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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. 2223-12
October 31, 2022

This Report requires corrective action. See pages 17-20.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on September 1, 2022, under the federal Individuals with Disabilities Education Act (IDEA) and the implementing Federal Regulations and State Rules governing publicly funded special education programs for children with disabilities in New Mexico.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, Principal, Special Education Teacher, Speech Clinician and Special Education Director;
- 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 develop and implement an IEP that would provide Student a free appropriate public education (FAPE) in violation of 34 C.F.R. § § 300.320-34 C.F.R. § 300.328 and 6.31.2.11(B)(1) NMAC, specifically whether the District,
 - a. Considered all relevant information in all areas of disability to develop Student’s IEP;
 - b. Provided the services mandated in Student’s IEP;
 - c. Improperly disciplined Student by restraining Student and/or sending Student home from school for behaviors related to diagnosed disability;
 - d. Failed to timely complete a functional behavior assessment (FBA) and behavior intervention plan (BIP) to address Student’s behavioral needs;

2. Whether the District provided Parent their procedural safeguards, in violation of 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, specifically whether the District,
 - a. Worked with Parent in reviewing records and developing an appropriate IEP;
 - b. Provided a prior written notice (PWN) that reflected what happened or was discussed at IEP meetings;
 - c. Ensure that providers that work with Student have the requisite skills and materials to implement the IEP; 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

Background Information

1. Student was in the seventh grade during the 2021-2022 school year. Student was eligible for special education services under four separate eligibility categories.
2. Student was eligible for special education services under the primary category of other health impaired (OHI) because of a diagnosis of epilepsy.
3. Student's second area of eligibility was specific learning disability (SLD) in the areas of math, reading and written language. Student's third category of eligibility was speech-language (SL) because of articulation deficits.
4. Student was also eligible under the category of emotional disturbance (ED).
5. Student had been in treatment with private mental health providers and was diagnosed with post-traumatic stress disorder (PTSD), dissociative type because of severe familial abuse.
6. In 2019, Student had been hospitalized for a nine-month period because of threats against siblings and others. This hospitalization was related to Student's traumatic experiences.
7. Upon release from the hospital, Parent provided all records, discharge summaries and reports to the District to assist in the development of a reentry plan when Student returned to school.
8. A reentry plan was not developed at that time.
9. During Student's reevaluation in 2021, Student had elevated anxiety, a high degree of sadness and was easily frustrated. Student reported being fearful the abusers would return.
10. There were inconsistent reports about Student's friendships. Some teachers reported Student made friends easily but Student reported a lack of friends and there were staff that questioned the quality of Student's friendships.
11. The report also noted that elevated and internalized anxiousness and sadness may be due, in part and consistent with the PTSD diagnosis.
12. The eligibility report noted these concerns had been observed since the incident on the playground in the 2019-2020 school year when Student attacked another student on the playground because Student believed that the other student was somehow related to previous abuse.
13. Individuals with PTSD, dissociative type have experienced significant trauma and the individual's reaction to the trauma is dissociation as a way of protecting the individual from intense pain/suffering.
14. Triggers for a dissociative episode may be unknown or unrelated to the trauma.

15. Individuals with this diagnosis may not know or cannot control their triggers and cannot prevent a dissociative episode or the length or severity of the dissociative episode.
16. The episodes may inhibit emotional, behavioral regulation and executive functioning capacities.
17. Last school year, Student had a dissociative episode in physical education (PE) class on April 21, 2022. At that time, Student choked another student and had to be physically restrained to release the other student and to prevent Student from attacking the staff that were present.
18. Student was suspended for five days following the incident.
19. When Student was not experiencing a dissociative episode, Student was polite, able to participate with classmates, completed work with assistance, was a hard worker and exhibited no negative behaviors and made progress on IEP goals.
20. Student's grades for the 2021-2022 school year were As and Bs.
21. An IEP meeting was scheduled for April 29, 2022 after the incident to discuss next steps and the completion of a functional behavior assessment (FBA), a behavior intervention plan (BIP) and safety/crisis plan because of the April 21, 2022 episode.

