



STATE OF NEW MEXICO
PUBLIC EDUCATION DEPARTMENT
300 DON GASPAR
SANTA FE, NEW MEXICO 87501-2786
Telephone (505) 827-5800
www.ped.state.nm.us

KURT STEINHAUS, Ed.D.
SECRETARY OF EDUCATION

MICHELLE LUJAN GRISHAM
GOVERNOR

NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. 2122-35
August 4, 2022

This Report requires corrective action. See pages 16-21.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on June 8, 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 the Parent, Advocate, Substitute Teacher, Special Education Director, Case Manager and Substitute Retired Teacher;
- 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 timely conduct a comprehensive evaluation of Student in suspected areas of disability in violation of 34 C.F.R. § 300.111, 34 C.F.R. § 300.306 and 34 C.F.R. § 300.101 and 6.31.2.10 (A), (F) (1) and 6.31.2.8 NMAC;
2. Whether the District developed and implemented an IEP that would allow Student to receive FAPE in violation 34 C.F.R. §§ 300.324-328 and 6.31.2.11(B)(1) NMAC, by,
 - a. Failing to develop goals to address Student’s receptive and expressive language needs, personal hygiene needs and behavior goals to address health and other needs;
 - b. Failing to consider Parent’s request for ABA therapy or other autism considerations and predetermining Student’s services;
 - c. Failing to provide regular progress notes to Parents on Student’s progress and meeting to amend IEP if Student was not making progress;
 - d. Failing to develop new appropriate annual goals to allow Student to make educational progress;
 - e. Failing to monitor Student closely to prevent possible harm to Student;
3. 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

Background Information

1. At the time of the complaint, Student was six years old and had multiple developmental issues including autism and intellectual disability.
2. Student was diagnosed with a pineal gland tumor and had surgical repair in March of 2020.
3. During the COVID-19 pandemic while schools were closed to in-person services, Parents opted out of virtual services for Student. Student returned to in person services in Spring, 2021.
4. The Speech Therapist reported to Parent concerns that Student may have a cortical visual impairment because of Student's difficulty with the Picture Exchange Communication System (PECS).
5. Student was subsequently diagnosed with a cortical visual impairment after Parents followed up with a private evaluation of Student.
6. Student has been receiving private Applied Behavior Analysis (ABA) services outside of the school day.

Evaluation Information

7. A review of existing evaluation data (REED) was completed on September 23, 2020 when Student was in Pre-K. The team, which included the Parents, agreed that at that time, no further assessments were needed because the comprehensive interdisciplinary assessment completed on June 19, 2018 by the University of New Mexico (UNM) Center for Developmental Disabilities still reflected Student's present levels of academic and functional performance.
8. A comprehensive evaluation from the UNM Center for Developmental Disabilities, completed on August 18, 2021, was provided to the District and was reviewed in development of Student's IEP
9. Parents had another feeding and eating assessment completed on January 28, 2022 at the UNM Health Center. The results from that evaluation indicated that Student exhibited needs in the following areas: low motor skills, nonverbal, recently diagnosed with cortical visual impairment, Pica, sensory processing including sensory seeking and sensory under responsivity, following directions, matching or identifying objects, imitating actions or sounds, initiating play, conceptualizing words or numbers, potty training, personal hygiene, dressing, fine motor skills, and delays in expressive, receptive and pragmatic language skills.

10. The evaluation recommended behavioral support and collaboration between ABA therapy and school and deep pressure therapy.
11. A comprehensive autism assessment from UNM was completed on August 9, 2021 and provided to the District. Concerns noted delays in motor development, cognitive and language skills.
12. The recommendations from the report were to continue language therapy to work on expressive, receptive and pragmatic language to increase Student's socially acceptable communication skills, work on getting ready for learning to learn. A functional behavior assessment (FBA) may be warranted to develop strategies to manage Student's outbursts including kicking and punching.
13. Following receipt of Student's Pica diagnosis, Student's health plan was adjusted accordingly.
14. The Case Manager assessed Student on May 5, 2022 using the Assessment of Basic Language and Learning Skills-Revised Skill Tracking System (ABLSS). The results from that assessment show that developmentally, Student in addition to language deficits, was having difficulty with preacademic and social interaction among other areas of need. Student can eat independently and tries to use a fork and can follow classroom routines very well.

