs in Math and Science. The second semester grades are from Student's time spent in the Level II program.
57. I-Ready test scores show slight regression. Student scored 411 in overall Math at start of year and finished the year with 391. Student also scored 379 in overall ELA and finished the year with 335.
58. Steady progress was made on annual IEP goals that were started on either January 10 or January 31 of 2022.
59. Student scored a 3 (progress made but instructional methods may have to change) on both Health Education and ELA goals.
60. Math goals show Student achieved a 4 (progress and expected to achieve goal by next IEP annual review meeting) on one goal and a 5 (achieved goal) on the other math goal.
61. Parent reported that Student's progress in Level II program was misleading because Student was doing less academic work in this placement and Student still displayed behaviors that impeded their learning.
62. Assistant Principal viewed Student as making educational progress because Student's grades improved and Student exhibited less behavior resulting in disciplinary referrals.
63. Teacher observed how Student reduced their task refusal behaviors and showed increased confidence in asking for help with class assignments. This trend, according to Teacher, led to Student completing more assignments which in turn improved Student's grades by the end of the 2021-2022 school year.

### **Discussion and Conclusions of Law**

#### **Issue No. 1**

**Whether the District failed to properly develop and implement an Individualized Education Program (IEP), in violation of 6.31.2.10(D) and 6.31.2.11(B) NMAC; 34 C.F.R. §§ 300.320-300.328:**

- a. **by delaying or not conducting a Functional Behavior Assessment**
- b. **by not implementing a Behavior Intervention Plan**
- c. **by not providing supplementary aids and services**

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. Failure to timely conduct a functional behavior assessment may contribute to a denial of a free appropriate public education (“FAPE”) if the IEP alone does not adequately address the student’s needs. *S.S. v. Bd. of Educ. of Harford Cty.*, 498 F. Supp. 3d 761 (D. Md. 2020), *appeal dismissed sub nom. S.S. by & through T.S. v. Bd. of Educ. of Harford Cty.*, No. 20-2260, 2021 WL 2102576 (4th Cir. Jan. 12, 2021). The omission of an FBA may constitute a serious procedural violation if understanding the root causes of problem behaviors is necessary for addressing them in the IEP. *L.O. v. New York City Dep’t of Educ.*, 822 F.3d 95, 112–14 (2d Cir. 2016).

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. It is based on the results of a FBA and the BIP includes a description of the problem behavior, a hypothesis as to why the behavior occurs, and interventions such as positive behavioral supports and services.

Supplementary aids and services are additional supports provided to a special education student. The rationale for providing supplementary aids and services is to enable the child in: (1) advancing towards achievement of annual IEP goals; (2) being involved in the general education curriculum; and (3) being educated with non-disabled peers. 34 C.F.R. § 300.320(a)(4)(i)–(iii). A 1:1 aide/paraprofessional is an example of a supplementary aid or service provided in an IEP. *See e.g., J.A. v. Smith Cnty. Sch. Dist.*, 364 F. Supp. 3d 803, 835–36 (M.D. Tenn. 2019), *case dismissed*, No. 19-5343, 2019 WL 4943763 (6th Cir. Apr. 18, 2019) (ordering 1:1 paraprofessional be included in IEP so that Student could receive appropriate educational benefit).

At the January 10, 2022 IEP meeting, the District’s IEP team determined that a new FBA was necessary to better understand how Student’s behaviors were impacting their learning in school. This was done in response to five disciplinary incidents that occurred up to that point during the school year. Disciplinary records show that the initial behaviors during the 2021-2022 were likely impeding Student’s learning because the behaviors involved Student refusing to do classwork. The FBA was timely completed two months later on March 11, 2022. Here, the District exercised their discretion to conduct an FBA which was in line with their ongoing duty to develop an appropriate IEP for Student.

