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SECRETARY OF EDUCATION

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NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
SPECIAL EDUCATION DIVISION  
Complaint Resolution Report  
Case No. C2223-08  
October 13, 2022

**This Report requires corrective action. See pages 12–13.**

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on August 15, 2022, under the federal Individuals with Disabilities Education Act (IDEA) and the implementing Federal Regulations and State Rules governing publicly funded special education programs for children with disabilities in New Mexico.<sup>1</sup> The SED has investigated the complaint and issues this report pursuant to 34 C.F.R. § 300.152 (a)(5) and 6.31.2.13(H)(5)(b) NMAC.

**Conduct of the Complaint Investigation**

The PED's complaint investigator's investigation process in this matter involved the following:

- review of the complaint and supporting documentation from complainant;
- review of the District's responses to the allegations, together with documentation submitted by the District at the request of the PED's complaint investigator;
- review of the District's compliance with federal IDEA regulations and state NMAC rules;

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<sup>1</sup> The state-level complaint procedures are set forth in the federal regulations at 34 C.F.R. §§ 151 to 153 and in the state rules at Subsection H of 6.31.2.13 NMAC.

- interviews with the parent, vocational therapist, special education teacher, and regular education teacher; and
- research of applicable legal authority.

### **Limits to the Investigation**

Federal regulations and state rules limit the investigation of state complaints to violations that occurred not more than one year prior to the date the complaint is received. 34 C.F.R. § 300.153(c); 6.31.2.13(H)(2)(d) NMAC. Any educator ethics issues, or any alleged Americans with Disabilities Act (ADA) or Section 504 disability discrimination issues, are not within the jurisdiction of this complaint investigation and, as a result, were not investigated. For these reasons, the Complaint Investigator did not investigate the following issues raised by the complainant: the drop out and graduation rates of the District high school.

### **Issue for Investigation**

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

1. Whether the District failed to properly develop an Individualized Education Program (IEP) by not addressing the Student’s transition service needs, in violation of 34 C.F.R. § 300.320(b)(2), 34 C.F.R. § 300.324(c), and 6.31.2.11(B) NMAC;
2. Whether the District failed to implement the Student’s Individualized Education Program (IEP), in violation of 34 C.F.R. §§ 300.320–300.328 and 6.31.2.11(B) NMAC; and
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**

1. Student is a twelfth-grade student eligible for special education under the classification of Specific Learning Disability (“SLD”).
2. During the 2021-2022 school year, Student was in eleventh grade and attended the District high school.
3. The 2021-2022 IEP makes multiple references to Student as having anxiety but this condition was not classified as a disability in Student’s IEP.

4. Instead, the IEP accommodations and modifications section states that “[Student] experiences significant anxiety that must be overcome in order to progress in her classwork.”

### **Transition Planning**

5. On September 24, 2021, the District’s vocational therapist administered the Transition Planning Inventory – Second Edition to identify the Student’s transition needs such as their career or vocational aspirations.
6. The inventory demonstrated that Student has an interest in graduating high school and becoming a phlebotomist. Vocational Therapist also discussed other vocational resources such as the New Mexico Department of Vocational Rehabilitation (“DVR”) and the UNM Continuing Education Program.
7. At an IEP team meeting on September 27, 2021, the IEP Team reviewed the results of the Transition Planning Inventory to update Student’s transition services.
8. Parent reports that Student was present at September 24<sup>th</sup> IEP meeting and stated her preference was to become a phlebotomist. A DVR representative attended the IEP meeting who encouraged Student to apply to DVR services at the beginning of their senior year.
9. The IEP Team recommended two vocational goals in furtherance of Student’s transition service needs. These goals included improving Student’s participation in school and submitting applications to college or technical school. The IEP likewise contained a postsecondary goal of attending school to become a phlebotomist.
10. Vocational Therapist stated that the application goal was added so that she could work with Student on looking at different colleges and other programs that would align with Student’s preference to become a phlebotomist.
11. Parent states that the vocational application goal was inappropriate because it was unlikely that Student would graduate high school and continue with post-secondary education.
12. The IEP Team recommended Student receive up to 15 minutes per month of vocational therapy.
13. During the 2021-2022 school year, Vocational Therapist reports that Student did not receive vocational therapy every month because Student was not in school consistently.
14. On multiple occasions Vocational Therapist would come to Student’s class to conduct a vocational therapy session but Student was not present in class. In these instances, the Vocational Therapist would try contacting Student directly to discuss vocational goals.
15. Vocational therapist reported that during times Student was available to participate in vocational therapy, Student appeared indifferent with actively exploring their vocational interests.