Development and implementation of IEP

22. Student's April 30, 2021 IEP, the draft April 29, 2022 IEP and the September 8, 2022 IEPs were silent on Student's diagnosis of PTSD or any needs related to that diagnosis.
23. Since the reevaluation in 2021, Student was determined and has continued to be eligible under the category of ED.
24. The IEP team met on April 29, 2022 after the incident in PE class to discuss the next steps for Student and to develop the annual IEP. That meeting was tabled before an IEP was completed because Parent had to leave for another appointment.
25. The District tried repeatedly throughout the month of May to schedule another IEP meeting for this Student. A meeting with a facilitator was scheduled for May 25, 2022, but was cancelled by Parent. Student's IEP lapsed on May 30, 2022 but special education services were provided under the April 30, 2021 IEP.
26. The next attempt for an IEP meeting was a voicemail left on Parent's phone on July 21, 2022. Parent did not return the call.
27. The District emailed the Parent on July 28, 2022 asking for times and dates for an IEP meeting. Parent responded with we are "at a standstill," and did not like the facilitator.
28. The District again contacted the Parent by email on August 4, 2022 requesting times and dates for an IEP meeting. The Parent would not agree to schedule an IEP meeting.
29. An IEP meeting was scheduled for September 8, 2022, after the start of the 2022-2023 school year.

30. On August 24, 2022, a meeting notice was sent to Parent scheduling an IEP meeting for September 8, 2022.
31. Multiple notices were sent to Parent by email and registered mail for the September 8, 2022 IEP meeting.
32. The District met without the Parent and finalized the IEP.
33. The only needs noted on the IEP that addressed Student's needs under the category of emotional disturbance were emotional regulation and appropriate peer relationships.
34. The most recent eligibility report stated that Student's emotional needs "may be due in part and consistent with PTSD diagnosis, but there was nothing on the IEP to outline how that diagnosis impacted learning or how to assist Student."
35. The April 30, 2021 and September 8, 2022 IEPs provided for 30 minutes a week of related services with the school psychologist to regulate emotions and appropriate peer relationships.
36. Staff and Parent indicated that Student had good peer relationships and "remarkable self-regulation." Student would notify staff when Student needed a time out, space or assistance.
37. Student's present levels of academic and functional performance listed Student's grades and IMSSA scores in math, reading and written language. The present levels did not provide a baseline for comparison or list Student's specific skill deficits.
38. The IEP noted that Student needed support in reading, writing and math but no further information about Student's individual skills or needs was included.
39. Student had five goals on the IEP. All goals except the social/emotional goal were rephrasing the State standards for Student's grade and not individualized to Student's skills or needs.
40. One transition goal was to pursue post high school education/training. The standard graduation option was the plan. Student was scheduled to graduate in May, 2027. Student received the majority of special education services through inclusion.
41. Student's reading goal stated "By September 08, 2023 when given grade-level literacy text, [Student] will be able to cite the textual evidence that most strongly supports an analysis of what the text says explicitly as well as inferences drawn from the text, in 3 out of 4 tests, with an accuracy of 80% or higher, as measured by data collections, observations, work samples, classroom activities/assignments, teacher created rubrics and/or district/state assessments."
42. The math goal was "By September 08, 2023 [Student] will be able to apply the Pythagorean Theorem to find the distance between two points in a coordinate system, in 8 out of 10 problems, for an accuracy of at least 80% as measured by as measured by data collection, observations, work samples, classroom activities/assignments, teacher created rubrics, and/or district/state assessments."

