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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. 2223-13
November 7, 2022

This Report requires corrective action. See pages 29-34.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on September 8, 2022, under the federal Individuals with Disabilities Education Act (IDEA) and the implementing Federal Regulations and State Rules governing publicly funded special education programs for children with disabilities in New Mexico.¹ The SED has investigated the complaint and issues this report pursuant to 34 C.F.R. § 300.152 (a)(5) and 6.31.2.13(H)(5)(b) NMAC.

Conduct of the Complaint Investigation

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

- review of the complaint and supporting documentation from complainant;
- review of the District's responses to the allegations, together with documentation submitted by the District at the request of the PED's independent complaint investigator;

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

- review of the District’s compliance with federal IDEA regulations and state NMAC rules;
- interviews with the Parent, Previous Teacher, Principal, Special Education Teacher, Reading Specialist, Math Specialist and Special Services Director; 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 timely evaluate Student in all suspected areas of disability and gather the necessary data to determine Student’s needs and develop an appropriate IEP in violation of 34 C.F.R. § 300.111, 34 C.F.R. § 300.306 and 34 C.F.R. § 300.101 and 6.31.2.10 (A), (F)(1) and 6.31.2.8 NMAC, specifically whether the District,
 - a. Failed to complete an occupational therapy (OT) evaluation;
 - b. Failed to complete a cognitive and academic evaluation, including a dyslexia assessment; and
 - c. Failed to complete a requested assistive technology (AT) assessment?

2. Whether the District failed to develop and implement an IEP that allowed Student to make educational progress in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC, specifically whether the District,
 - a. Failed to provide appropriate specialized instruction in reading, math and writing as required by Student’s IEP;
 - b. Failed to ensure timely implementation and efficacy of computer auditory development, writing services and math educational programming;
 - c. Failed to obtain sufficient and necessary data to determine Student’s needs so as to develop an appropriate IEP that provided a free appropriate public education (FAPE);
 - d. Failed to ensure adequate progress on goals or modify IEP goals from year to year if insufficient progress and timely provide progress reports;
 - e. Failed to consider needs of Student instead of staffing needs in the determination of special education services and Student’s difficulties with online learning;

- f. Failed to develop goals aligned with State standards that would allow Student to make yearly progress on goals; and
 - g. Failed to consider necessary factors in the least restrictive analysis for Student or provide instruction and services in the Student's least restrictive environment?
3. Whether the District denied Parent procedural safeguards, including meaningful parental participation, in the development of Student's IEP in violation of 34 C.F.R. § 300.322, 34 C.F.R. § 300.500; 34 C.F.R. §300.501(b) and 6.31.2.11(B)(2), 6.31.2.13(A) and 6.31.2.13(C) NMAC, specifically whether the District,
 - a. Failed to consider Parental concerns raised at multiple IEP meetings;
 - b. Terminated the IEP meeting early or required members left the IEP meeting before all IEP issues were addressed or resolved;
 - c. Failed to implement or discuss decisions made during the December, 2021 IEP meeting and agreed to in the prior written notice (PWN) from that meeting in subsequent meetings;
 - d. Misrepresented or mischaracterized parental input on the IEP;
 - e. Modified goals and service times outside of the IEP meeting without Parental involvement; and
 - f. Failed to consider the appropriate standards for the need for extended school year (ESY) services?
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

Background Information

1. Student was age nine and in the fifth grade at the time of the filing of the Complaint.
2. The issues in the Complaint concern the 2021-2022 school year.
3. Three IEPs were provided and reviewed in the course of investigating this Complaint: September 23, 2020 IEP, February 11, 2021 IEP and April 28, 2022 IEP.
4. Student's September 23, 2020 IEP lapsed on September 22, 2021 but no IEP was developed until February 11, 2021. Documents from an IEP team meeting on December 15, 2021 were not provided to the investigator but were noted on the April 28, 2022 prior written notice (PWN). The IEP team also met on April 7, 2022 but the meeting was tabled before the IEP was finalized as noted on the April 28, 2022 PWN.
5. Records provided noted that a review of existing evaluation data (REED) was completed and signed on February 14, 2022 indicating no further assessments were needed. That REED was not provided to the investigator. Another REED was completed on April 28, 2022

which indicated that no further assessments were needed which was provided to the investigator.

