



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. 2223-02
September 6, 2022

This Report requires corrective action. See pages 18-24.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on July 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, Special Education Director, Principal, Assistant Superintendent, Special Education Teacher and District Facilitator;
- 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 in all 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, specifically whether the District:
 - a. Failed to complete the necessary steps in the identification, evaluation and eligibility of Student;
 - b. Failed to complete and involve parent in review of existing evaluation data (REED);
 - c. Failed to consider outside evaluations in determining needed assessments and eligibility;
2. Whether the District failed to develop and implement an IEP that allowed Student to make educational progress in violation 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC;
3. Whether the District denied Parent meaningful parental participation in the development of their Student’s educational program in violation 34 C.F.R. § 300.322; 34 C.F.R. § 300.501(b) and 6.31.2.11(B)(2) and 6.31.2.13(C) NMAC;
4. Whether the District failed to provide the required procedural safeguards in determining student’s eligibility and development and implementation of the IEP for Student in violation of 34 C.F.R. § 300.500 and 6.31.2.13(A) NMAC; 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 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 ten years old and attended schools within the District. Student was eligible for special education and related services under the category of intellectual disability and speech-language impairment.
2. Student had started early intervention services at the age of two.
3. Parent had arranged for Student to receive private applied behavior analysis (ABA) services from Behavioral Change Institute (BCI) and was seeking provision of those services within the school setting because there was a medical need for such services.
4. District has regularly received progress reports from BCI.
5. Student was initially evaluated at the University of New Mexico Autism Spectrum Evaluation Clinic on September 19, 2016. The results of this evaluation indicated that the results were not consistent with autism but Student met the criteria of intellectual disability (ID), speech-language impairment (SLI) and may need additional assessments to determine attention deficit hyperactivity disorder (ADHD) if there were continued concerns.
6. Student was determined eligible under developmental disabilities (DD) in 2016 and an IEP was developed. No further assessments were completed.
7. In 2019, a review of existing evaluation data (REED) was completed and the District completed a comprehensive evaluation. Student was determined eligible under the categories of ID and SLI. The psychologist that conducted the evaluation also suggested consideration of other health impaired (OHI) because of suspected ADHD, but there was nothing in the records that indicated the District completed the form to determine OHI eligibility.
8. Student was diagnosed with Autism Spectrum Disorder in a 2019 assessment by Mountain West. Parent reported that this evaluation was provided to District. She also stated that two additional evaluations in 2020 and 2021 with the autism diagnosis were provided to District.
9. The only Mountain West evaluation found in District records was the 2022 Mountain West evaluation which was received August 5, 2022.
10. Student was served at home virtually during the COVID-19 pandemic. Parent reported that this was not conducive to Student's learning. Parent also reported that Student did not receive required occupational therapy (OT) services while at home.

11. The District has not assessed Student for the need for any recovery services since return to school after COVID-19 closures.

Evaluation Information

12. A REED was completed on August 17, 2021 at Student's annual IEP meeting. The results of the REED indicated no further assessments were needed. Parent participated in the review of existing data and recommended an updated functional behavior assessment (FBA) and revised behavior intervention plan (BIP) be completed.
13. At a November 17, 2021 IEP meeting, the functional behavior assessment (FBA) was reviewed and BIP updated.
14. The updated FBA indicated that Student displayed inappropriate language, aggression, property destruction, and elopement when frustrated. The behaviors most often occurred when Student was presented with unfamiliar or unpreferred tasks. Student's behaviors were the result of skill deficits.
15. When Student was frustrated or escalated, the BIP provided the use of clear expectations, positive behavior momentum and encourage positive peer models.
16. Student would have a timer, vocal and visual reminders (especially prior to transitions), praise, break up work into smaller units, and frequent positive reinforcement.
17. When demonstrating appropriate behavior, Student could choose desired activities, request a break as needed and be allowed time to process.
18. The effectiveness of the BIP would be assessed a year after implementation.
19. On March 30, 2022, Parent requested a meeting to discuss eligibility and other issues.
20. One of the topics discussed was the inclusion of BCI therapists to work with Student while in school. That proposal was rejected because of state legal requirements associated with background checks and other prerequisites for working in schools with students.
21. IEP Team recommended that Student continue receiving behavior support at school through the BIP and staff behavior support team.
22. Parents expressed concern that Student had been diagnosed as recently as February, 2022 with autism spectrum disorder by Mountain West, but was not eligible for special education services under the autism category.
23. The Mountain West evaluation was discussed at that meeting but the report was not sufficient to determine eligibility. The District records indicated they had yet received the Mountain West report.
24. At the March 30, 2022 meeting, the Evaluation Team completed the REED and determined additional evaluations were needed. The District could not rely solely on the