IEPS and addendums

September 22, 2021 IEP and addendums

15. Student's most recent IEP was completed on September 22, 2021.
16. Student's eligibility on that IEP was autism and speech language.
17. This IEP did not identify any behavior issues that impeded Student's learning, but states that Student required accommodations and modifications in the classroom.
18. The accommodations were primarily for Student's safety such as holding hands with a staff member when leaving the classroom and limited access to crayons and other items Student would put in mouth. There were also accommodations for visual symbols, schedule and other visual aides to help understanding.
19. The IEP noted that Student did not understand social expectations or boundaries and needed extended school year services (ESY).
20. There were six goals listed on the September 22, 2021 IEP.
 - a. Language: Demonstrate will improve language skills by completing following objectives (No objectives listed);
 - b. Fine Motor: Demonstrate increased interest in writing and drawing, begin to draw prewriting shapes, color simple pictures, match the letters of name,

- demonstrate increased visual motor and bilateral coordination to manipulate objects and toys;
- c. Preschool/Functional: Use the toilet and indicate need to be changed;
 - d. Preschool: Perform functionally appropriate actions with classroom objects with cues;
 - e. Preschool: Attend to teacher directed learning task for 3-5 minutes with minimal hand over hand support; and
 - f. Gross Motor: Demonstrate functional, safe and functionally mobility, ascend and descend stairs at a functional pace, explore and interact with playground toys and structures, show interest and participate in object manipulation such as throwing and catching.
21. The IEP noted that Student's goals were similar to the goals on the September 23, 2020 IEP but it was noted on the IEP that Student had limited participation because of virtual learning as a result of COVID-19.
22. Student received 25.5 hours per week in a self-contained classroom. These services includes 60 minutes per week of speech language services (SL), 30 minutes a week for occupational therapy (OT). 60 minutes per week of physical therapy (PT), 600 minutes per week of language arts, 600 minutes per week of math, 90 minutes per week of science, and 90 minutes a week of social studies. Student participated with regular education peers at breakfast, lunch and recess.
23. Justification for Student's placement was "Student requires services in a special education setting to facilitate greater educational progress."
24. Parents were to receive quarterly progress reports.
25. The following year services would increase to 31 hours per week with an increase of 30 minutes a week for PT and a change to 560 minutes per week for other life skills.
26. Student participated with typically developing peers for lunch/breakfast and recess.
27. The District reviewed the eleven autism considerations for effective educational programming, including need for behavior supports.
28. A prior written notice (PWN) from this meeting recommended an adaptive PE assessment and autism assessment at UNM and increased OT services.
29. District stated that the adapted PE assessment was completed and was ready to be presented at the next annual IEP review. The adaptive PE assessment was not provided to the investigator.

November 12, 2021 Addendum

30. An addendum was completed on November 12, 2021 to update IEP goals. The information from UNM August 18, 2021 report was considered during a November 12,

2021 IEP meeting. The purpose of that meeting was to change/modify Student's program. The primary change to the IEP was modifying Student's goals and objectives. The Addendum did not indicate whether Student's new goals were in addition to or replacement for the goals from the September 22, 2021 IEP. Additional objectives were added but there was no mention of a goal for potty training.