6. The most recent comprehensive evaluation was completed in August, 2019.
7. Student was eligible under the category of specific learning disability (SLD) and had needs in three areas: reading, written language and math.
8. An eligibility report was completed at the April 28, 2022 IEP meeting that determined Student continued to be eligible under SLD.
9. On the September 23, 2020 IEP Student's present levels of academic achievement and functional performance (PLAAFP) noted that Student was at Level 1 in reading and at or below the 20th percentile and was below expectations in all math domains.
10. In the September 23, 2020 IEP, Student had a reading, writing and math goal. The writing goal was to write sight words correctly. Student received special education services in the resource room for three hours per week.
11. An IEP meeting was scheduled for December 15, 2021. The meeting was tabled because of time constraints and the IEP was not completed at that time.
12. At that meeting, there was a discussion about the recent central auditory processing (CAP) assessment that was completed. Student did not have a CAP disorder but had some deficits that may be related to poor organizational, executive functioning and language processing skills.
13. Online services in the home were recommended and Grandparent agreed to ensure Student completed an online program thirty minutes a day, five days a week. The audiologist would monitor Student's progress.
14. Grandparent reported difficulties accessing the online program and Student did not complete the required lessons. There has been no discussion at IEP meetings or notations on the IEP or PWN about Student's need for these services.
15. The next time a meeting could be scheduled after the December 15, 2021 IEP meeting was February 11, 2021. As noted on that IEP, Student was at or below Level 2 in reading at the 40th percentile, in math Student was near the target in some domains, still below in geometry, problem solving, modality, fractions and quantile score was 510. A written language goal, similar to the last IEP's written language goal, was added to write 100 sight words. No additional time was added to address the writing goal. The math goal was to multiply and divide 1–2-digit numbers and reading goal was to read text at Student's level of understanding. Student received three hours of special education services per week in the resource room.
16. A PWN provided that a REED was completed on February 14, 2022 with no further assessments needed.

17. Even though Student was eligible in written language, Student did not have a writing goal on the IEP until the February 11, 2022 IEP. The goal addressed Student's ability to write sight words but was not a specific writing goal.
18. The IEP team explained that writing was included in Student's reading program so there had been no need for a writing goal.
19. On March 8, 2022, Grandparent wrote a seven-page letter to the District outlining concerns about Student's educational program and progress.

Timely completion of needed assessments

20. At the February 11, 2022 IEP meeting, the IEP team, as noted on the PWN, agreed to an occupational therapy (OT) evaluation to determine the need for services with executive functioning and organizational skills deficits.
21. Consent was not obtained nor was an OT evaluation completed.
22. There was discussion about the Grandparent's request for a comprehensive evaluation including dyslexia but the need for that was not determined by the IEP Team nor was consent obtained for the evaluation.
23. Another REED was considered at the April 28, 2022 meeting and a comprehensive evaluation was recommended but the REED also indicated no need for further assessments. The status of the OT evaluation agreed to at the February 11, 2022 IEP meeting was not clear.
24. During interviews, District personnel stated a comprehensive evaluation was "in the pipeline." Consent for a comprehensive evaluation was requested but not received and it is unclear what "in the pipeline" meant.
25. At the April 28, 2022 IEP meeting and in the March 8, 2022 letter, Grandparent requested an assistive technology assessment (AT). The District refused on the PWN because Student did not need constant and consistent AT to access the educational curriculum. Student had access to a Chromebook which provided speech to text and text to speech.
26. Both Parent and Teacher noted that Student had difficulty with accessing online programs, including speech to text software independently.
27. The District never followed up to ascertain whether Student needed additional AT services or devices.
28. In the March 8, 2022 letter, Grandparent requested an OT, AT and comprehensive evaluation.
29. The OT evaluation had been agreed to at the February 11, 2022 IEP meeting but has not been completed.
30. Grandparent was to assist Student with online supports at home using Student's Chromebook, but Grandparent was not able to provide much assistance because of

limited knowledge and experience with Chromebooks and the software Student was using.

31. During interviews, the District noted that the District does not conduct AT assessments because all students have access to Chromebook with speech to text and text to speech. However, if there were additional AT needs suspected, an AT evaluation could be completed.
32. Student had a new Case Manager and Special Education (SE) Teacher for the 2022-2023 school year.