16. Student did not make progress on her annual IEP vocational goals. Vocational Therapist asserts that lack of progress in these goals was due to Student not being present enough in school to work on applying to vocational/educational programs.
17. For the 2022-2023 school year, Vocational Therapist administered the Self-Directed Search assessment which determined that Student now preferred to directly enter the workforce upon graduating from high school.
18. Based on those results, Vocational Therapist is now working with Student to develop a new transition plan that focuses on employability in general.

### **Special Education Programming**

19. Aside from transition services, the District also provided Student with special education programming.
20. The IEP team meeting on September 27, 2021, included a review of Student's special education programming.
21. The recommendation following this review was for Student to receive 3.5 hours per week of special education programming.
22. At the meeting, Parent expressed concerns about Student's lack of academic progress in obtaining course credit. Parent requested that teachers provide specially designed instruction so that Student could access academic content.
23. In response, the IEP team agreed to modify the Student's schedule to enable Student to attend two classes with a preferred regular education teacher who Parent reports was effective at teaching Student.
24. Student's class schedule also included tutorial class with a special education teacher. This class was designed to assist Student with reading and writing as well as work on assignments from their ELA course.
25. Parent reports that Student received specialized instruction in tutorial class, yet Parent considered service ineffective because volume of assignments in tutorial class undercut Student's focus on mastering content in other courses.
26. Special education teacher for tutorial class states that Student only received specialized instruction when Student attended their various classes and that Student attended tutorial classes four or five times during the 2021-2022 school year.
27. Other times, Special Education Teacher found Student wandering the school hallways as a means to avoid class or go to the library instead to study. In response to this truancy, the District's Special Education Director spoke directly with the Student about class attendance.
28. Special Education Teacher explained that Student would avoid tutorial class because Student disliked large group class settings and only attended classes with preferred teachers.

29. Parent raised concerns that Student's IEP accommodations and modification were not implemented during the 2021-2022 school year. Specifically, Parent stated that Student was not receiving extra time to complete assignments or a copy of class notes.
30. Parent claims that the lack of accommodations and modification provided to Student resulted in Student getting poor grades.
31. One of Student's preferred teachers was a regular education teacher who taught Student financial literacy. The Regular Education Teacher said that she modified Student's instruction, used differentiation teaching techniques, and provided accommodations such as extra time and class notes.
32. According to the Regular Education Teacher, Student did not attend Geometry class because Student could not understand Geometry teacher's verbal instruction due to teacher's accent.
33. Regular Education Teacher states that Student did not report any issues to her about receiving accommodations and modification in other classes.
34. In January 2022, Parent requested an IEP meeting to address Student's academic struggles and Parent reports that District waited to hold another IEP meeting until the Student was due for an annual review meeting.

### **School Attendance**

35. Student displayed a pattern of absences throughout the 2021-2022 school year.
36. Records show Student had 280 course absences and the District's response asserts that Student "attended 28% of the days [tutorial] instruction was provided [in one semester]."
37. District efforts to address Student's lack of attendance included automated attendance calls to Parent, District attendance clerk directly contacting Parent, and referral by District attendance coach to Engage NM. District reports that Parent did not respond to these attendance interventions.
38. District witnesses shed light on a practice in which Student would skip nonpreferred academic courses and either go to the classroom of the preferred Regular Education Teacher or not attend class at all. During times Student went to the classroom of the Regular Education Teacher, Student would work with this teacher on other coursework.
39. Both the Regular Education Teacher and Special Education Teacher reported that the substituted teacher arrangement impacted Student's academic progress because the absences from class did not permit Student to reliably receive instruction in all her courses.
40. This is evidenced by the minimal advancement in Student's IEP goals and Student receiving five Fs in her courses.
41. The Regular Education Teacher surmised that Student's anxiety was triggered from attending class and that once the anxiety became overwhelming, Student no longer put forth a sustained academic effort.