31. There were six new goals listed on the amended IEP:

- a. Written language/communication: Trace first name and all other letters of alphabet, write 10 letters, write name, show how to tap instead of pinch to get attention. Objectives include attend to speaker and imitate vocalizations to make words, use a mode of communication to engage listener, complete 1 step directions, match 10 letters, trace letters, write 10 letters, write name independently, listen and engage in purposeful reading activities;
- b. Fine motor: Activate a voice output switch, engage in purposeful play activities without putting objects in mouth;
- c. Gross Motor: Walk in any position in line and maintain pace, ascend and descend stairs, explore and interact with playground equipment and object manipulation;
- d. Math: Place numbers in order 1-5, learn 1-1 correspondence between number and objects, participate in counting songs, learn to count to 5, match, trace and write numbers, learn to match, color and draw basic shapes;
- e. Behavior: Keeping hands to himself and out of pants, greeting with fist bump instead of pinch, signing help, sit on the toilet at least once an hour and pull up pants;
- f. Communication: Develop 7 preference tasks, completion of simple tasks, demonstrate appropriate refusal.

32. The services under the addendum were for 20.83 hours per week. This broke down to 25 minutes a day for written language, 45 minutes a day for reading, 45 minutes a week of language arts, 60 minutes a day of math, 25 minutes a day for science, 25 minutes a day for social studies, 60 minutes a week of OT, 25 minutes a day for behavior, 240 minutes monthly for SL, and 240 minutes monthly for PT.

33. Time would increase next school year to 27.33 hours per week.

34. The team agreed to a 1-1 aide for Student which was not provided.

Implementation of Services for 21-22 school year

35. After Christmas break, the classroom teacher was removed and a long-term Substitute Teacher (Teacher) was hired as an aide in the classroom. She was in and out of the classroom until she was assigned full time as the Teacher in late February.

36. Most of the students in that room were transferred to other classes so only three students with significant disabilities remained in that room.
37. After reviewing Student's IEP, the Case Manager realized the goals were too challenging and revised them to be more appropriate to Student's present levels.
38. Parents agreed with more functional goals.
39. In January, the K-2 resource teacher was assigned as the Case Manager for Student.
40. The Case Manager would consult with the Teacher in the classroom and provide suggestions and materials for the students in that room, but she was only in the classroom 2-3 times per week because she had her own students in another resource room.
41. The class was using the ABLLS curriculum.
42. The Teacher did not have any teaching license but was serving as a substitute teacher. She continued to be the only staff member in the classroom until a retired General Education Teacher (Retired Teacher) with no special education certification was hired in April through the end of the school year. The Teacher continued as the aide in that classroom until the end of the year.
43. Neither the Teacher nor the Retired Teacher had access to Student's IEP, but they were provided with ABLLS' checklists to work on.
44. The Teacher and Retired Teacher were to document what the Student was doing every day and share that with the Case Manager who would make recommendations for tasks and lessons.
45. Student had SL and OT services weekly and was to have weekly PT services but those were inconsistent.
46. Logs of PT services for the entire school year were not provided. The latest log date for PT services was September 14, 2021.
47. Logs indicate that at times, OT, PT and SL were combined for only 30 minutes that counted for total time for all three related services providers.
48. The logs from the OT and SL indicate, except for co-services, Student received 60 minutes of service per week for each provider and if services were missed, make up services were provided.
49. The District indicated that some PT services were provided at various locations throughout the school. Some PE services were missed and made up during ESY services. However, the teacher indicated that PT services were inconsistent and often missed and without logs, it was impossible to determine whether all services were provided as required by the IEP.
50. Student's plan included a visual schedule and visual labels for objects around the room. This picture system was being used to improve communication