Development and implementation of IEP

33. A review of the PLAAFP on the April 28, 2022 IEP indicated inconsistent levels of academic performance in reading, writing and math.
34. The Teacher noted that Student was not able to perform at grade level in reading, writing or math and needed extensive help in the classroom.
35. The PLAAFP states that Student's reading level was beginning third grade. Later in the PLAAFP, it indicated Student's Lexia score was first grade, level H. The Istation score was 1590 Level 1 to level 3 (second grade at or below Level H, first grade). Student's sight word frequency was 61% at the third-grade level.
36. The present levels of academic achievement and functional performance (PLAAFP) also noted that Student struggled with grade level work and could not read independently. The text was read aloud to Student or Student used audio books. Student struggled with reading comprehension and math computation. Teacher often had to work 1-1 with Student for Student to be able to complete assigned work.
37. Student was not consistently able to use speech to text or text to speech functions without assistance.
38. The Reading Specialist that worked with Student stated that Student had reading growth from September 23, 2020 (the last IEP) until February 11, 2022, (the new IEP) from kindergarten level to beginning third grade at the time of the February 11, 2022 IEP.
39. The Reading Specialist reported during the interview and it was noted in the PLAAFP that although Student was not yet at grade level in reading, Student had made three grades of progress since receiving special education services in reading and was expected to be at grade level (5th grade) by the end of the 2022-2023 school year.
40. The PLAAFP noted "Lexia will tell us about [Student's] need and what lesson the team should focus on."
41. Although requested, data to support Reading Specialist's conclusion was not included in the records submitted by the District.

42. Student's reading goal on the February 11, 2022 IEP was to demonstrate reading fluency and comprehension at a third-grade reading level orally and in writing.
43. Despite the accommodations and modifications provided in the IEP, Student was unable to complete fourth grade work and needed extensive help from the classroom teacher.
44. Student needed support in math, reading and writing to complete assigned work.
45. According to the Teacher, Student greatest struggle was writing and sequencing multiple sentence passages. Often, Teacher would need to be a scribe for Student.
46. Student had no writing goal and did not receive special education services in writing during the 2021-2022 school year. A writing goal was added to the February 11, 2022 IEP for Student to write sight words.
47. The District explained that there was no writing goal because there was a writing component included in the District's reading program. They also opined that Student had a new SE Teacher during the 2021-2022 school year, so the District was not sure why a writing goal was not included on the IEP.
48. At the April 28, 2022, a new writing goal was included which addressed writing passages.
49. Student's writing goal was to organize, compose and edit a written response to an assigned topic with five sentences using a writing rubric with appropriate vocabulary, capitalization and punctuation. There was also a short-term objective to write spelling words.
50. Student also struggled in math. The IEP noted that math was at the kindergarten level in some areas and Student had significant gaps in basic knowledge that impacted the completion of higher-level grade level math skills.
51. Student struggled with fractions and division with grouping and regrouping.
52. Student needed extensive assistance in math to complete grade level work. Student had difficulty recalling previously learned math skills. Story problems were very challenging and Student did not understand multiplication or division.
53. Student's math goal for 5th grade was to add, subtract, multiply and divide greater than 2 digits.
54. Although Student was still not at grade level in reading and had significant gaps in math, Student had made more than one year of growth this past year.
55. The discrepancies on the PLAAFP on the IEP included disagreements between data from the Teacher and the Reading and Math Specialist and SE Teacher.
56. During the interview, the District noted that Teacher was underestimating Student's abilities and expecting more progress and growth to happen in a shorter time. In contrast, the Reading Specialist and SE Teacher, based on the results from the reading and math programs, reported progress in all areas.
57. In the April 28, 2022 IEP, Student received 5.38 hours of special education service per week. This included 180 minutes a week in reading, 45 minutes in writing, 90 minutes a week in math and 30 minutes a month of audiology services.