Mountain West evaluation to determine eligibility in the area of autism, especially when the District had not yet received a copy of the report.

25. An evaluation plan was proposed to include assessments in a number of areas including: achievement; basic reading, written expression and math calculation; cognitive and adaptive behavior; autism; inattention, hyperactivity/impulsivity; functional behavior assessment (FBA); speech-language and sensory assessment.
26. Parent provided consent to the reevaluation plan, the assessments would begin in 60 days and be completed before April 2023.
27. The evaluation has been completed and a meeting will be scheduled soon to review those assessments.
28. Student's annual IEP meeting was scheduled for September 15, 2022.

IEP Meetings

29. Student's annual IEP date is August 17, 2021.
30. An IEP meeting was held on November 17, 2021 to revise the BIP. The FBA had been previously completed by an outside agency and a BIP had been developed to address Student's skill deficits and teach Student to express needs.
31. Another IEP meeting was held on March 30, 2022 when the REED was completed and evaluation plan developed.
32. An IEP addendum meeting was held on April 18, 2022 to address Student's needs and other issues. Parent and Advocate participated in that meeting.
33. Goals and present levels were updated.
34. Student's areas of need included reading, writing, math, expressive and receptive language and articulation.
35. Parent advocated for Student to work on being as independent as possible.
36. Student displayed disability-related deficits including short attention span, lack of social skills, aggressive when frustrated, and struggling with new surroundings, changes and unfamiliar people.
37. It was noted that behavior and communication deficits impacted Student's learning.
38. Goals and positive behavior interventions and supports were included in the IEP; Student had a behavior intervention plan (BIP) and needed extended school year (ESY) services because of slow progress and regression.
39. The IEP included nine goals:
 - a. Math: Add and subtract whole numbers in real life situations;
 - b. Language: Identify two rhyming words and identify the emotions in photographs and others and identify own emotions;
 - c. Articulation: Improve articulation of age-appropriate phonemes;

- d. Behavior: Develop appropriate coping strategies;
 - e. Behavior: Use prosocial forms of communication to indicate needs without aggressive behavior;
 - f. Social/Emotional: Accept changes to schedule or routine by participation in unscheduled event;
 - g. Reading: Practice reading at Student's level that help with rate and fluency;
 - h. Reading: Decoding and blending, highlighting note cards for hard words;
 - i. Behavior: Use a visual schedule with reminder not to throw things and rewarded if successful.
40. The majority of Student's services were provided in the special education room. Student needed a visual schedule and to be with an adult at all times, preferably a familiar adult.
41. Student received 31.44 hours of special education and related services per week. These included: 30 minutes a semester for occupational therapy (OT) services; 60 minutes a week for SL; 300 minutes of math in special education room and 150 minutes per week in general education; 450 minutes a week in language arts in special education room and 150 minutes per week in regular education; 75 minutes per week in regular education science; 75 minutes a week in regular education electives; 225 minutes per week in life/social skills; 200 minute a week for lunch/breakfast and 200 minutes per week at recess.
42. An adult was with Student at all times including when Student was in the general education setting. The adult would assist Student in completion of tasks.
43. Parent was concerned that Student could not handle general education and the classroom and educational materials were overwhelming to Student.
44. Parent and advocate wanted Student to receive ABA services from BCI during school. The IEP team discussed this but it was not included on the IEP itself. It was noted that a memorandum of understanding (MOU) and requirements such as background checks for BCI staff would need to be completed before anyone could come to school to provide services.
45. Student was receiving twenty hours of ABA services per week: four hours of individualized ABA services five days a week. The Parent and Advocate believed Student needed continuous behavior support throughout the school day.
46. A District Facilitator was at the meeting to assist the team in the development of the IEP.
47. A prior written notice (PWN) was prepared by the Facilitator during the meeting.
48. The PWN noted the development of goals, the presence of familiar adults and other topics decided at that IEP meeting.
49. The PWN stated that "[t]he team discussed BCI services in the school and mom still want this service to come into the school." This provision was noted as accepted by the IEP