42. As result, Regular Education Teacher and other staff were limited in monitoring Student's progress in achieving their academic IEP goals.
43. The progress report for Student's reading goal shows some progress in the second half of the school year, however Student was not progressing towards achieving their math and vocational therapy goals.
44. Regular Education Teacher also reported Student demonstrated minimal progress in life skills goal of attending class on-time and completing assignments due to the attendance issues.
45. Special Education Teacher explained that they did not monitor Student's progress towards their IEP goals because Student was not in school enough to produce progress monitoring data.
46. District did not convene another IEP meeting during the 2021-2022 school year to address student's attendance issues or explore how the lack of attendance may be related to Student's anxiety.
47. The 2021-2022 IEP listed Student as not displaying behaviors that impeded their learning which meant that no positive behavior interventions were included in the IEP.

#### **Facilitated IEP Meeting**

48. Following the Parent's filing of a state complaint, a facilitated IEP meeting was held on September 21, 2022.
49. The IEP team recommended conducting a triennial reevaluation of Student to assess her current needs especially in light of Student's ongoing anxiety-related issues.
50. At this meeting a new career readiness goal was added to the IEP with an emphasis on Student exploring vocational services such as NM Workforce and DVR programs.
51. Similarly, measurable post-secondary goals were revised to focus Student's efforts on gainful employment following high school.
52. Vocational therapy services in the 2022-2023 IEP were increased to 30 minutes per month and special education programming was increased to 380 minutes a week in an inclusion classroom with a special education teacher.

## Discussion and Conclusions of Law

### Issue No. 1

**Whether the District failed to properly develop an Individualized Education Program (IEP) by not addressing the Student's transition service needs, in violation of 34 C.F.R. § 300.320(b)(2), 34 C.F.R. § 300.324(c), and 6.31.2.11(B) NMAC.**

Transition planning are activities designed to facilitate a student's advancement from school to adult life such as postsecondary education, vocational education, employment, independent living, and community participation. 34 C.F.R. § 300.43(a)(1). In New Mexico, transition services for special education students begin when the child turns 14. 6.31.2.11(G)(2) NMAC. An IEP will encompass transition planning by including measurable postsecondary goals and transition services. 34 C.F.R. § 300.320(b).

Schools adhere to IDEA procedural requirements for transition planning. Procedural requirements include inviting the special education student to an IEP meeting if the purpose of the meeting is to consider postsecondary goals and transition services. 34 C.F.R. § 300.321(b)(1). If the parent or student consents, the District must invite a representative of an agency that is responsible for funding transition services. 34 C.F.R. § 300.321(b)(3). Districts must also consider the student's transition preferences and base postsecondary goals on an age-appropriate transition assessment. 34 C.F.R. § 300.320(b)(1); 34 C.F.R. § 300.321(b)(2). The failure to take into account a student's preferences or conduct a transition assessment may render a transition plan substantively inadequate. *Gibson v. Forest Hills Loc. Sch. Dist. Bd. of Educ.*, 655 F. App'x 423, 436–39 (6th Cir. 2016).

The District took several steps to conduct transition planning for the Student. Student was invited and attended the IEP meetings on September 27, 2021, and September 21, 2022, in which student's postsecondary goals and transition needs were discussed. The Vocational Therapist administered two different transition assessments prior to each IEP meeting and the results of those assessments were used to develop postsecondary goals in both the 2021-2022 and 2022-2023 IEPs. The postsecondary goals aligned with Student's preferences of initially becoming a phlebotomist and then later entering the workforce without a specific career field interest. Vocational therapy was included as a transition service in both IEPs to enable Student to achieve their postsecondary goals. For these reasons, the District properly developed IEPs that addressed the Student's transition service needs.

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

## **Issue No. 2**

**Whether the District failed to implement the Student’s Individualized Education Program (IEP), in violation of 34 C.F.R. §§ 300.320–300.328 and 6.31.2.11(B) NMAC.**

Once an IEP is developed, the special education and related services outlined in the document must be made available to the student. 34 C.F.R. § 300.323(c)(2). A material failure to implement an IEP occurs when there is more than a minor discrepancy between the services a school provides to a child with a disability and the services required by the IEP. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). If a student displays truancy behaviors that impede their learning, then the District may have a duty to address the absenteeism in the IEP with the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). A failure to address excessive absenteeism hinders the appropriate implementation of an IEP, especially when the IEP includes a goal to improve a student’s handling of school responsibilities like class attendance. *Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159–61 (D. Mass. 2009).