58. Student was in the general education class the majority of the day but received all special education services in the resource room. Grandparent wanted more inclusion but the IEP team determined that Student's least restrictive environment (LRE) was the resource room for special education services.
59. The District used the ALEKS program for specialized instruction in math. According to District personnel, this program allowed for the continuous determination of Student's skills and any learning gaps that Student may have and provided instruction and training in those deficit areas.
60. Grandparent requested documentation of the efficacy of the ALEKS program for special education students. Information was provided to the Grandparent that indicated that the program was not developed for special education eligible students but the program and information provided were beneficial for determining the needs and progress of special education students.
61. The SE Teacher worked with three students during Student's math services time and all students were at different levels in the ALEKS program. The SE Teacher reported that she would walk around and assist as needed but if she was working with one student, it might be some time before she was able to get back to student.
62. Grandparent reported that Student was using the program without the direct assistance of the instructor at all times so when Student did not know the answer or how to solve the problem, the program would state "let's take a break" and no additional instruction was provided for a period of time and a new concept would be addressed.
63. It was not clear how much time lapsed before a new concept was presented or how often SE Teacher monitored Student.
64. At the April 28, 2022 IEP meeting, the IEP team determined that Student did not need ESY services because there was no evidence of significant regression and recoupment.
65. During the 2021 summer, Student was offered the opportunity to participate in summer institute. This past summer, online supplemental programs were provided to Student. There was no follow up to ensure Student was able to access those programs.

Procedural safeguards

66. The PWN attached to the April 28, 2022 IEP meeting noted that on February 14, 2022 IEP meeting (The IEP lists a February 11, 2022 meeting date), the IEP team agreed to an OT and comprehensive academic and cognitive assessment but also that the REED showed no need for further assessments.
67. Although the District says the evaluations are "in the pipeline", no consents were provided nor was there an end date for completion of the evaluations.

68. The IEP team met on April 7, 2022 to discuss Grandparent's concerns from that letter. The meeting ended before all concerns were addressed. The meeting was reconvened on April 28, 2022.
69. One of Grandparent's concerns was that Student needed to complete the auditory program and supplemental math and reading online services at home but Grandparent was not able to assist Student and Student was unable to access programs independently.
70. There were concerns that Student had executive functioning, organizational and/or language processing deficits and that was the reason for the agreed to OT evaluation that had not been completed.
71. Despite the inconsistent reading and math results on the PLAAFP, the District did not request consent for additional assessments to accurately determine Student's present levels.
72. At the beginning of the 2021-2022 school year, the school did not have a SE teacher. In November, a SE teacher was assigned to the school two and one-half days per week.
73. It was not until November of 2021 that Student began to receive the special education services outlined in the IEP during the 2021-2022 school year.
74. Student did not have a consistent schedule for services because of the SE Teacher's limited time in the building and large caseload.
75. Teacher requested a copy of Student's schedule every month but Student did not have a consistent schedule until March or April.
76. Without a schedule or service logs, it was difficult to determine whether all services were consistently provided.
77. Grandparent wanted more services and inclusion; According to Grandparent, District's response was that there were not enough available staff to provide inclusion services.
78. Grandparent requested to meet in September and October, 2021 but this was not possible. The earliest meeting time available was in December.
79. The IEP Team finally held an IEP meeting December 15, 2021, but the meeting ended without finishing the IEP. They could not reconvene until February 11, 2022 and all decisions made at the December meeting were not incorporated in the February 11, 2022 IEP.
80. Grandparent said items like service minutes and location of services were agreed to at the December 15, 2021 IEP meeting but when the final IEP was received, services minutes and location were changed for math and written language services.
81. Although requested, no documents from the December 15, 2021 IEP meeting were provided to the investigator. Information from that IEP meeting was included in PWNs from subsequent meetings.
82. Teacher and Grandparent reported that the programs used by the District were not always compatible with Chromebooks nor was Student able to independently use the programs.

However, there was limited assistance to increase Student's independent use of those programs.