43. The written language goal stated “By September 08, 2023, [Student] will be able to write informative/explanatory texts to examine a topic and convey ideas, concepts and information through the selection, organization, and analysis of relevant content by developing the topic with relevant, well-chosen facts, definitions, concrete details, quotations, or other information and examples, for and accuracy of 80% or higher, as measured by data collections, observations, work samples, classroom activities/assignments, teacher created rubrics, and/or district/state assessments.”
44. The social/emotional and articulation goal was “By September, 2023, [Student] will complete the following functional academic objectives with 80% accuracy or better as measured by performance in the school setting:” Objective one was produce vocalic “r” in conversation with 90% accuracy; Objective two was “[Student] will appropriately advocate for [Student] and self-regulate to avoid conflict with [Student’s] peers with 80% frequency” and Objective three “[Student] will identify and express feelings and strengths about self with 80% frequency.”
45. Student received 13 hours a week of special education and related services. All services were in the regular classroom except for 30 minutes weekly of speech and 30 minutes a week of psychological services with the school psychologist.
46. According to the service logs provided by the speech therapist, Student was provided all speech therapy service hours as outlined on the April 30, 2021 IEP during the 2021-2022 school year and the current school year.
47. There was no goal to address Student’s needs related to the PTSD diagnosis or the April 21, 2022 episode.
48. There have been no assessments concerning the impact of the PTSD diagnosis on Student’s learning nor consultation with Student’s Therapist about any educational impact because of that diagnosis or how to assist with educational programming to prevent or minimize dissociative episodes which have resulted in suspension of Student.
49. Student had an ongoing health plan because of epilepsy diagnosis and staff were annually trained on what to do if Student had a seizure.
50. Prior to the April 29, 2022 IEP meeting, the District had never developed a safety/crisis plan because of Student’s PTSD. The safety plan proposed after the April 29, 2022 IEP meeting was revised at the September 8, 2022 IEP meeting.
51. The safety plan included allowing Student to leave as needed, refrain from discussions on sensitive topics, if those topics come up in the classroom, allow him to leave to go to the resource room, if Student becomes defiant do not go head-to-head, allow space and if needed, remove the remaining students and contact administration, do not talk or reason with Student. Administration and the Nurse will handle the matter and contact Parent. Physical restraint will only be used if danger of harm to Student, other students or staff.

52. The staff acknowledged that when Student was not having a dissociative episode, Student's emotions and peer relationships were appropriate.

Procedural safeguards

53. Parent had previously requested a reentry plan for when Student returned to school after hospitalization; a plan was never developed.
54. Parent provided all of the reports and discharge documents from Student's previous hospitalization, including the need for a plan when Student has a dissociative episode and provided suggestions of what to do when Student had an episode.
55. Parent does not recall ever being asked to sign a release of information for Student's Therapist. If requested, Parent would have signed the release.
56. Parent proposed inviting Student's Therapist to the April 29, 2022 IEP meeting via email on April 27, 2022. The Therapist was not invited to the April 29, 2022 IEP meeting or the September 8, 2022 IEP meeting.
57. There was a discussion at the April 29, 2022 IEP meeting about what needed to be in a safety plan but the meeting was tabled before the plan was finalized because Parent had to leave the meeting for another appointment.
58. The District did not consult with Parent or Student's Therapist in the drafting or revision of the safety plan.
59. A FBA, BIP and safety plan were completed outside of the April 29, 2022 IEP team meeting by the previous Special Education Teacher. Parent did not provide consent for the FBA. The Special Education Teacher is no longer with the District.
60. These documents were provided to Parent along with a prior written notice (PWN).
61. Parent rejected the FBA, BIP, safety plan and PWN because the PWN did not include all items discussed at the meeting and the FBA, BIP and safety plan were not developed with the assistance of Parent but were based on partial information from discharge documents from Student's previous hospitalization in 2019 and did not consider Parent's concerns or Student's Therapist's information.
62. The District did not amend the PWN or safety plan but determined that there was no need for a FBA and BIP because there was no pattern of behavior since the dissociative episodes had only occurred twice since 2020.
63. A PWN was provided after the September 8, 2022 meeting.
64. The PWNs were drafted by the District reflecting what decisions had been made at the respective meetings and the reasons for the decisions.
65. Prior to the start of the 2021-2022 school year, not all of Student's Teachers were aware of Student's history, PTSD diagnosis or what to do if a dissociative episode happened at school. All of the medical records were maintained in the special education file, but the

diagnosis was not included in the IEP. Student's Teachers did not have access to all of records in the special education file.

66. At the start of this school year, all staff that worked with Student were provided information about Student's safety plan. This year, staff were provided generalized training by the nurse about common health conditions, including epilepsy, and what to do if an issue arose with a student.
67. The District has requested but not received updated medication list for Student.
68. Parent was concerned with the crisis prevention institute (CPI) certification of staff during the incident on April 21, 2022. Only one staff member present at the time of the incident was CPI certified. Two other staff members had previously been CPI certified but their certification had lapsed.
69. The District was aware from the medical reports that Student could react in a similar manner to the incident on April 21, 2022 even if had not happened in the last two years.
70. At the present time, nine staff members are CPI certified and additional CPI trainings are ongoing.
71. Parent was also concerned that Student had significant bruising following the restraint of Student during the incident in PE on April 21, 2022.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to develop and implement an IEP that would provide Student a free appropriate public education (FAPE) in violation of 34 C.F.R. § § 300.320-34 C.F.R. - 300.328 and 6. 31.2.11(B)(1) NMAC, specifically whether the District