team but it was also noted that “[t]he MOU has not been signed yet and staff at BCI needs to be compliant with HB 128.”

50. A meeting was planned for May 1, 2022 to sign the MOU but that meeting was cancelled and nothing else has been scheduled regarding the completion of the MOU. BCI staff have successfully completed required background checks.
51. The facilitator, who drafted the PWN, indicated that the purpose of that statement on the PWN was not rejecting services of BCI, but it was premature because steps needed to be completed before BCI staff could be in the school.
52. She and the Special Education Director, who were both at the April 18, 2022 IEP meeting, indicated that Parent and Advocate were adamant that the District was rejecting the inclusion and need for BCI services at school for this Student and the PWN was reiterating that this inclusion was not rejected at this time. In their view, if it is not rejected, it is accepted, conditional on other legal requirements being met.
53. The District had its own behavior supports and intervention staff to assist Student and Student had been receiving and continued to receive those services.

Parental Participation

54. Parent attended and participated in all evaluation and IEP meetings for Student.
55. Draft REEDs and IEPs were brought to the meetings and discussed and changed as needed at the meetings.
56. The Mountain West autism evaluation was received by the District on August 5, 2022.
57. Other evaluations and outside information provided by Parent were considered by the IEP team.
58. At IEP meetings, Parent requested additional services including 1-1 support for student, and more behavioral supports and interventions. Parent did not believe Student was making progress on goals and placement in the general education classroom was overwhelming for Student.
59. These issues were discussed and considered by the IEP team at multiple meetings.
60. The District stated that Student had made progress since the last IEP. However, since progress notes for the 2021-2022 school year were not available and the District did not provide evidence of progress, it is unclear what progress Student had made.
61. In the past, Student has made some progress on goals and there has been some changes to the IEP goals from year to year.
62. Parent also requested an eligibility change to autism based on the diagnosis from Mountain West.

63. Eligibility under the category of autism would be determined by the Eligibility Team after the evaluations outlined in the evaluation plan were completed on or before March, 2023.
64. At the April 18, 2022 IEP meeting, there was a lengthy discussion of the inclusion of BCI services at school.

Procedural Safeguards

65. Parent was provided appropriate notice of meetings, and PWNs.
66. Parent was provided with documents such as IEPs, REEDs, evaluation reports, and other documents related to the identification, evaluation, educational placement and provision of FAPE for Student.
67. Progress notes for the 2021-2022 school year were not provided to Parent nor were progress notes from this year included in the Student's special education file except for progress notes for the last quarter which indicated no progress on Student's goals because the goals were recently changed during the April 18, 2022 IEP meeting.
68. The teacher has provided daily reports to Parent about Student's day and progress.
69. The teacher who was responsible for preparing progress notes for the first three quarters has left the District.
70. Student had been determined eligible under the categories of ID and SLI even though Parent believed Student should be eligible under the category of autism.
71. District stated that they do not have sufficient information to support a determination that Student is eligible under the category of Autism.
72. The Eligibility Team has never determined if Student was eligible under the category of OHI because of Student's ADHD diagnosis.
73. The District has not implemented BCI services as provided in the PWN for this Student nor have they provided the required progress notes.