83. The District did not monitor Student's work at home nor did they verify that Student was able to access the programs independently to support the instruction at school.
84. The ALEKS program was not developed for children with disabilities but the District chose this program, in part, because of its ability to measure small deficits that impact on mastery of later math skills. The program constantly monitors and reports Student's progress and particular concepts or skills with which Student struggled.
85. Grandparent expressed concern about middle school next year and the Student's ability to progress with the skill gaps in math, reading and writing.
86. Although Grandparent reported that no progress notes were provided, the District stated that Student was making progress in reading, writing and math.
87. In the April 28, 2022 IEP, progress notes were to be provided monthly.
88. Progress notes were provided to the investigator for the reading, math and written language goals. The progress noted for written language included progress on October 28, December 15, March 21, and April 7. Student did not have a written language goal before February 11, 2022. The progress noted on the writing goal progress note did not reflect the sight word goal but discussed reading decoding.
89. The reading and math progress notes only included information dated May 12, 2022.
90. At the April 28, 2022 IEP meeting, the IEP team agreed on goals.
91. The IEP team members agreed that Student's reading ability was higher than Student's comprehension skills.
92. Prior to IEP meetings, the team members would meet to discuss Student's needs and have a unified plan to present to Grandparent at the meeting.
93. At that April 28, 2022 IEP meeting, the Special Services Coordinator went line by line through the issues outlined in Grandparent's letter. The District addressed every point in the letter and clarified that Grandparent understood the District's position.
94. Over the course of the 2021-2022 school year, the IEP team met multiple times because issues were not resolved before the end of the scheduled IEP team meeting time. The District tried to schedule a follow up meeting as soon as possible but, according to the District, that was impossible with all of the provider's schedules.
95. No required IEP team members left a meeting earlier than the scheduled ending time, but rather, the scheduled meeting time had expired and IEP team members had other commitments so another meeting had to be scheduled at a later date.
96. The District used the standard of regression and recoupment for the determination of ESY services. Student did not demonstrate significant regression or recoupment to justify ESY services.

97. The District provided access to online programs over the summer and encouraged Student and Grandmother to use those programs and other supports.
98. During a recent evaluation, Student tested out of the resource reading group.
99. All special education services outlined on the IEP were provided according to the District, but although the District indicated logs were provided, no logs were received.
100. Until the IEP was completed on February 11, 2022, the District followed Student's 2021 IEP.
101. An advocate was present for the April 28, 2022 IEP meeting that lasted four to five hours. Grandparent did not express any concerns after that meeting until the Complaint was filed.
102. The Special Services Coordinator shared with Grandparent that the District would schedule an IEP meeting anytime she requested a meeting.
103. The District did not change the IEP services or times outside of the IEP meeting. Grandparent was provided training on how to use computer programs at home, but Grandparent still struggled with assisting Student.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to timely evaluate Student in all suspected areas of disability and gather the necessary data to determine Student's needs and develop an appropriate IEP in violation 34 C.F.R. § 300.111, 34 C.F.R. § 300.306 and 34 C.F.R. § 300.101 and 6. 31.2.10 (A), (F)(1) and 6.31.2.8 NMAC, specifically whether the District,

- a. Failed to complete an occupational therapy (OT) evaluation;
- b. Failed to complete a cognitive and academic evaluation, including a dyslexia assessment; and
- c. Failed to complete a requested assistive technology (AT) assessment?

a. Failed to complete and occupational therapy (OT) evaluation

Reevaluations are required to determine both if the child is still eligible for special education and related services and the needs of the particular child. 34 C.F.R. § 300.305. A reevaluation must be conducted once every three years unless the parent and district agree there is no need for a reevaluation. 34 C.F.R. § 300.303 (B). In determining the need for a reevaluation, the IEP team must complete a review of existing evaluation data (REED) on the child which would include evaluations and information from the parent, current assessment and classroom-based observations and observations by teachers and related service providers. 34 C.F.R. § 300.305 (a)(2)(i)(A). After completion of the REED, the IEP team must identify what other data is needed to determine:

1. Whether the child is a child with a disability and the educational needs of the child;

2. The present levels of academic achievement and related developmental needs of the child;
3. Whether the child continues to need special education and related services; and
4. Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum. 34 C.F.R. § 300.305 (a)(2).

Failing to consider the need for other information to develop an appropriate IEP beyond completion of the REED can be a denial of FAPE. *New Mexico Public Education Department*, 115 LRP 12278 (SEA NM 2015).