51. Routines were important for Student and the same tasks would be repeated and restructured every day until skills were mastered.
52. Student was making slow progress.
53. Previously, Student would pinch or hit to communicate with staff; by the end of the year, Student would grab the hand of the teacher and would allow the teacher to soothe Student when Student was overwhelmed or if Student needed assistance.
54. Student learned and followed classroom routines but still was requiring diapers rather than using the toilet or sharing the need to be changed.
55. Student learned to move the icons on the calendar and would put the backpack away on the hook. There was an increase in participating in class activities including using crayons.
56. Routines were very important to Student and when disruptions occurred as the year progressed, Student was better able to handle the disruptions and the class would return to the routine as soon as possible.
57. Student needed a rest period during the day and that was built into the schedule.
58. A typical day included breakfast, then the 'good morning' song, then the class would work on English, reading and writing.
59. Student needed hand-over-hand assistance with writing and by the end of the year was beginning to want to use the crayons for writing or coloring.
60. The class would practice the alphabet song, and "say it, sign it" to increase communication. The class also worked daily on hand-eye coordination. All of the students worked on feeding themselves, using forks and drinking with a straw.
61. The students would work on hand washing, walking line, going to the bathroom.
62. The class would play a lot of games and activities that the therapists recommended.
63. For example, Student would trace letters in whipped cream, scatter balls throughout the room and then sort and count them.
64. The class would read along with books of interest and learn to use the daily calendar.
65. Student had difficulty adjusting to change, and it took time to build a relationship with the staff. Student did not have close relationship with Therapists because Student saw them infrequently. It was a challenging year for Student because of all the transitions in staffing.
66. All of the students in the classroom participated in graduation with cap and gown, photo books from the year and their class projects in gift bags so they had a special transition to kindergarten.
67. Apart from PT progress reports, progress notes for all other goals, including those of the other related services providers for the 21-22 school year were not provided to the investigator. Parent also reported not receiving progress reports from teachers and related service providers.

68. PT progress reports indicated that Student made insufficient progress throughout the year.
69. Results from the ABLLS assessment indicated that Student was making progress on skills measured on that assessment.
70. The progress notes from Student's PT goals from the 20-21 school year indicated that Student made insufficient progress, but was making some limited progress.
71. Staff that were in the classroom reported Student was making limited progress this year but did not provide copies of progress notes sent to Parents.
72. For the upcoming school year, the District has hired trained therapists that can assist Student and others in working on behavior goals and needs.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to timely conduct a comprehensive evaluation of Student in suspected areas of disability in violation of 34 C.F.R. § 300.111, 34 C.F.R. § 300.306 and 34 C.F.R. § 300.101 and 6.31.2.10 (A), (F) (1) and 6.31.2.8 NMAC?

After the initial evaluation to determine eligibility for special education services and the need for special education services, a reevaluation must occur every three years unless the parents and agree that a reevaluation is not needed. 20 U.S.C. § 1414(a)(2). Generally, reevaluations are encouraged to ensure that student's education or related services are being met. Reevaluations are required when certain factors are met that warrant a reevaluation or parents or teacher request an evaluation 34 C.F.R. § 300.303(a). The completion of the REED without timely conducting a reevaluation can be a denial of FAPE. *New Mexico Public Education Department*, 115 LRP 12278 (SEA NM 2015). It is not required that districts document agreements to not complete reevaluations. *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007).

Student was evaluated at the University of New Mexico in 2018. That comprehensive evaluation was accepted by the District and no further evaluations were completed by the District. In 2021, a REED was conducted, with the involvement of the parents, and it was determined that no additional evaluations were needed. The IEP team had sufficient data to develop an appropriate IEP that would provide FAPE to Student. Parents at that time did not request a reevaluation, but as part of this Complaint, they have requested a comprehensive reevaluation of Student to include an assistive technology and augmentative communication assessment since Student is nonverbal.

The REED indicated all parties agreed that no further assessments were needed at that time. Since the Parents agreed at the time of the REED that no further reevaluation was needed, there was no violation. However, if Parents submit a request for a comprehensive reevaluation then the District needs to complete the request for consent for an evaluation or document in a PWN why it is not needed.

As to Issue No. 1, the District is not cited, and Corrective Action is not required.

Issue No. 2

Whether the District developed and implemented an IEP that would allow Student to receive FAPE in violation 34 C.F.R. §§ 300.324-328 and 6.31.2.11(B)(1) NMAC, by,

- a. Failing to develop goals to address Student’s receptive and expressive language needs, personal hygiene needs and behavior goals to address health and other needs;**
- b. Failing to consider Parent’s request for ABA therapy or other autism considerations and predetermining Student’s services;**
- c. Failing to provide regular progress notes to Parents on Student’s progress and meeting to amend IEP if Student was not making progress;**
- d. Failing to develop new appropriate annual goals to allow Student to make educational progress;**
- e. Failing to monitor Student closely to prevent possible harm to Student?**

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). An IEP must include:

1. A statement of the child's present levels of academic achievement.
2. A statement of measurable annual goals, including academic and functional goals.