A BIP emerged from the FBA on April 11, 2022. Parent does not dispute that BIP was implemented but instead considered it ineffective because Student continued to display behaviors in school. District witnesses provided evidence that the BIP was consistently implemented. Assistant Principal stated that implementation of BIP led to fewer disciplinary referrals. Teacher described how staff used behavioral strategies such as Student verbalizing frustration and requesting delayed access to educational tasks. Teacher also observed how these strategies reduced Student's disability-related learning barriers as exemplified by increased engagement in academic work. The evidence supports a finding that the District implemented a BIP to address Student's behaviors that impeded their learning.

There is no question that Student was not provided a supplementary aid/service in the form of a 1:1 aide. The IEP dated January 11, 2021 included the provision of a 1:1 aide which is evident from the combination of the "SE Medical/Safety Support in Gen Ed" language listed under special education services as well as the twenty-two references to "1.1 EA" or "1.1 support" stated throughout the entire IEP. This IEP was in effect when Student began attending the Middle School at the start of the 2021-2022 school year. Assistant Principal claims that the January 11 IEP did not list 1:1 aide as a service. Yet the information in the IEP provides sufficient information to reasonably conclude that the elementary school IEP team had included a 1:1 aide in the IEP to address Student's social emotional and safety needs because 1:1 support was an integral component of educating Student while Student was in the fifth grade Level I program. Student's nonreceipt of a 1:1 aide during the first half of the 2021-2022 school year was a failure by the District to provide supplementary aids and services to Student.

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

### **Issue No. 2**

**Whether the District failed to comply with disciplinary procedures for students with disability-related behavioral needs, in violation of 6.11.2.11(B) NMAC and 34 C.F.R. § 300.530(e).**

Local educational agencies have the authority to suspend a student with a disability subject to certain procedural requirements. 34 C.F.R. § 300.530; 6.11.2.11 NMAC. One such requirement is if a child's disciplinary removals constitute a "change in placement," then the LEA must convene a Manifestation Determination Review (MDR) meeting to assess whether the child's behavior is related to their disability. 34 C.F.R. § 300.530(e); 6.11.2.11(B) NMAC. A disciplinary change in placement occurs when a child is removed from school for more than 10 consecutive school days OR the child is subject to a series of removals that constitute a pattern because: (1) there were more than 10 school days of removal; (2) the child's behavior is similar to previous incidents

resulting in removal; and (3) there were additional factors such as the length, time, and proximity of the removals. 34 C.F.R. § 300.536; 6.11.2.11(G) NMAC.

It is the responsibility of the LEA to determine whether a change of placement has occurred on a case-by-case basis. *Id.* Whether an in-school suspension should be counted as part of the days towards a change in placement depends on the unique circumstances of each case as well as continuation of the student's participation in the general curriculum, receipt of IEP services, and participation with nondisabled peers. 71 Fed. Reg. 46715; *Dear Colleague Letter* 68 IDELR 76 (OSERS/OSEP 2016), footnote 29.

Within 10 school days of any decision to change the placement of a special education student, the LEA must convene a MDR meeting. 34 C.F.R. § 300.530(e)(1); 6.11.2.11(B)(2) NMAC. The MDR team must review all relevant information about the student and decide whether: (1) the student's conduct in question was caused by or had a direct and substantial relationship to the student's disability; or (2) the conduct in question was a direct result of the administrative authority's failure to implement the IEP. 34 C.F.R. § 300.530(e)(1); 6.11.2.11(B)(2) NMAC. If the MDR team determines that the student's behaviors were a manifestation of their disability, then an IEP team meeting must be convened to either conduct a functional behavior assessment or modify an existing behavior intervention plan. 34 C.F.R. 300.530(f); 6.11.2.11(C) NMAC.

Student had displayed a pattern of removals during the 2021-2022 school year. Student received eight days out-of-school suspensions and one day in-school suspension. For the in-school suspension, there is evidence in the record that Student was permitted participation in the general curriculum, received IEP services, and participate in learning with peers. Therefore, Student's in-school suspension does not warrant inclusion in the pattern of removals for purposes of calculating a disciplinary change in placement. The incongruence of information between Parent and the District regarding the number of times Student was picked up from school due to behaviors renders this evidence less credible in terms of applying IDEA disciplinary protections. Based on this information, no finding can be made that Student was removed from school for more than 10 school days for purposes of constituting a disciplinary change in placement.