Student's last comprehensive evaluation was completed in March, 2019. The IEP team completed a REED on February 14, 2022 and determined that no additional assessments were needed; the IEP team had sufficient information to develop an appropriate IEP. Grandparent signed off on the REED, but later expressed concerns for additional evaluations including an OT, AT and comprehensive evaluation because of Student's difficulties with reading, handwriting, executive functioning and the need for a scribe to complete written work in the classroom. The Grandparent requested the OT evaluation at the February 11, 2022 IEP (inconsistent dates February 11, 2022 and February 14, 2022) meeting and the District agreed on the PWN from that meeting. The OT evaluation had not been completed at the time of the filing of the Complaint. If District does not intend to complete a requested evaluation, they must provide a PWN outlining the reasons for the refusal to evaluate. Reevaluations do not have specific timelines for completion but they must be completed in a timely manner. The last IEP meeting for this Student was April 28, 2022 more than two months after the OT evaluation was accepted, but it has not been completed yet. The District is in violation of IDEA for failing to timely complete the OT evaluation or providing a PWN for refusing to complete the evaluation they had previously agreed to provide.

b. Failed to complete a cognitive and academic evaluation, including a dyslexia assessment

The District, when conducting an evaluation, must use a variety of assessment tools and strategies to gather needed functional, development and academic information about the child, including parental information. The child must be assessed in all suspected areas of disability. The purpose of the reevaluation is to determine whether the child continues to be a child in need of special education and whether there are any new or modified needs that can be met through special education and related services to allow student to meet measurable annual goals and participate in the general education curriculum. 34 C.F.R. § 300.304. Assessments must be sufficiently comprehensive, even if the area of concern is not commonly linked to the disability category for which the child is eligible. 34 C.F.R. § 300.304 (c)(6).

Grandparent requested a comprehensive evaluation of Student including a dyslexia assessment because of Student's ongoing reading needs. Even though Grandparent previously agreed to the determination following the REED that no further assessments were needed, Grandparent was concerned about Student's lack of progress in reading and requested a comprehensive evaluation. If the District believes that the evaluation was not needed, then a PWN should have been sent outlining the reasons for the refusal to evaluate. The District has now agreed to conduct a comprehensive evaluation of Student and consent has been received and the evaluation is "in the pipeline" but this was not done until after the complaint was filed. Moreover, the records for this Student are inaccurate and list multiple dates for meetings without corresponding meeting notices. For example, the April 18, 2022 PWN indicated that the REED from that day determined no additional assessments were needed but a comprehensive evaluation was agreed to and it also noted an OT evaluation was agreed to on February 14, 2022 (The IEP meeting was February 11, 2022). There were no consents obtained or provided to the investigator. These were procedural violations of IDEA.

c. Failed to complete a requested assistive technology (AT) assessment

"An "assistive technology device" is any item, piece of equipment, or product system used to increase, maintain, or improve the functional capabilities of a child with a disability. This term includes devices that are acquired commercially off the shelf, as well as those that are modified or customized. It does not include a medical device that is surgically implanted or the replacement or such a device." 34 C.F.R. § 300.5.

"An "assistive technology service" is any service that directly assists a child with a disability in the selection, acquisition, or use of an AT device. AT services may include:

- Evaluating the student's needs;
- Purchasing, leasing, or otherwise providing for the acquisition of AT devices by children with disabilities;
- Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing AT devices;
- Coordinating and using other therapies, interventions, or services with AT devices;
- Providing training or technical assistance to a child with a disability or, if appropriate, the child's family; and
- Providing training or technical assistance for professionals, employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the child's major life activities." 34 C.F.R §300.6.

It is required under IDEA that each school district ensure that AT devices or services are made available if the services are required as part of that Student's IEP. 34 C.F.R. § 300.105 (a). To determine the need for AT services or devices, the District may need to conduct an evaluation.

Letter to Fisher, 23 IDELR 565 (OSEP 1995). The failure to evaluate a student's need for AT services may be a denial of FAPE. See, e.g., *North Hills School District v. M.B.*, 65 IDELR 150 (Pa. Commonwealth Ct. 2015, unpublished). See in contrast, *E.F. v. Newport Mesa Unified School District*, 726 F App'x 535, 71 IDELR 161 (9th Cir. 2018) (there was no denial of FAPE because no need for AT services).

