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**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2223-11
October 21, 2022**

This Report requires corrective action. See pages 11-12.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on August 25, 2022, under the federal Individuals with Disabilities Education Act (IDEA) and the implementing Federal Regulations and State Rules governing publicly funded special education programs for children with disabilities in New Mexico.¹ The SED has investigated the complaint and issues this report pursuant to 34 C.F.R. § 300.152 (a)(5) and 6.31.2.13(H)(5)(b) NMAC.

Conduct of the Complaint Investigation

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

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

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

- interviews with the Parents, Special Education Director, Special Education Administrator, Autism Instructional Specialist, and Special 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 ADA or Section 504 disability discrimination issues, are not within the jurisdiction of this complaint investigation and, as a result, were not investigated.

Issues 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 follow IDEA procedures prior to conducting an evaluation of the Student, in violation of 34 C.F.R. §§ 300.300, 300.304(a) and 6.31.2.10(D) 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;
3. Whether the District failed to educate the Student in the least restrictive environment, in violation of 34 C.F.R. § 300.114 and 6.31.2.11(C) NMAC; and
4. 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 in kindergarten and eligible for special education under the classification of Autism.
2. During the 2021-2022 school year, Student attended the District's Developmentally Delayed Preschool Program.
3. For the current school year, Student attends a general education kindergarten class with pull-out special education programming as well as related services in the areas of Speech Therapy, Occupational Therapy, and Psychological Services.

STAR Profile

4. Records show that the District's Autism Instructional Specialist completed a STAR Level I Learning Profile ("STAR Profile") of the Student on March 18, 2022.
5. Included with this assessment was an observation of the Student in class.
6. The STAR Profile is a curriculum-based assessment to measure a Student's receptive language, expressive language, spontaneous language, functional routines, academics, and social skills.
7. The Autism Instructional Specialist reported that the STAR Profile was administered to the Student to gauge their level of progress in the aforementioned curriculum skills.
8. The District's response to the state complaint states: "In March 2022, student was observed utilizing the STARS screener to assist in determining independent skills levels to assist in establishing the amount of special education support required for the next school year in a general education setting."
9. According to the Autism Instructional Therapist, the results of the STAR Profile showed that the Student could practically do every task assessed on the profile and that Student had the entry-level skills to go into a general education setting for kindergarten.
10. The STAR Profile was presented to the Parents at a virtual meeting on April 20, 2022. Parents report that it was at this meeting that they were first informed that the STAR Profile was administered to the Student.
11. At the meeting, Autism Instructional Therapist reported to Parents that the STAR Profile results showed that Student possessed the requisite skills to enter kindergarten in a general education setting with appropriate supports.
12. Both parents replied that their preference was for Student to continue receiving all instruction and services in a special education setting.

IEP Team Meeting

13. An IEP Team meeting was held on May 20, 2022 to conduct an annual review of the Student's IEP.
14. A District Special Education Administrator participated in the IEP Team meeting as an LEA representative. This administrator reported that the IEP Team, including the Parents, reviewed the recent STAR profile/observation results, progress report, and other data to determine appropriate programming and services for the Student.
15. The IEP Team also considered teacher and parent input in developing the IEP for next year.

16. The progress report for the 2021-2022 school year showed that Student had made progress toward achieving their goals in areas such as occupational therapy, preschool readiness, integrated language, and social skills.
17. The Special Education Administrator said that the District recommended that Student be placed in a general education kindergarten classroom with special education supports because the information on Student's current needs, taken together, showed that Student could be integrated into the regular education setting and continue making educational progress.
18. Parents expressed initial opposition to the placement of Student in a general education setting.
19. Special Education Administrator discussed with parents how the whole picture of the Student needed to be considered and that a general education classroom would afford Student more interaction with non-disabled peers and a broader scope of learning opportunities that catered to Student's strong academic skills. Additionally, the Administrator said they discussed with Parents that Student could be accommodated in a regular education setting with visual schedules, small group activities, and positive reinforcement.
20. By the end of the meeting, Father reported that he would agree to placement as long as Student spent the majority of their instruction in a special education setting. Student's mother similarly requested that Student be in a special education setting and then taken to a general education environment for integration.
21. The Prior Written Notice ("PWN") from the May 20, 2022 meeting records the IEP team as having reached a consensus agreement to place Student in a general education kindergarten classroom and specialized instruction in the amount of 235 minutes per week in Reading, Written Language, and Math each.
22. Furthermore, the PWN states that the IEP Team would convene another IEP meeting by August 15, 2022 to assess Student's progress in their new kindergarten placement.

2022–2023 School Year

23. Father stated that the IEP was not properly implemented this school year.
24. Father described how the Student is not supervised with transportation transfers or in-school transitions and staff are not using accommodations and modifications to facilitate Student's learning. According to the Father, these inadequacies have resulted in a regression in Student's education such as not counting as many numbers, not being able to read the same amount of words, or not progressing in developing an appropriate writing technique.