- a. **Considered all relevant information in all areas of disability to develop Student's IEP;**
- b. **Provided the services mandated in Student's IEP;**
- c. **Improperly disciplined Student by restraining Student and/or sending Student home from school for behaviors related to diagnosed disability;**
- d. **Failed to timely complete a functional behavior assessment (FBA) and behavior intervention plan (BIP) to address Student's behavioral needs;**

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. Failing to provide needed supports and services can be a denial of FAPE. *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016).

a. Considered all relevant information in all areas of disability to develop Student's IEP.

The IEP must consider all aspects of an eligible individual when developing an IEP. *Caldwell Independent School District v. Joe P.*, 551 F App 'X 140 (5th Cir, 2014) (unpublished). The IEP must account for all disabilities and the impact those disabilities have on the education for a particular student. In the *Caldwell* case, the District's note about a student's visual impairment without including that on the IEP and the possible impacts of that disability limited the teachers' ability to address the student's needs that arose from that disability. See also 34 C.F.R. § 300.324(A)(2)(i) ("In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and support, and other strategies to address that behavior.")

The IEP must include measurable goals designed to meet student's disability-related needs. 34 C.F.R. § 300.320 (a)(1). The statement of measurable goals must:

1. Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
2. Meet each of the child's other educational that result from the child's disability. 34 C.F.R. 300.320 (a)(2)(i).

The goals on the IEP must not be too vague and should be understood by a stranger. See *Rock Hill Local School District*, 111 LRP 67202 (SEA OH 2011).

Although short-term objectives are not required, they must be developed as a logical step towards achievement of that annual goal and be a milestone in measuring progress toward achievement of the annual goal. *Notice of Interpretation*, Appendix A to 34 CFR Part 300 (1999 regulations). Short term objectives must be related to the measurable goal for the student. See *Burlington School District*, 20 IDELR 1303 (SEA VT. 1994) and *Sacramento City Unified School District v. R.H.*, 68 IDELR 220 (E.D. CA. 2016) (Addressing all needs related to a student's disability supports provision of FAPE, a failure to address all needs may be a denial of FAPE).

Student, at the last eligibility meeting in 2021, was determined eligible under four categories, including the category of ED. The IEP stated that the eligibility category was because of emotional regulation and inappropriate peer relationships. The IEP was silent regarding Student's mental health diagnosis of PTSD and any potential educational impact of that diagnosis. Student had been hospitalized for nine months in part because of actions from that diagnosis. There have been no assessments or consultation with Student's Therapist about the diagnosis and the educational impact of that diagnosis.

Reports indicated generally, Student had no behaviors that impacted learning, got along well with peers and staff and had no emotional outbursts. However, although the Student had made great strides in preventing dissociative episodes by avoiding known triggers and other strategies, there was still the potential for episodes in school that could be severe. District knew when Student returned from the nine-month hospitalization pertaining to the dissociation PTSD diagnosis, that Student may experience dissociative episodes at school and the consequences of that episode could be significant. The District declined to develop a reentry plan and did not develop a safety/crisis plan until after the April 21, 2022 incident and without the involvement of Parent or Therapist. Prior to this school year, not all of Student's teachers were aware of the diagnosis and educational impact nor possible triggers for Student's dissociative episodes. The medical records were in the special education file, not the cumulative folder and since the IEP did not mention the diagnosis, the teachers may have been oblivious to the diagnosis and nature of the impairment. After the incident, Student was suspended. This was the first episode in two years but, having incomplete information regarding possible triggers, there was no guarantee that another episode would not happen.

Moreover, the only goal that addressed Student's ED eligibility was self-advocacy and identifying emotions and feelings. While Student may have had these needs, the eligibility records for ED indicated that Student's emotional needs "may be due in part and consistent with PTSD diagnosis." Parent proposed inviting Student's Therapist to the meeting to assist in the development of the IEP but the Therapist has not been invited to any IEP meeting nor has a release of information been requested. Without more information about the educational impact of the PTSD diagnosis, it is not clear that all of Student needs in the area of ED were being met. In addition, Student was maintaining good grades and making progress on goals but it was unclear from both the goals and present levels of academic and functional performance exactly what Student's needs were. The goals were taken from the State standards and were not individualized to reflect Student's strengths and weaknesses. Moreover, the social-emotional and articulation goal provides that Student would "complete the following functional academic objectives" and the objectives listed use of "r" in conversation, self-advocacy, appropriate peer

relationships and identifying feelings, emotions and strengths. This was the only goal that would address Student's ED needs and the objectives did not correspond to a measurable goal.

b. Provided the services mandated in Student's IEP.