3. A description of how the child's progress toward meeting the annual goals will be measured.
4. A statement of the special education and related services and supplementary aids and services to be provided to the child.
5. An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the extracurricular or other nonacademic activities.
6. A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on statewide and districtwide assessments.
7. The projected date for the beginning of the services and modifications along with the anticipated frequency, location, and duration of those services and modifications.
8. Appropriate, measurable postsecondary goals and the services needed to reach those goals.
9. Not later than one year before the child reaches the age of majority under state law, a statement that the child has been informed of the child's rights under the IDEA with regard to the rights of the child in reaching the age of majority. 34 C.F.R. § 300.320.

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).

- a. Failing to develop goals to address Student's receptive and expressive language needs, personal hygiene needs and behavior goals to address health and other needs;

Student's placement for half of the year was a classroom with two other students and a non-certified Teacher for approximately two months and a Retired Teacher for approximately three weeks. The first half of the year, Student was in a classroom with 17 students, a certified teacher and a full-time aide. This teacher was subsequently removed as the classroom teacher and a series of substitutes completed that year. The Case Manager assisted in developing materials and observing the classroom 1-2 times a week but she was unable to be in the classroom fulltime because she had her own students in the K-2 resource room. The Case Manager modified the goals to be more appropriate for Student, with the consent of the Parents, but the teachers that were in the classroom were not privy to the IEP. The modified goals were more functionally based and were more reflective of Student's present levels. However, the Teacher and Retired Teacher were the instructors in the classroom every day but were not aware of the goals on the IEP. The Case Manager was providing materials and ideas for Student but was not providing any

specialized instruction nor observing Student on a regular basis to determine appropriateness of goals or progress being made. The initial IEP had goals that addressed receptive and expressive language, personal hygiene and behavior goals. Student worked on potty training skills in the classroom, but it was not a goal on the addendum IEP. The IEP team agreed to 1-1 aide for Student, but for the majority of the second semester, there was no 1-1 aide only the teacher with three students. In the November addendum, the goals for personal hygiene and behavior goals were modified to more accurately reflect Student's present levels, but the language goals remained the same. The goals on the IEP were reflective of Student's present abilities.

b. Failing to consider Parent's request for ABA therapy or other autism considerations and predetermining Student's services;

At the last IEP meeting, Parents requested private ABA services be provided in the classroom. The IEP team discussed ABA services and determined that ABA services may be medically necessary and beneficial for Student, but were not educationally necessary. The PWN noted that Student would benefit from ABA Services. The District has been working with the ABA provider about a plan to come into the building for services. The District is also hiring staff next year to work with students on behavior concerns. The IEP team did review and document on the IEP that the team had reviewed the required areas of consideration related to autism. There was no evidence of predetermination of Student's services.

c. Failing to provide regular progress notes to Parents on Student's progress and meeting to amend IEP if Student was not making progress

With the change in staffing in Student's classroom, progress notes were not provided except for those related to PT goals. PT reports indicated insufficient progress throughout the year including during ESY. Parents were kept informed of progress, but reported that no reports were received. The Teacher did keep in regular contact with Parents about Student and the observed gains. The IEP was amended in the mid-year by the Case Manager, with the involvement of the Parents. Those amendments included modification of the IEP goals to be more achievable as well as the addition ABLLS curriculum to Student's program. Since progress notes were not provided, it is unclear what progress was made on each of the IEP goals, but the information that was obtained evidenced the general lack of progress by Student. While the IEP was modified mid-year because Student was not making progress on goals, no changes were made to IEP to reflect the lack of progress during the second half of the year or during ESY.