25. Mother stated that Student is not doing well in the general education classroom because Student requires ongoing adult assistance to remain on task and complete assignments.
26. Student had two documented bathroom accidents in school on August 2 & 3, 2022. Mother claims that the accidents are Student's way of expressing frustration, especially if Student is having difficulty making transitions in-school. Other times, Student may tap their pencil on the desk as a form of self-stimulation. Parents consider these behaviors manageable if Student is properly redirected.
27. Records show no history of discipline or behavioral incidents.
28. District Special Education Director said that Autism Instruction Specialist was sent to Student's general education classroom this school year to provide teachers with techniques for managing Student's behavioral needs. Support from the Autism Instruction Specialist is listed in the Student's IEP under Supplementary Aids and Services.
29. With regards to transition support, the current IEP notes that Student requires mobility assistance, and that Student should be supervised at all times.
30. District Special Education Director spoke with school building administrators to ensure that staff were guiding Student while Student transitioned throughout the school day.
31. On August 12, 2022, District staff had an internal staff meeting to discuss the appropriateness of Student's current placement. Based on that discussion, the District proposed to collect data of Student while in the general education setting and then convene another IEP Team meeting with Parents to determine if general education kindergarten classroom still constituted the least restrictive environment for the Student.
32. This proposed data collection, which included conducting a new STAR Profile, did not go forward because both parents have not consented to the additional assessments and communication with Father has been limited since the filing of this state complaint.
33. In the District's response, the purpose of conducting another STAR Profile and collecting other data is to "help support the IEP team in determining if the current setting is meeting the individual needs of the student."
34. The Special Education Teacher reports that they "pull-out" Student from general education classroom for two hours each day to provide specialized instruction in special class setting. Teacher decided to have Student pulled out of general education setting because it was easier to keep Student focused and redirected in smaller student classroom. On the other hand, Special Education Teacher noted that the general education classroom permits Student to generalize his communication skills with other non-disabled peers.
35. Special Education Teacher described Student as gradually adjusting to general education classroom by displaying better verbal communication, applying academic skills together, participating in group activities, and using adult assistance for independent work.

36. Student's progress towards achieving their IEP goals were assessed on September 22, 2022. The progress reports shows that Student made sufficient progress in the first quarter by exhibiting an increased ability to appropriately grip a pencil, make verbal requests, answering "wh" questions, number counting, and independently writing their name. But in reading, Student continues to struggle with the IEP goal of answering factual questions about a story.
37. I-station benchmark testing conducted in August and September 2022 show overall progress in early reading skills with remaining weaknesses in vocabulary and phonemic awareness.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to follow IDEA procedures prior to conducting an evaluation of the Student, in violation of 34 C.F.R. §§ 300.300, 300.304(a) and 6.31.2.10(D) NMAC.

A district must provide written notice and obtain consent when conducting an initial evaluation or reevaluation. 34 C.F.R. §§ 300.300(a)&(c), 300.304(a). The screening of a student by a specialist to determine appropriate instructional strategies for curriculum implementation is not considered an evaluation for purposes of special education eligibility. 34 C.F.R. § 300.302. Screening is "typically a relatively simple and quick process that can be used with groups of children. Because such screening is not considered an evaluation under 34 CFR 300.301 through 34 CFR 300.311 to determine eligibility for special education services, parental consent is not required." 71 Fed. Reg. 46,639 (2006). For example, an autism specialist observing a student already deemed eligible for special education may not need parental consent if the observation is meant to help develop additional teaching strategies. *McKnight v. Lyon Cnty. Sch. Dist.*, No. 315CV00614MMDCBC, 2018 WL 4600293, at *5 (D. Nev. Sept. 25, 2018), *aff'd*, 812 F. App'x 455 (9th Cir. 2020). In contrast, if the purpose of the assessment is to determine the nature and extent of special education and related services that a child needs, then the assessment is considered an evaluation that triggers notice and consent requirements. 34 C.F.R. § 300.15; *Smith v. Cheyenne Mountain Sch. Dist. 12*, No. 14-CV-03390-PAB-KHR, 2018 WL 1203172, at *8–9 (D. Colo. Mar. 6, 2018).

Here, a review of all the evidence supports a finding that the STAR Profile was used to assess the Student's current needs for special education and services and whether Student could be educated in a general education setting before entering kindergarten. Although the STAR profile appears to serve as a screener on its face, the District's response to the state complaint concedes that the STAR Profile was used to establish the amount of special education programming and

support that Student would require next year. The Autism Instruction Specialist who conducted the STAR Profile said that the results of the assessment indicated that Student has sufficient skills to enter a general education kindergarten classroom. Both the Special Education Director and Special Education Administrator stated that the STAR Profile was considered when determining Student's placement for the 2022-2023 school year. The STAR Profile was first discussed with the parents at a meeting on April 20, 2022 in which the primary focus of the meeting was to discuss Student's placement for next year. Finally, the District is now seeking to conduct a new STAR Profile to determine whether Student's current classroom is appropriate to Student's needs and have sought the consent of Parents before proceeding with the assessment. The totality of this evidence shows that the STAR Profile was used with this Student to assess their needs for determining an appropriate placement, thereby rendering the STAR Profile within the meaning of an evaluation under IDEA with corresponding notice and consent procedural requirements. By not providing the parents prior written notice or seeking their consent before administering the STAR Profile, the District committed an IDEA procedural violation.