District's Failure to Cooperate with this Investigation

In the July 14, 2022 acknowledgement letter, the District superintendent, special education director and school district attorney were all provided with a list of documents that were to be provided to the Complaint Investigator on or before 5:00 pm on August 3, 2022. In an August 3, 2022, email from the special education director, some, but not all of the requested documents were provided. The District did not explain to the Complaint Investigator why only some of the documents were provided. On August 22, 2022, 19 days after the initial deadline, additional documents were provided by the District's attorney's office. When the Complaint Investigator inquired about the delay in submitting the requested documents, the District's response was they had difficulties with accessing the system to retrieve the requested documents.

Some of the requested documents were never received. It is not clear whether those documents do not exist or that they simply were not provided. NMPED must assume that a specifically required action of the District did not occur unless documents or other evidence to support the District's claims are provided.

Furthermore, none of the documents submitted to the Complaint Investigator were provided to the Parent until the Complaint Investigator reminded the District about that requirement noted in the acknowledgement letter. Although the Complaint Investigator was able to review all of the late submitted documents in this Complaint in preparation of the Complaint Resolution Report (CRR), such delays can limit the ability for the Complaint Investigator to use due diligence in preparation of the investigation report and, moreover, the delay in submissions can be considered noncooperation by the District which in itself can be a violation of IDEA. See 34 C.F.R. 300.211 (a district must provide the state agency with the information necessary for the state agency to carry out its duties under the IDEA).

This will serve as the District's notice that if any complaints are filed against the District in the future, and there appears to be an unwillingness to cooperate or provide records, the District will be cited and will be required to complete corrective action.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to timely conduct a comprehensive evaluation in all 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, specifically whether the District:

- a. Failed to complete the necessary steps in the identification, evaluation and eligibility of Student;**
- b. Failed to complete and involve parent in review of existing evaluation data (REED); and**
- c. Failed to consider outside evaluations in determining needed assessments and eligibility.**

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 district agree that a reevaluation is not needed. 20 U.S.C. § 1414(a)(2). Generally, reevaluations are encouraged to ensure that a current student's educational or related service needs are being

met. Reevaluations are required when certain factors are present that warrant a reevaluation or parents or teacher requests an evaluation. 34 C.F.R. § 300.303(a). Parents must provide consent for any reevaluation. 34 C.F.R. § 300.300(c). Parents must also be afforded meaningful parental participation in the identification and evaluation of Student. 34 C.F.R. § 300.322. When outside evaluations are provided, the Eligibility Team must consider those evaluations and determine if additional evaluations are warranted or the outside evaluations are sufficient to determine eligibility and develop an appropriate IEP that provides FAPE. *Sylvan Union School District*, 117 LRP 25142 (OCR 2017).

a. Failure to complete the necessary steps in the identification, evaluation and eligibility of Student;

Since 2016, Student has had a number of evaluations completed by the District and also from outside providers. Parent has continued to raise concerns that Student had been diagnosed with autism and, therefore, Student's eligibility should be changed to autism. She believed if the eligibility category changed, so would the services that Student could receive. There was some dispute about whether the District ever received the outside Mountain West evaluation which diagnosed Student with autism. The District acknowledged receipt of the 2022 Mountain West evaluation report on August 5, 2022. The District's records indicated that was the only Mountain West evaluation received. At the March 20, 2022 REED, which Parent attended, the District developed an evaluation plan which included assessments in the additional eligibility areas of OHI and autism. Although Parent stated that Student had been previously diagnosed with autism, the District did not believe they had sufficient information to determine eligibility under the category of autism or OHI and recommended assessments in those areas. District insisted they did not have any outside reports that Student had autism and did not have data to indicate a reason to suspect autism. They reiterated that the eligibility would not change services and that an autism and OHI evaluation would be completed at the three-year reevaluation.