Here, the District failed to properly implement the Student’s IEP. Specialized instruction and vocational therapy were not consistently provided because the Student was not in class to receive those services. Although the District communicated with Parent and Student about attendance and modified Student’s class schedule, there was little improvement in class attendance to enable delivery of IEP services. The District did not seek to use behavioral management services to consider whether school truancy was connected to Student’s disability. The lack of additional attendance interventions also amounts to a failure to act on Student’s goal of improving their on-time class attendance. Therefore, the failure to take additional steps in addressing attendance constitutes an IEP implementation failure because the reduced frequency of services was a material departure from the IEP and no consideration of behavioral interventions undermined Student’s progress in achieving an IEP goal.

**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.**

A student eligible for special education is entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. School districts are obligated to provide FAPE for each student eligible in their district. 6.31.2.9(A), 6.31.2.11(I)(2) NMAC. If an IDEA procedural violation occurs, that violation will constitute a denial of FAPE only if it: (1) resulted in a substantive harm to the child or their parents; (2) deprived an eligible student of an IEP; or (3) resulted in the loss



of an educational opportunity. *Boutelle v. Bd. of Educ. of Las Cruces Pub. Sch.*, No. CV 17-1232 GJF/SMV, 2019 WL 2061086, at \*7 (D.N.M. May 9, 2019). The substantive legal standard for determining whether a District has offered a student FAPE is whether an IEP is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017).

The transition plan and services were reasonably calculated to prepare Student for postsecondary life. For example, the transition plan offered Student access to coursework and IEP goals that emphasized pre-vocational activities and independent living skills. While the specific aims of the postsecondary goals were somewhat vague, the general statements of becoming a phlebotomist or entering the workforce were a genuine reflection of Student's preferences and interests at that time. *Pangerl v. Peoria Unified Sch. Dist.*, No. CV-14-00836-PHX-JJT, 2017 WL 603834, at \*6–7 (D. Ariz. Feb. 15, 2017), *aff'd*, 780 F. App'x 505 (9th Cir. 2019). Accordingly, the transition plans offered the Student FAPE based on Student's level of readiness to make career decisions.

The District's failure to address Student's truancy in their IEP resulted in a denial of FAPE regardless of whether the absences stemmed from Student's specific learning disability. The record of evidence reveals that Student's truancy stemmed in large part from feeling anxious in school and the District did not take other special education related measures to improve attendance. Despite a sustained pattern of absences that impacted student academic progress, the District did not consider the use of positive behavioral interventions or a Functional Behavior Analysis (FBA) and Behavior Intervention Plan (BIP) to address this behavior and solely relied on truancy procedures, changes to class schedule, and in-person communication with Student at school. 34 C.F.R. § 300.324(a)(2)(i); *see also Garris v. D.C.*, 210 F. Supp. 3d 187, 191–92 (D.D.C. 2016) (IEP should contain behavioral strategies to address student's truancy issues). The statements from the Special Education Teacher and Regular Education teacher demonstrate that the District had access to the Student to possibly address absenteeism because Student's class avoidance manifested in wandering the hallways, learning in the school library, or going to the Regular Education Teacher's classroom.

Furthermore, the District did not conduct a reevaluation of Student during the 2021-2022 school year as another means to determine what was causing the extreme level of absences. *See e.g., Urban Pathways Charter School*, 112 LRP 27526 (SEA PA 5/1/2012) (finding District denied student FAPE by failing to study what was causing student absenteeism problem). Even when Parent requested an IEP meeting halfway through the 2021-2022 school year to discuss Student's lack of academic progress, the District declined to hold another IEP meeting until the annual review. Based on the foregoing, the District denied the Student FAPE by not using the IEP process

to address Student’s lack of attendance which materially hindered the implementation of Student’s IEP.