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). 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).

Although Parent was concerned that Student was not receiving speech services, the record demonstrated that Student had received speech services and was making progress on the speech objective.

c. Improperly disciplined Student by restraining Student and/or sending Student home from school for behaviors related to diagnosed disability;

District personnel may remove a child with a disability who violates a code of student conduct from his current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct. 34 C.F.R. § 300.530 (b)(1). A District can only restrain a student when the student's behavior presents an imminent danger of serious physical harm to the student or others; and a less restrictive intervention is insufficient to mitigate the imminent danger of serious physical harm. NM Stat § 22-5-4.12 (2017).

The incident on April 21, 2022 was a violation of the student code of conduct. Prior to that date, Student had not had any violations of the code of conduct, nor had Student been suspended to be removed from school for disciplinary reasons. If Student would have been removed for disciplinary misconduct for ten school days during the 2021-2022 school year, additional proceedings under IDEA would have been required, including a manifestation determination. Since the Student was not removed for more than ten days during the 2021-2022 school year, the District did not violate the IDEA when Student was suspended for Student's actions in the incident on April 21, 2022.

Furthermore, given the imminent risk of harm to Student, other students or staff during the incident on April 21, 2022, staff were justified in restraining Student. While the possible need for a restrictive intervention or restraint should be addressed by the IEP team, the District, prior to the incident, did not see a need for restraint and, therefore, it was not included in Student's IEP nor was there a safety plan developed for Student.

d. Failed to timely complete a functional behavior assessment (FBA) and behavior intervention plan (BIP) to address Student's behavioral needs.

The IDEA requires when the IEP team determines that Student's conduct was a change of placement (removal for more than 10 school days) and was a manifestation of the student's disability, then the IEP team must conduct an FBA and develop a BIP, if warranted. 34 C.F.R. § 300.530 (f).

Student was not removed from school during the 2021-2022 school year for more than ten days and no manifestation determination was required or completed. There is no requirement that Students who are eligible under the category of ED must have an FBA and BIP unless they are required because a student's behaviors impact a student's learning. The FBA focuses on a pattern of behavior. In this case, the IEP noted that behaviors did not impact Student's learning and there was no pattern of behavior. The incident on April 21, 2022 was an isolated incident and the first one in two years. The District did not err in failing to complete an FBA and BIP.

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

Issue No. 2

Whether the District provided Parent their procedural safeguards, in violation of 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, specifically whether the District,

- a. Worked with Parent in reviewing records and developing an appropriate IEP;**
- b. Provided a prior written notice (PWN) that reflected what happened or was discussed at IEP meetings;**
- c. Ensure that providers that work with Student have the requisite skills and materials to implement the IEP?**

a. Worked with Parent in reviewing records and developing an appropriate IEP

Parents are mandatory members of the IEP team and are afforded the opportunity to participate in any IEP meetings. 34 CFR § 300.321(a); 34 CFR § 300.322(a). Meaningful parental participation is more than the opportunity to speak but must include consideration of parent's concerns and being open and responsive to the parent's input. *R.L. v. Miami-Dade County School*

Board, 63 IDELR 182 (11th Cir. 2014). Participation includes a consideration of parent's suggestions, and as appropriate, incorporating those suggestions into the IEP. *Deal v. Hamilton County Board of Education*, 42 IDELR 109 (6th Cir, 2004, *cert denied*, 110 LRP 46999, 546 U.S. 936 (2005), *on remand*, 46 IDELR 45 (E.D. TN 2006), *aff'd* 49 IDELR 123 (6th Cir. 2008). Parents are to be involved in any decisions concerning the identification, evaluation and educational placement of the student and the provision of FAPE. 34 C.F.R. § 300.501(b). There must be a valid IEP in place at the start of the school year. 34 C.F.R. § 300.323(a).