If the District had knowledge of an autism diagnosis, they should have promptly completed the evaluations necessary to determine eligibility under the category of autism. If they did not have notice of an autism diagnosis and no reason to suspect autism, then completing an autism assessment as part of the three-year reevaluation was warranted. The District stated that they received the February 2022 Mountain West evaluation report on August 5, 2022. Parent did not provide evidence that previous reports had been provided to the District. The IEP team at the March 30, 2022 meeting discussed the Mountain West report and determined that additional assessments were needed to find Student eligible under the category of autism. An evaluation plan was developed to consider both autism and OHI. Consent was received and the report has

been completed. The District completed the necessary steps in the identification, evaluation and eligibility of Student in all suspected areas of disability.

b. Failure to complete and involve parent in review of existing evaluation data (REED).

District prepared a draft REED before the meeting on March 30, 2022. At the meeting, the Eligibility Team reviewed the REED and determined that additional assessments were needed in the area of autism and OHI. Parent was involved in the process of completing the REED and developing the evaluation plan for Student's upcoming three-year reevaluation. Parent was actively involved in the discussion and review of the REED. Parent asserted that Student should be eligible under the category of autism based on the outside Mountain West evaluation. Assessments in the areas of autism and OHI were added to the REED because of Parent's insistence. The District did not exclude Parent from meaningful participation in this process.

c. Failure to consider outside evaluations in determining needed assessments and eligibility;

Parent stated that she had provided copies of all of the Mountain West evaluations from previous years to the District for consideration. District records indicated the only report received was August 5, 2022. The Mountain West evaluations were not available at the REED meeting on March 30, 2022, but it was discussed. There was no documentation from Parent that other evaluations were provided to the District. The progress notes from BCI were not evaluation data. After the Mountain West report was provided to the District on August 5, 2022, the District reviewed the report during the reevaluation assessments. Previously, the District had considered and adopted the 2016 UNM evaluation in determining eligibility. When provided with outside evaluations, the District considered those evaluations. The District considered outside evaluations available to the Eligibility Team during REED and eligibility determinations.

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

Issue No. 2

Whether the District failed to develop and implement an IEP that allowed Student to make educational progress in violation 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC.

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). Districts have broad discretion to determine the qualified providers and methodologies used to meet the needs of a particular student. *N.B. and C.B v. New York City Department of Education*,

711 Fed.Appx. 29 (2nd Cir, 2017). *See also Board of Education of the Hendrick Hudson Central School District v. Rowley*, 102 S.Ct. 3034, 458 U.S. 176 (US, 1982), for a discussion of methodology decisions and obligations for school districts.

An IEP was developed on August 17, 2021 and the IEP, including goals and services, was amended on April 18, 2022. The IEP and addendum addressed all of the required components of the IEP and appears to have been reasonably calculated to enable the Student to make progress in light of circumstances. However, Parent believed that the IEP was not appropriate because Student was overwhelmed and not making progress. A review of the goals on the IEP and Parent's comments indicate that Student struggled with grade level tasks. Student's goals on the 2020 IEP and the 2021 IEP were similar, but Student had been making slow progress the previous year as demonstrated by past progress notes. District reported Student had made progress during the 2021-2022 school year, but this could not be definitively determined without progress notes or other data that demonstrated progress. The teacher, however, reported that the Parent was provided with daily reports of what Student had been working on and things that happened that day.

The District did provide some behavior supports to Student and convened IEP meetings during the school year to specifically address behavioral changes and needs which included changes to Student's BIP. However, because of the lack of progress reports, there is no documented indication that the behavioral interventions were effective.