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

### **Issue No. 3**

**Whether the District failed to provide an opportunity to Complainant to participate in meetings with respect to the educational placement of Student, in violation of 6.31.2.13(C) NMAC and 34 C.F.R. § 300.501(c).**

Both federal and state regulations require the parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the educational placement of the child. 34 C.F.R. § 300.501(c); 6.31.2.13(C) NMAC. Meaningful participation means considering parent suggestions, discussing placement options, and answering parent questions. *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 856–57 (6th Cir. 2004). When an IEP Team fails to consider the viewpoint of the parent and predetermines an IEP, this deprives a parent of meaningful participation in development of the IEP. *E.H. v. New York City Dep't of Educ.*, 164 F. Supp. 3d 539, 551 (S.D.N.Y. 2016).

At the January 10, 2022 IEP meeting, the IEP Team recommended placing Student in the Level II program. Parent objected to this change in placement and asked that the IEP team consider both an FBA/BIP and reinstating a 1:1 aide in Student's current Level I program. Parent and Advocate reported that IEP team did not consider Parent's position that collecting new behavior data via an FBA, providing behavioral supports through an updated BIP, and assigning a 1:1 aide could appropriately address Student's behavior without placing Student in more restrictive setting. Assistant Principal stated that IEP Team listened to parent concerns but ultimately reached a consensus with other team members in recommending a change in placement to Level II. The discussion held at the IEP meeting and the proposal to change Student's educational program was captured in a Prior Written Notice that was provided to Parent.

Another IEP team meeting was held on January 31, 2022. At this meeting the Parent was able to reiterate their request for a 1:1 aide which the IEP declined due to the level of support available in the Level II Program. Taken together, the record demonstrates that the District may have had pre-formed options about revising Student's IEP but kept an open mind as to the Parent's point of view. The fact that the IEP team reached a decision to change Student's placement which the Parent opposed does not mean that District staff predetermined the change in placement decision or that the parent was excluded from participating in meetings related to Student's educational placement.

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

**Issue No. 4**

**Whether the School failed to provide Student with an IEP and educational program that allowed for the Student to be educated 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).

The Level II program was a more restrictive learning environment because it involved additional intensive supports such as two adult aides and the AIM curriculum which included behavioral components such as a lunch reward program. The Level II program also had a lower staff-to-student ratio to Level I because Student was among a group of ten students in Level II with a teacher and aide support. Therefore Level II bore less resemblance to a regular education classroom compared to Level I which made it more restrictive.

At the January 10, 2022 IEP team meeting, Parent requested both an FBA/BIP and a 1:1 aide as supplementary aides and services that could make Student's placement in Level I successful. The IEP team declined to conduct an FBA/BIP while Student was in Level I and instead opted to pursue that service once Student's placement was changed to Level II. As the District response to the complaint points out, the IEP team in this instance did not properly consider the use of an FBA/BIP as a form of intervention to support Student in Level I before deciding to place Student in the more restrictive Level II. In doing so, the District failed to consider the continuum of support services that could be used satisfactorily to maintain Student in the Level I.

There is some evidence that the IEP team compared the academic benefits between Level I and Level II as well as non-academic benefits among the settings. Assistant Principal asserted that the IEP Team considered Student's placement in Level II as temporary so that Student could acquire social-emotional skills and address academic deficits with a smaller teacher-student ratio. Yet there is less evidence of how the IEP team considered the academic and nonacademic benefits of the Level I program before recommending a change in placement to Level II. Both records and witness interviews provide evidence that the IEP team prioritized consideration of the benefits of Student attending Level II without a closer analysis of how Student could benefit in Level I. As such, the District failed to consider the academic and nonacademic benefits

between the Level I and Level II programs before placing Student in a more restrictive environment.