- d. Failing to develop new appropriate annual goals to allow Student to make educational progress;

As stated previously in subpart c, Student had significant disabilities which could limit the amount of progress that Student was capable of making on annual basis. Student's IEP goals were modified in the middle of the year to better reflect Student's abilities. Student has mastered significant academic and functional skills this past school year despite all the changes in staffing, but it was unclear what goals Student was working on since neither The Teacher or Retired Teacher had access to Student's IEP and the Case Manager was not in the classroom on a daily basis. Student's PT services were inconsistent and progress notes were not provided so it was unclear what educational progress Student made. Student was using the ABLLS curriculum and was achieving success in many areas, however, Student made insufficient or limited progress on goals.

- e. Failing to monitor Student closely to prevent possible harm to Student;

The second half of the year, Student was in a classroom with a full-time staff member and two other children. The Teacher was with Student all day unless Student was receiving other therapies or at recess with another teacher supervising. Student developed a good relationship with this Teacher so if Student was overwhelmed or anxious or need assistance, Student would allow the Teacher to comfort or help Student. There was no evidence on this record that Student was not properly supervised or injured in any way.

The District had significant staffing changes which impacted the provision of special education services to Student. While staffing needs can be challenging, Student and peers were nonverbal and needed the consistent staffing by qualified personnel who reviewed and followed the IEP for Student. The Case Manager could not teach the students in the Resource Room and be solely responsible for Student's educational services. Student's PT services were inconsistent. The Teacher and Retired Teacher stepped in and provided consistency and support for Student and Student made progress in skills, but Student did not receive the special education services to which Student was entitled.

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

Issue No. 3.

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?

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-1*, 137 S. Ct. 988 (2017). The Court in *J.L. v. Mercer Island School District*, 592 F3d 938, 951 (9th Cir. 2010), held that a procedural violation may be a denial of FAPE when it resulted in the loss of an educational opportunity, infringed on parents' opportunity to participate in the development of the IEP or deprived the student of an educational benefit. All circumstances surrounding the implementation of the IEP must be considered to determine whether there was a denial of FAPE. *A.P. v. Woodstock Board of Education*, 370 F. Appx. 202 (2d Cir. 2010). A failure to provide behavioral and other supports that does not allow the student to receive educational benefit may be a denial of FAPE. Dear Colleague Letter, 68 IDELR 76 (OSERS/OSEP 2016).

There were a number of procedural errors on this record. Student's Teachers were not aware of the requirements of the IEP and, therefore, could not implement Student's IEP. There was no certified special education teacher or aide available to work with Student. The required PT services were inconsistent. Progress notes were not provided. These procedural errors did deprive Student of an educational opportunity and resulted in a denial of FAPE.

The IEP was amended when the Case Manager took over Student's case. While she provided materials and suggestions to the Teacher in the classroom, she was not able to monitor Student when she had other special education students on her caseload. The Teacher and Retired Teacher that were responsible for the day-to-day instruction of Student never saw Student's IEP so could not have implemented the IEP with fidelity. This was a substantive denial of FAPE. While the IEP may have been reasonably calculated to allow Student to make appropriate progress in light of Student's circumstances, without appropriate implementation, Student was substantively denied FAPE.

As to Issue No. 3, the District is cited, and Corrective Action is required.

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. §§ 300.324-328 and 6.31.2.11(B)(1) NMAC	The District failed developed and implemented an IEP that would allow Student to receive FAPE by; Failing to provide regular progress notes to Parents on Student’s progress and meeting to amend IEP if Student was not making progress; Failing to develop new appropriate annual goals to allow Student to make educational progress
34 C.F.R. § 300.101 and 6.31.2.8 NMAC	The District’s actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE).