Notably, the April 18, 2022 IEP addendum and PWN do not agree on the need or provision of BCI services. The IEP outlined behavioral goals and services and a BIP was developed for Student but the IEP was silent on the educational need for ABA services as provided by BCI. In comparison, the PWN states "[t]he team discussed BCI services in the school and mom still want this service to come into the school." This was accepted by the IEP team but it was noted that "[t]he MOU has not been signed yet and staff at BCI needs to be compliant with HB 128." However, the plain language on the PWN noted that the IEP team accepted the need for ABA services through BCI and was waiting for signature on a MOU and completion of HB 128 requirements. Although the District opined that the acceptance was to acknowledge Parent's concerns and not reject any services, that does not agree with the plain meaning in the PWN. This position is also inconsistent with the fact that the District had arranged for a meeting with BCI shortly after the April 18, 2022 IEP addendum meeting to finalize the MOU to provide services, a meeting that was cancelled and never rescheduled. Furthermore, the barrier to providing services potentially created by requirement of HB 128 does not impact the decision that Student needed these services, but only impacts the requirements that must be met before this service could be provided. The District's unreasonable delay in meeting these requirements cannot absolve it of the obligation to provide the services agreed upon in the IEP meeting. While the District may have similar behavior

supports and interventions in District, the team agreed in the PWN that BCI services were accepted once the requirements were met. The IEP was silent about provision of BCI services, but the PWN indicates that this service was agreed to by the IEP team and must be provided.

The lack of progress notes or any records of progress made by Student severely limits the examination of whether Student's IEP was appropriate and properly implemented. Moreover, Student's behavior has been an ongoing concern and the IEP team agreed that Student needed the services of BCI, but still has not provided those behavior supports and services. Without those needed BCI services and the lack of any data to indicate Student had made progress during the 2021-2022 school year, it cannot be determined if Student's needs were adequately addressed by the goals and other supports and services on the IEP, and, therefore, the District failed to develop and implement an appropriate IEP.

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

Issue No. 3

Whether the District denied Parent meaningful parental participation in the development of their Student's educational program in violation 34 C.F.R. § 300.322; 34 C.F.R. § 300.501(b) and 6.31.2.11(B)(2) and 6.31.2.13(C) NMAC.

Parents are mandatory members of the IEP team. 34 C.F.R. § 300.321(a)(1). Parents are entitled to meaningful parental participation in the identification, evaluation, education placement and provision of FAPE. 34 C.F.R. 300.501(b). Meaningful parental participation included considering parents' suggestion and to the extent appropriate, including those suggestions in the IEP. *Deal v. Hamilton County Board of Education*, 392 F 3d 840 (6th Cir. 2004). Districts must come to an IEP meeting with an open mind and be receptive and responsive to parents' concerns. *R.L. v. Miami-Dade County School Board*, 757 F 3d 1173 (11th Cir. 2014). However, parents do not have veto power over IEP team decisions, the goal is to reach consensus with all IEP team members. 34 C.F.R. § 300.503(a) and *Letter to Richards*, 53 IDELR 101 (OSEP 2010).

Parent participated in all IEP meetings concerning the educational program for her Student. Although Parent requested additional services and goals at the IEP meeting and asserted that Student should have been determined eligible under the category of autism since 2019, the record here indicates that Parent was provided meaningful parental participation. The provision of services by BCI was proposed by the Parent and the District accepted that proposal. When the evaluation plan was developed, the District did not have the latest Mountain West evaluation and wanted additional data to determine eligibility. However, the District did consider all other evaluations provided by the parent. The Evaluations Team agreed to evaluate in the area of autism and OHI. The records and information related to the IEP team and Eligibility Team

meetings clearly show that Parent meaningfully participated in decisions involving the educational program of Student.

As to Issue No. 3, the District is not cited and no Corrective Action is required.

Issue No. 4

Whether the District provided the required procedural safeguards in determining student's eligibility and development and implementation of the IEP for Student in violation of 34 C.F.R. § 300.500 and 6.31.2.13(A) NMAC.

Every year at the annual IEP meeting, parents are provided with a copy of their procedural safeguards which outlines the protections and procedures a district must follow for the implementation of IDEA. 34 C.F.R. § 300.504(a). A PWN must be provided to parents when the district proposes or refuses to initiate or change the identification, evaluation, educational placement or provision of FAPE. 34 C.F.R. § 300.503(a). These procedural safeguards include proper notice, parental participation, copies of IEP, PWN and other documents, access to educational records maintained by the district. 34 C.F.R. § 300.504(c).