Student's behaviors while attending Level I during the first half of the 2021-2022 school year were clearly disruptive to other students in the program. Student's aggression in class towards both staff and peers including crumpling other students' paper assignments had a negative effect on the learning of other students. That said, the Student's behaviors alone do not outweigh the District's failure to either consider appropriate supplementary aids and services or assess the benefits of attending either setting before changing Student's placement to a more restrictive environment. Based on the foregoing, the District failed to take appropriate steps to determine Student's least restrictive environment.

**As to Issue No. 4 the District is cited and Corrective Action is required.**

**Issue No. 5**

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

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 individual circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017).

Student's IEP from fifth grade called for 1:1 aide support to assist student in both academics and social interactions among staff and student peers. This level of support was necessary for Student to educationally progress while attending the fifth grade Level I program because Student could remain focused in class and an aide mitigated the risk of Student displaying behaviors that would impede their learning. Based on this information, the District should have known that Student was unlikely to be successful heading into a sixth grade Level I program without ongoing support from a 1:1 educational assistant as required by the January 11, 2021 IEP. By not providing Student with a 1:1 aide for the first half of sixth grade, the District committed a material failure in the implementation of the IEP which was a serious procedural violation that denied Student FAPE. See e.g., *Norristown Area Sch. Dist. v. F.C.*, 636 F. App'x 857, 861-62 (3d Cir. 2016) (District

knew or should have known student was unlikely to be successful in general education classroom without one-on-one paraprofessional and thus District was required to provide this supplementary aid and service so that student could receive FAPE). The substantive adequacy of the January 11, 2021 IEP cannot be determined because the material failure to implement this IEP meant Student never had an opportunity to fully benefit from the full range of services contained in their individualized program.

Another serious procedural basis for a denial of FAPE was the District's failure to make reasonable efforts to accommodate Student in the Level I program before changing Student's placement to the more restrictive Level II program. The refusal of the IEP team to attempt an FBA/BIP before initiating a placement change precluded any opportunity for the District to determine if Student could educationally benefit from remaining in the Level I program with additional behavioral supports. Furthermore, Student's initial academic struggles in the lesser restrictive Level I program may be directly related to the District's material failure to implement supplementary aids and services contained in the January 11, 2021 IEP. Therefore, the District's failure to consider relevant factors in determining the most integrated educational setting for Student contributed to a denial of FAPE.

Conversely, the IEPs crafted at the January 10, 2022 and January 31, 2022 IEP team meetings support a finding that Student was offered FAPE. Student was able to make educational progress during the second half of the 2021-2022 school year upon the change in placement to the Level II program. For example, Student's improvement in grades correspond with the change in placement and adoption of the January 10<sup>th</sup> IEP. Progress reports show steady advancement in achieving all IEP goals by the time Student completed sixth grade. Both District witnesses attest to Student's progress in both academic learning and behavioral self-regulation during the second semester. For these reasons, the IEP dated January 10, 2022 was substantively adequate to provide Student FAPE.

**As to Issue No. 5, the District is cited and corrective action is required.**

**Summary of Citations**

<b>IDEA/State Rule Provisions Violated</b>	<b>Description of Violation</b>
6.31.2.11(B) NMAC and 34 C.F.R. § 300.320(a)(4)	The District failed to properly develop and implement an Individualized Education Program (IEP) by not providing supplementary aids and services.
6.31.2.11(C) NMAC and 34 C.F.R. § 300.114(a)	The District failed to provide Student with an IEP and educational program that allowed for the Student to be educated in the Least Restrictive Environment.
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 August 5, 2022**, the District’s Special Education Director must assure the SED in writing that the District will implement the provisions of this Corrective Action Plan (CAP). The SED 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](mailto: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 SED 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 SED.

Each step in this Corrective Action Plan is subject to and must be carried out in compliance with the procedural requirements of the IDEA 2004 and the implementing federal regulations and State rules. Each step also must be carried out within the timelines in the Corrective Action Plan. If a brief extension of time for the steps in the Corrective Action Plan is needed, a request in writing should be submitted to the Corrective Action Plan Monitor. The request should include the case number, the date for the proposed extension, and the reason for the needed extension. The SED will notify the parties of any extension granted.