Required Actions and Deadlines

By August 19, 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

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 August 5, 2023 and reported to the SED no later than August 16, 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

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).	August 19, 2022	Written Assurance Letter/Email	August 19, 2022
2.	The District Special Education Director and the school principal shall meet with the PED SED Education Administrator 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 plans to take to ensure that the violations are corrected and do not recur. The District Director has the discretion to	August 26, 2022	Notes from meeting prepared by District	September 2, 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>
	include other District or school administrators or personnel in this meeting. The District Director shall be responsible for arranging this meeting with PED SED staff members.			
3.	The District Special Education Director will meet with the student’s special education teacher, general education teachers, 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.	September 2, 2022	Notes from meeting prepared by District	September 9, 2022
4.	<p>The District will convene a facilitated IEP meeting for Student. The FIEP meeting shall address:</p> <ul style="list-style-type: none"> • Goals that are challenging but achievable and address Student’s needs; • Determination of additional needs because of cortical visual diagnosis or other medical diagnoses; • Plan for the provision of compensatory services required in Step 6; • Additional compensatory education hours directed at PT; 	September 2, 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"> • Comprehensive reevaluation as described in Step 7; • an effective communication system for School and Parent which shall include keeping Parents informed of Student’s progress. <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, and related services providers (OT, SLP, etc.).</p>		Confirmation of arrangement with Facilitator from PED approved list of Facilitators	Within 3 days of making arrangements for facilitator.
5.	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:	October 7, 2022	Confirmation of the date of the training Confirmation of attendees at the training and plan for addressing	September 22, 2022 October 21, 2022

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
	<p>(1) developing and implementing an appropriate IEP with appropriate staffing, providing regular progress notes and meeting to revise IEP when progress is not noted or is inadequate;</p> <p>(2) when reevaluations are warranted.</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>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>September 9, 2022</p>
<p>6.</p>	<p>The District shall provide 200 hours of compensatory education services to Student. The compensatory education plan may include specialized instruction in all areas of need. The IEP team must also review the provision of PT services to determine if Student needs additional PT services beyond the 200 hours of compensatory services. 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>August 5, 2023</p>	<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>Monthly from date of compensatory services plan until the compensatory education hours are completed</p> <p>15 days after the FIEP meeting is held</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>These compensatory services are 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 provisions of services in 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>			
7.	<p>During the Facilitated IEP meeting described Step 4, the IEP Team shall reconsider whether a comprehensive reevaluation is needed, especially in areas of need that have been identified since the last evaluation. At a minimum, the IEP Team shall consider evaluations for assistive technology, communication or other possible needs arising from Student’s cortical visual disorder.</p> <p>If the IEP team determines that an evaluation is warranted, parental</p>	<p>September 2, 2022</p> <p>October 1, 2022</p>	<p>Prior Written Notice from Facilitated IEP meeting related to Evaluation</p> <p>All Evaluation reports and related records</p>	<p>15 days after the FIEP meeting is held</p> <p>October 21, 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>consent shall be obtained and the evaluation conducted as soon as practical.</p> <p>If an evaluation is conducted, an IEP meeting or addendum meeting shall be held as soon as possible after the evaluations are completed and the IEP shall be amended, as needed, based on the results of the evaluation.</p>	October 31, 2022	Revised IEP or IEP Addendum with all supporting documents	November 7, 2022
8.	<p>If Special Education staff vacancies exist at the school on the date of this Report, District will develop and submit a comprehensive plan to address recruitment and retention of qualified and licensed special education staff at the School including special education teachers, EAs, and related service providers.</p> <p>The plan shall include recruitment from both inside and outside of the State. The District shall also consider virtual options for service provision as part of its plan.</p>	September 9, 2022	Comprehensive Plan to address recruitment and retention of licensed special education staff	September 16, 2022
9.	<p>District shall submit, on a monthly basis, all documentation related to its activities and continued attempts to recruit and retain qualified and licensed special education staff.</p> <p>This monthly update shall include a current list of special education staff vacancies at the School.</p>	Ongoing starting September 9, 2022	Documentation related to activities and continued attempts to recruit and retain licensed special education staff	Submitted Monthly until August, 5, 2023 or until all School special education staff positions are filled, whichever is earlier.

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 Bennett

Michele K. Bennett, 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