Parent received notice of all meetings concerning identification, evaluation, eligibility and development of IEP that would provide FAPE. Parent participated in the REED, development of the evaluation plan, and the IEP. Although Parent did not receive everything she was seeking on the IEP, her requests were appropriately considered and, at times, accepted by the IEP team, including the need for BCI services. Additionally, Parent had access to any educational records. The parent was provided appropriate procedural safeguards while participating in the development and implementation of Student's education program.

As to Issue No. 4, the District is not cited and no 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 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." *Andrew F. v.*

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

The District's failure to complete and provide progress notes during the 2021-2022 school year makes it difficult to determine if there was a substantive denial of FAPE since, without data, it cannot be determined if the IEP allowed Student to make progress. In addition, there were procedural violations on this record when the District failed to provide BCI services to Student after accepting Parent's request at the April 18, 2022 IEP meeting. The IEP team noted that Student needed behavioral and other supports to be successful, and the PWN indicated that the team agreed with the educational need for BCI services, but the BCI services were not provided. Furthermore, without the progress notes or other progress data, it cannot be determined if any of the goals and services on the IEP were effective for Student. In essence, the District failed to provide any evidence of progress monitoring of Student.

Notably, the District's failure to appropriately document progress severely impeded its ability to consider and determine whether Student needed recovery services due to learning loss and missed services during the period of remote learning during the COVID-19 pandemic. Furthermore, by the District's own admission, no such services have been considered despite the fact that some services, including OT were missed during this period. These failures related to progress monitoring, coupled with the District's failure to provide BCI services constitutes a denial of FAPE.

As to Issue No. 5, the District is cited, Correction action is required.

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC	The District failed to develop and implement an IEP that allowed 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 September 16, 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 September 6, 2023 and reported to the SED no later than September 20, 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).	September 16, 2022	Written Assurance Letter/Email	September 16, 2022
2.	District shall designate a Corrective Action Plan Monitor (District CAP Monitor) to coordinate all corrective action activity required by the District in this case and all cases in which a CAP is currently active. The designee shall be someone other than the District Special Education Director.	September 16, 2022	District shall identify the designated CAP Monitor in the initial assurances letter required in Step 1.	September 16, 2022
3.	The District Special Education Director, District CAP Monitor, and the school principal shall meet with the SED Education Administrator assigned to the District and the SED CAP Monitor to review the Complaint Resolution Report, the Corrective Action Plan, and any other measures that the District plans to take to ensure that the violations are corrected and do not recur. The	September 23, 2022	Notes from meeting prepared by District	September 30, 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>
	District Director has the discretion to include other District or school administrators or personnel in this meeting. The District Director shall be responsible for arranging this meeting with SED.			
4.	The District Special Education Director and CAP Monitor will meet with Student’s special education teacher, general education teachers, any related service personnel, school special education coordinator/lead 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 30, 2022	Notes from meeting prepared by District	October 7, 2022
5.	<p>The District shall participate in an audit of student files conducted by auditors with special education program experience appointed by the PED to determine whether the District:</p> <ul style="list-style-type: none"> • Provides PWNs that appropriately reflect IEP Team decisions regarding services to be provided to students; • Sufficiently monitors progress and provides written progress reports with sufficient detail to parents. 	December 30, 2022	Audit Report to be provided by PED appointed auditors	January 30, 2023