Parent was invited to and participated in the April 29, 2022 IEP meeting. At some point during the meeting, Parent requested that the meeting be tabled because Parent had another obligation. Parent did not provide consent for the FBA. When the meeting ended, the Special Education Teacher took the notes from the meeting and developed an FBA, BIP and safety plan without including Parent. When copies were provided to Parent, along with a PWN, Parent objected to the FBA, BIP and safety plan because Parent was not involved and they did not reflect Student's needs.

After that, although the District attempted to schedule an IEP meeting with Parent during the month of May, July and August, Parent was not willing to schedule an IEP meeting. Finally, after the 2022-2023 school year had started and Student's IEP had lapsed, the District held an IEP meeting without Parent. The IEP was finalized, the IEP team determined there was no need for an FBA or BIP and revised the safety plan previously developed by the Special Education Teacher without the input of the Parent or Student's Therapist.

After the meeting was tabled, the District developed and submitted the completed documents to Parent and from that time forward, Parent refused to participate in IEP meetings. Because of District's actions, the Parent refused to be involved in another IEP meeting. It cannot be determined if Parent's refusal to participate in IEPs after April 29, 2022 was a result of District's actions.

However, the District had an obligation to have a valid IEP in place at the start of the school year, and Student's IEP had lapsed when school began. The District tried repeatedly to schedule a meeting with Parent to no avail and, therefore, it was necessary for District to hold an IEP meeting and complete an IEP without Parent's involvement. If Parent refuses to participate, The District may hold the IEP without the Parent. 34 C.F.R. § 300.322(d). However, the District erred in drafting and finalizing an FBA, BIP and safety plan without scheduling another meeting where Parent and possibly Student's Therapist could be involved in the completion of those documents.

The District did not include the Parent in the development of the documents following the April 29, 2022 IEP meeting and did not obtain consent from parent to conduct an FBA. The safety plan and need for an FBA and BIP were directly related to Student's educational needs and Parent

should have been involved in the development of those documents at that meeting. This constitutes a violation of Part B of IDEA.

b. Provided a prior written notice (PWN) that reflected what happened or was discussed at IEP meetings.

One of the procedural safeguards required by the IDEA is a prior written notice (PWN) when a district proposes or refuses to initiate or change the identification, evaluation or educational placement of a student or the provision of FAPE. 34 C.F.R. § 300.503(a). A PWN must include what was proposed or rejected and the reasons why the decision was made and what information was considered in making that decision. 34 C.F.R. § 300.503(b). The PWN is not a verbatim summary of what happened at the IEP meeting nor it is required to include all topics discussed unless decisions were made from the discussion topics. The PWN is prepared by the District.

The District provided a PWN after both the April 29, 2022 IEP meeting and September 8, 2022 meeting which Parent did not attend. Parent objected to the PWN from the April 29, 2022 meeting because it did not include information about all of the items discussed. The PWN provided by the District included the issues accepted and rejected and the reasons for the decisions. The District could amend the PWN with Parent's input but was not required to do so. There was no error by the District related to the issuance of the PWN.

c. Ensure that providers that work with Student have the requisite skills and materials to implement the IEP?

The IDEA as amended by the Elementary and Secondary Schools Act (ESSA) (20 U.S.C. 1412 (a)(14)(c) requires that all special education teachers must have full state certification. 34 C.F.R. § 300.156 (c)(1). A District can only restrain a student when the student's behavior presents an imminent danger of serious physical harm to the student or others; and a less restrictive intervention is insufficient to mitigate the imminent danger of serious physical harm. NM Stat § 22-5-4.12 (2017). When restraint is required because of the imminent danger, the restraint shall only be used by "school employees who are trained in the safe and effective use of restraint and seclusion techniques unless an emergency situation does not allow sufficient time to summon those trained school employees." NM Stat § 22-5-4.12 (B)(3) (2017).

All of Student's special education teachers, educational assistants and related services providers had the appropriate certification to provide special education and related services to Student.

Regarding the incident on April 21, 2022, there was risk of imminent harm to Student, other students and staff justifying the need for restraint of Student. Although not all staff present during the incident had current CPI certification, the circumstances surrounding the use of

restraint was an emergency situation that warranted the immediate intervention by staff. The danger during April 21, 2022 incident justified the involvement of non-CPI certified staff. There was no violation of IDEA.