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

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). A District's action may not constitute a material failure to implement an IEP if the Student shows academic improvement and staff efforts help Students towards attaining their goals. *A.P. v. Woodstock Bd. of Educ.*, 370 F. App'x 202, 205 (2d Cir. 2010).

Here, the District did not fail to implement Student's IEP. The record demonstrates that District staff sought to support Student's mobility/transition and behavioral needs in school. Accommodations such as redirection of Student to task have been readily employed in the classroom. The Special Education Teacher has made an individual effort to pull the Student into a special education setting each day to provide Student with more individualized attention to their learning needs. The record also shows that Student is making steady progress towards improving their skill deficits in motor skills, language, math, and writing while benchmark testing is used to monitor Student's remaining weaknesses in reading. The weight of the evidence favors a finding that the District did not materially fail to implement the Student's IEP.

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

Issue No. 3

Whether the District failed to educate the Student in the least restrictive environment, in violation of 34 C.F.R. § 300.114 and 6.31.2.11(C) NMAC.

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

In applying the first prong of this test, courts consider additional non-exhaustive factors including: (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; (3) the child's overall educational experience in regular education, including non-academic benefits; and (4) the effect on the regular classroom of the disabled child's presence in that classroom. *G.W. v. Boulder Valley Sch. Dist.*, No. 16-CV-00374-PAB-SKC, 2019 WL 4464130, at *14 (D. Colo. Sept. 18, 2019). A mainstream classroom is a student's least restrictive environment when they are able to achieve satisfactory progress in that setting. *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 162–63 (2d Cir. 2014).

The District took several steps to accommodate the Student in a regular classroom. A STAR Profile and observation were used to assess the Student's learning skills and readiness for kindergarten in a general education setting. Training and support have been provided by the Autism Instruction Specialist to Student's regular education teaching staff to appropriately address behavioral needs. Adult assistance is provided to Student when they are doing independent work in the general education classroom.

The decision about placement also properly weighed the academic and non-academic benefits of regular or special education class placement. At the May 20, 2022 IEP Team meeting, District Special Education Administrator discussed the academic benefits between a regular and special education classroom. Specifically, the Administrator explained that while Student may benefit from a small classroom, the Student's overall needs would be better served in a regular education environment that would continue to develop Student's strong academic skills. Non-academic

benefits such as peer socialization in general education kindergarten classroom were also brought up by the Special Education Administrator at the meeting. There is no evidence that the Student's presence in the regular classroom has had an effect on the learning of other kindergarten students. Based on this information, the District has properly mainstreamed Student in a regular education environment.

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

Issue No. 4

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 District's failure to comply with notice and consent requirements when conducting the STAR Profile was a procedural violation, standing alone, that does not rise to the level of a FAPE denial. Parents did not suffer a substantive harm due to this technical noncompliance because the Parents still had the opportunity to participate in the IEP decision-making process. The results of the STAR Profile were made available at the April 20, 2022 virtual meeting and Parents were able to discuss this evaluative information for determining Student's educational placement at the May 20, 2022 IEP Team meeting. Student was not deprived of an IEP due to the District's nonadherence to IDEA evaluation procedures. Finally, there is no evidence that some kind of additional educational opportunity would have been provided to the Student had the District provided notice and sought consent for completing the STAR Profile. Therefore, the violation as to IDEA evaluation procedures did not deny the Student FAPE.

Student's 2022-2023 IEP is substantively adequate. Student receives 11.75 hours of specialized instruction each week to address their learning needs in areas such as literacy and mathematics. Speech and occupational therapy services are provided to improve Student's oral language and motor skills. Staff training and classroom supports through the Autism Instructional Specialist are made available as a supplementary aid and service. Both IEP progress reports and benchmark

testing show the Student is making steady progress in their IEP goals and reading skills. This evidence demonstrates that the Student's IEP was designed to enable their educational progress based on their disability-related learning needs.

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

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. §§ 300.300, 300.304(a)	The District failed to follow IDEA procedures prior to conducting an evaluation.

Required Actions and Deadlines

By October 31, 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 January 6, 2023 and reported to the SED no later than January 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.	October 31, 2022	Written Assurance Letter/Email	October 31, 2022
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.	November 7, 2022	Notes from meeting prepared by the District.	November 11, 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>
3.	<p>The District shall provide training to District special education administrators and diagnosticians on the following topics:</p> <ul style="list-style-type: none"> • Parental Consent and Notice for Initial Evaluation or Reevaluation; and • Distinguishing between an Instructional Screening and Evaluation based on the purpose for which the child is being assessed. <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>	December 16, 2022	<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 the 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>December 2, 2022</p> <p>January 6, 2023</p> <p>November 21, 2022</p>

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

Investigated by:

/s/ Michael W. Gadomski
Michael W. Gadomski, Esq.
Complaint Investigator

Reviewed by:

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

Reviewed and approved by:

A handwritten signature in cursive script, appearing to read "Deborah Dominguez-Clark".

Deborah Dominguez-Clark
Director, Special Education Division