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>This audit will be conducted as part of the audit ordered in C2223-01.</p> <p>The appointed auditors will determine the start date and schedule for the audit. District shall provide any support and access to all documentation and information requested by the auditors throughout the course of the audit. Any failure to cooperate with the auditors may result in further corrective action.</p> <p>The District shall create and provide a plan to PED to address all areas for improvement identified in the audit report. The plan shall include deadlines for completion of each planned action addressing areas of improvement. District shall address all areas of improvement by September 2, 2023.</p> <p>This plan may include revision of policies and procedures, supplemental training related to areas of improvement, direct coaching of special education personnel and periodic review of IEP and progress monitoring compliance.</p> <p>PED will monitor the implementation of the plan until all areas of improvement have been sufficiently addressed. PED has the discretion to</p>		<p>Written plan addressing all areas of improvement identified in the audit report for PED approval.</p> <p>Documentation of implementation of Improvement Plan</p>	<p>February 27, 2023</p> <p>Plan shall include deadlines for related document submission</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>
	require additional audit reporting, training, and support based on the results of this audit and subsequent improvement plan.			
6.	<p>The District shall arrange to provide training to District staff (including special education teachers, special education administrators, and related service personnel), on the following special education topics:</p> <ul style="list-style-type: none"> • Developing and implementing an appropriate IEP that includes meeting behavioral and other needs of Student through an IEP, • Progress monitoring and progress reporting • Meeting to review IEP when progress is not noted or is inadequate; <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>	November 7, 2022	<p>Confirmation of the date of the training</p> <p>Confirmation of attendees at the training and plan for addressing provision of training to those staff not in attendance</p> <p>Submission of proposed trainer and trainer’s resume and proposed presentation for NMPED approval.</p>	<p>October 17, 2022</p> <p>November 14, 2022</p> <p>October 3, 2022</p>
7.	District shall submit the recent evaluation reports completed for Student to the SED and ensure the copies of the most current and final reports are also provided to the Parent prior to any IEP meeting. including the Facilitated IEP meeting ordered in Step 9.	September 16, 2022	Student’s most recent evaluation reports and proof that parent received most recent final evaluation reports	September 16, 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>
8.	<p>District shall promptly make arrangements for BCI or another ABA provider certified by the Behavior Analyst Certification Board to begin providing services to Student at Student school during the regular school day.</p> <p>If an ABA provider other than BCI is selected to provide ABA services to Student, District shall provide the proof of the chosen providers certification by the Behavior Analyst Certification Board.</p>	September 19, 2022	<p>MOU or other written confirmation that BCI or other ABA provider will be permitted to provide services to Student on school campus during the regular school day</p> <p>Proof of BACB Certification</p>	<p>September 23, 2022</p> <p>September 23, 2022</p>
9.	<p>The District will convene a facilitated IEP meeting for Student. The FIEP meeting shall address:</p> <ul style="list-style-type: none"> • Plan for the provision of ABA services through BCI or another ABA provider certified by the Behavior Analyst Certification Board; • Determination if there are additional behavioral or other needs arising from an autism or ADHD diagnoses; • Additional needs identified in recent comprehensive reevaluation; • Plan for monitoring Student’s progress on IEP goals; • Plan for the provision of compensatory services required in Step 10; 	October 1, 2022	<ol style="list-style-type: none"> 1. Invitation to IEP meetings, 2. IEPs, 3. Prior Written Notices, and 4. Agenda for FIEP team meetings 	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"> • Need for recovery services due to learning loss and missed services during remote learning; • An effective communication system for School and Parent which shall include written progress reports provided no less than once a quarter. <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, ABA service provider, and related services providers (OT, SL etc.).</p>		Confirmation of arrangement with Facilitator from PED approved list of Facilitators	Within 3 days of making arrangements for facilitator.

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>
10.	<p>The District shall provide the following compensatory education to Student:</p> <ul style="list-style-type: none"> • 150 hours of specialized instruction in academic subject areas of need to be decided by the IEP team • 100 hours of ABA services to be provided in non-classroom settings determined by the IEP team <p>The plan for compensatory services shall be documented in the PWN(s) for the Facilitated IEP meeting(s) as well the IEP resulting from Step 9.</p> <p>These compensatory services are above and beyond the regular 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>	September 6, 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>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>

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:

A handwritten signature in blue ink, reading "Deborah Dominguez-Clark", enclosed in a light blue rectangular box.

Deborah Dominguez-Clark
Director, Special Education Division