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

Issue #3

Whether the District's actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE), in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

Students who are eligible for special education services are entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. Districts are obligated to provide a FAPE to students within their jurisdiction who have been determined eligible for special education services. 34 C.F.R. § 300.17. The determination of whether there has been a denial of FAPE requires consideration of two components: substantive and procedural. The question one must answer to determine the substantive standard is whether the IEP was "reasonably calculated to allow the child to make progress appropriate in light of the child's circumstances." *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).

The District reported that Student had made progress on all goals on the IEP. However, the District failed to determine and develop individualized goals to address Student's needs in for all areas of eligibility and the goals do not appear to reflect Student's individual needs. Without appropriate goals and services, the IEP was not reasonably calculated to allow Student to make progress in all areas of needs. This was a substantive denial of FAPE.

In addition, District's development of a FBA, BIP and safety plan without Parental involvement and failure to consider Parent's concerns was a denial of parent's opportunity to participate in the development of the IEP. The safety plan that was developed without Parent's input addressed Student's PTSD needs, but without involving Parent or Therapist in its development, there may be additional concerns that are not being addressed by that plan. The failure to develop goals that addressed all of Student's needs including Student's ED diagnosis also deprived Student of an educational benefit. These procedural violations rise to the level of a denial of FAPE.

As to Issue 3, the District is cited and Corrective Action is required.

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC	The District failed to develop and implement an IEP that would provide Student a free appropriate public education (FAPE), by failing to work with Parent in reviewing records and developing an appropriate IEP.
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	Whether the District provided Parent their procedural safeguards, whether the District, worked with Parent in reviewing records and developing an appropriate IEP.
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 November 11, 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 31, 2023 and reported to the SED no later than February 15, 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 PED SED Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan (CAP).	November 11, 2022	Written Assurance Letter/Email	November 11, 2022
2.	The District Special Education Director and the school principal shall meet with the PED SED Education Administrator assigned to the District and the PED SED CAP Monitor to review the Complaint Resolution Report, the Corrective Action Plan, and any other measures that the District plans to take to ensure that the violations are	November 18, 2022	Notes from meeting prepared by District	November 28, 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>
	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 PED SED.			
3.	The District Special Education Director will meet with Student's special education and general education teachers, related service providers, and 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.	December 2, 2022	Notes including staff attendance and date of meeting from meeting prepared by District	December 9, 2022
4.	District shall complete a comprehensive evaluation of student with respect to the eligibility diagnosis of ED and the medical diagnosis of dissociative PTSD and to ascertain Student's individual needs in all areas. The evaluation pertaining to Student's PTSD and educational impact must be completed by a person knowledgeable and qualified to evaluate in the area of dissociative PTSD and its educational impact.	January 15, 2022	Signed parental consent form and evaluation report.	Within 15 days of completing evaluation report.
5.	District shall create a plan to improve communication with parent which includes communication regarding:	November 30, 2022	Written Communication Plan which may be included	December 15, 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>
	<ul style="list-style-type: none"> • Dissociative PTSD episodes • Other concerns related to Student’s ED and other needs; • Urgent or emergent reporting to parent as needed; <p>Parents shall be included in the creation of this plan.</p>		in Student’s IEP or the IEP meeting PWN.	
6.	<p>The District will convene an IEP meeting for Student. The IEP meeting shall address:</p> <ul style="list-style-type: none"> • Additional needs identified as part of the comprehensive evaluation required in Step 4; • Parent Communication Plan required in Step 5 which shall include a progress reporting plan • Review and revision if needed, of Student’s safety plan. <p>The IEP 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 IEP meeting.</p> <p>The District shall ensure that the IEP team includes, but is not limited to, parents, special education teacher, Student’s therapist and related services providers.</p>	January 31, 2022	<ol style="list-style-type: none"> 1. Invitation to IEP meetings, 2. IEP, 3. Prior Written Notices, and 4. Agenda for IEP team meetings 	15 days after the IEP meeting is held
7.	The District shall arrange to provide training to District staff (including	January 13, 2022	Confirmation of the date of the training	December 9, 2022

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 K. Bennett
Michele K. Bennett, Esq.
Complaint Investigator

Reviewed by:

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

Reviewed and approved by:



Deborah Dominguez-Clark
Director, Special Education Division