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

**Summary of Citations**

| <b>IDEA/State Rule Provisions Violated</b>         | <b>Description of Violation</b>                     |
|--|---|
| 34 C.F.R. §§ 300.320–300.328 and 6.31.2.11(B) NMAC | The District failed to implement the Student’s IEP. |
| 34 C.F.R. § 300.101 and 6.31.2.8 NMAC              | The District denied Student FAPE.                   |

**Required Actions and Deadlines**

**By October 24, 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@ped.nm.gov

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 October 13, 2023 and reported to the SED no later than October 27, 2023.** All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the state complaint case number and step number.

**Corrective Action Plan**

| <b>Step No.</b> | <b><u>Actions Required by District</u></b>  | <b><u>Complete Actions By</u></b>                   | <b><u>Documents Required to be Submitted to PED SED</u></b> | <b><u>Document Due Date</u></b>                          |
|-----------------|---|---|---|--|
| 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.   | <b>October 24, 2022</b>                             | Written Assurance Letter/Email.                             | <b>October 24, 2022</b>                                  |
| 2.              | The District Special Education Director and the school principal shall meet with the SED Education Administrator assigned to the District and the SED CAP Monitor to review the Complaint Resolution Report, the Corrective Action Plan, and any other measures that the District plans to take to ensure that the violations are corrected and do not recur. The District Director has the discretion to include other District or school administrators or personnel in this meeting. The District Director shall be responsible for arranging this meeting with SED. | <b>October 28, 2022</b>                             | Notes from meeting prepared by District.                    | <b>November 4, 2022</b>                                  |
| 3.              | The District will conduct a reevaluation of the Student that includes a psychological evaluation.<br><br>Any reevaluation of Student conducted after September 21, 2022 may serve to satisfy this requirement so long as the reevaluation included a psychological evaluation.  | <b>Within 30 days of receiving parental consent</b> | Signed parental consent form and reevaluation report.       | <b>Within 15 days of completing reevaluation report.</b> |

| <b>Step No.</b> | <b><u>Actions Required by District</u></b>   | <b><u>Complete Actions By</u></b>                     | <b><u>Documents Required to be Submitted to PED SED</u></b>  | <b><u>Document Due Date</u></b>  |
|-----------------|--|---|--|--|
| 4.              | The District shall convene an IEP meeting to review the Student's reevaluation and consider any necessary revisions to the IEP such as behavioral interventions or an FBA/BIP.   | <b>Within 15 days of completing the reevaluation.</b> | Prior Written Notice and Revised IEP.  | <b>Within 15 days of completing IEP Review meeting.</b>  |
| 5.              | <p>The District shall provide training to High School administrators, special education leads, and special education staff and related service providers on the following topics:</p> <ul style="list-style-type: none"> <li>• Addressing truancy in an IEP; and</li> <li>• IEP Implementation for students with excessive absenteeism.</li> </ul> <p>The District may provide this training through a District level staff member who has expertise in special education requirements. This person must be approved by NMPED.</p> | <b>December 2, 2022</b>                               | <p>Confirmation of the date(s) of the training.</p> <p>Confirmation of attendees at the training with submitted documentation of signed attendance sheet from all attendees and plan for addressing provision of training to those staff not in attendance.</p> <p>Submission of proposed trainer and trainer's resume and proposed presentation for NMPED approval.</p> | <p><b>November 18, 2022</b></p> <p><b>December 16, 2022</b></p> <p><b>November 4, 2022</b></p> |
| 6.              | <p>The District shall meet with the Parent and Student to develop an individual attendance improvement plan for Student.</p> <p>District may discuss and complete the individual attendance improvement plan as part of the IEP meeting required in Step 3.</p>  | <b>November 4, 2022</b>                               | Individual Attendance Improvement Plan   | <b>November 11, 2022</b>   |

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

Investigated by:

*/s/ Michael Gadomski*

Michael W. Gadomski, Esq.

Complaint Investigator

Reviewed by:

*/s/ Miguel Lozano*

Miguel Lozano, Esq.

Chief Counsel, Special Education Division

Reviewed and approved by:

A handwritten signature in black ink, appearing to read "Deborah Dominguez-Clark". The signature is written in a cursive style with a large, sweeping initial 'D'.

Deborah Dominguez-Clark

Director, Special Education Division