**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 January 31, 2023 and reported to the SED no later than February 14, 2023.** All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the state complaint case number and step number.

**Corrective Action Plan**

<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED SED</u></b>	<b><u>Document Due Date</u></b>
<b>1.</b>	As described above, the District will submit a written assurance to the PED Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan (CAP).	<b>August 5, 2022</b>	Written Assurance Letter/Email	<b>August 5, 2022</b>
<b>2.</b>	The District Special Education Director, School Principal, and School Special Education Coordinator/Lead shall meet with the PED SED EA assigned to the District and the PED SED CAP Monitor to review the Complaint Resolution Report, the Corrective Action Plan, and any other measures that the District and School plan to take to ensure that the violations are corrected and do not recur. The District Director has the discretion to include other District and school administrators or personnel in this meeting. The District Director shall be responsible for setting up this meeting with PED SED.	<b>August 12, 2022</b>	Notes from meeting prepared by the District	<b>August 19, 2022</b>
<b>3.</b>	The District Special Education Director will meet with the student’s special education teacher, general education teachers, 1-1 aide, related service personnel, School Special Education Coordinator/Lead and school principal to review the Complaint	<b>August 19, 2022</b>	Notes from meeting prepared by District	<b>August 26, 2022</b>

<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED SED</u></b>	<b><u>Document Due Date</u></b>
	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.			
<b>4.</b>	<p>The District shall provide training to Middle School administrators, special education leads, and special education staff and related service providers on the following topics:</p> <ul style="list-style-type: none"> <li>• IEP Drafting and implementation including clear descriptions of special education programming, related services, and supplementary aids and services; and</li> <li>• Reasonable efforts to accommodate students in the least restrictive environment.</li> </ul> <p>The District may provide this training through a District level staff member who has expertise in special education requirements. This person must be approved by NMPED.</p>	<b>September 30, 2022</b>	<p>Confirmation of the date(s) of the training</p> <p>Confirmation of attendees at the training with submitted documentation of signed attendance sheet from all attendees and plan for addressing provision of training to those staff not in attendance.</p> <p>Submission of proposed trainer and trainer’s resume and proposed presentation for NMPED approval.</p>	<p><b>September 16, 2022</b></p> <p><b>October 14, 2022</b></p> <p><b>September 2, 2022</b></p>

<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED SED</u></b>	<b><u>Document Due Date</u></b>
5.	<p>The District shall convene a Facilitated IEP meeting to discuss the following with Parent:</p> <ul style="list-style-type: none"> <li>• Student’s educational placement and whether Student can be educated in a lesser restrictive environment with the provision of supplementary aids and services; and</li> <li>• Plan to provide compensatory education hours required in step 6.</li> </ul> <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 any related services providers.</p>	August 26, 2022	<p>Invitation to IEP meeting, IEP, Prior Written Notice, Agenda for FIEP team meeting</p> <p>Confirmation of arrangement with Facilitator from PED approved list of Facilitators</p>	<p>September 2, 2022</p> <p><b>Within 3 days of making arrangements for facilitator.</b></p>

<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED SED</u></b>	<b><u>Document Due Date</u></b>
6.	<p>The District shall provide Student with 30 hours of compensatory education provided by a 1:1 tutor. The distribution of the 30 hours of tutoring in specific academic 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 5. The plan for compensatory services shall be documented in the PWN(s) for the Facilitated IEP meeting(s).</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>	January 31, 2023	<p>Documentation of delivery/provision of compensatory education services, including logs of services and progress reports</p> <p>Prior Written Notice containing plan for compensatory services.</p>	<p><b>Monthly from date of compensatory services plan until the compensatory education hours are completed.</b></p> <p><b>September 2, 2022</b></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/ Michael W. Gadomski*  
Michael W. Gadomski, Esq.  
Complaint Investigator

Reviewed by:

*/s/ Miguel Lozano*  
Miguel Lozano, Esq.  
Chief Counsel, Special Education Division

Reviewed and approved by:



Deborah Dominguez-Clark  
Director, Special Education Division