Grandparent repeatedly requested an AT evaluation for Student. The District's consistent response was all students have Chromebooks that have text to speech and speech to text capability so Student did not need additional AT services or devices or an evaluation to determine the need for such services or devices. Grandparent and Teacher both reported that Student had difficulties accessing text to speech on the Chromebook and also accessing other software programs that Student was to work on at home. Although the District provided training to both Grandmother and Student, Grandmother still reported difficulties with accessing the programs on the Chromebook and assisting Student with accessing the computer programs. If the District refused to conduct an evaluation requested by the Grandparent, they should have noted the same on a PWN with the reasons for the refusal. The PWN after the April 28, 2022 IEP meeting listed the reasons why there was no need for a AT assessment. This was not done before that time even though Grandparent had repeatedly requested an AT assessment. The District committed procedural error by not timely completing a PWN refusing an AT assessment after repeated requests from Grandparent. Additionally, the District had sufficient information that Student's need for AT or training should have been reassessed as the technology provided was generally inaccessible to Student.

The District is in violation of 1a, 1b and 1c. Corrective action is required.

Issue No. 2.

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

- a. Failed to provide appropriate specialized instruction in reading, math and writing as required by Student's IEP;**
- b. Failed to ensure timely implementation and efficacy of computer auditory development, writing services and math educational programming;**
- c. Failed to obtain sufficient and necessary data to determine Student's needs so as to develop an appropriate IEP that provided a free appropriate public education (FAPE);**
- d. Failed to ensure adequate progress on goals or modify IEP goals from year to year if insufficient progress and timely provide progress reports;**
- e. Failed to consider needs of Student instead of staffing needs in the determination of special education services and Student's difficulties with online learning;**

- f. **Failed to develop goals aligned with State standards that would allow Student to make yearly progress on goals; and**
- g. **Failed to consider necessary factors in the least restrictive analysis for Student or provide instruction and services in the Student's least restrictive environment?**

a. Failed to provide appropriate specialized instruction in reading, math and writing as required by Student's IEP

Special education is defined as “specially designed instruction, provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability, including: 1) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and 2) instruction in physical education.” 34 C.F.R. § 300.39 (a)(1). Specially designed instruction is defined as “adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction -- 1) to address the child's unique needs resulting from the disability; and 2) ensuring the child's access to the general curriculum so that the child can meet the educational standards that apply to all children within the jurisdiction of the public agency.” 34 C.F.R. § 300.39 (b)(3).

The IDEA does not require the District to list or use any specific methodology for a student with a disability as long as the student receives a FAPE through the use of that methodology. 71 Fed. Reg 46,665 (2006); 34 C.F.R. § 300.320 (d)(1). Districts have broad discretion in the choice of methodology for a particular student. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 102 S. Ct. 3034, 458 U.S. 176 (US 1982) and *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (US 2017).

Although Grandparent was not in agreement with the reading and math methodology used with Student, data reported by the Reading and Math Specialists indicated that Student had been making progress in reading, writing and math using the District's chosen methodologies. The PLAAFP from the IEP, which included Teacher's classroom data, indicated that Student had not been making progress in those areas, but that discrepancy would warrant the District to conduct additional assessments to determine if Student had additional needs. The Specialists' data that was reported during the interviews supported that Student had been making progress with the use of the District's chosen methodologies. There was no violation with the District's chosen methodology.

b. Failed to ensure timely implementation and efficacy of computer auditory development, writing services and math educational programming

See Issue 2a. The IEP must be implemented as written with all required components. 34 C.F.R. § 300.323 (c) (2). An IEP must be in effect at the beginning of each school year. 34 C.F.R. § 300.323 (a). Also, a district must ensure that as soon as possible after development of the IEP, special education, related services and other supports and services outlined in the IEP are provided to Student. 34 C.F.R. § 300.323 (c) (1) and (2).

There was a delay in services at the start of the 2021-2022 school year. The District did not have a SE Teacher on site at the beginning of the year. A SE Teacher was assigned to the building in early November, but due to multiple buildings and a large caseload, scheduling of services was inconsistent. After November, Student received special education services in reading and math. Although Student had been determined eligible in the written language, Student did not have a written language goal on the IEP or receive services in the area of written language. The District stated that written language was a component of the reading methodology the District was using, but if Student had needs in that area, a goal should have been included on the IEP with documentation on the IEP of how that Student would receive specialized instruction in that area. An actual writing goal and services were added to the IEP during the April 28, 2022 IEP meeting.

Following the completion of the CAP assessment, it was determined that Student did not have a central auditory processing disorder, however, Student would benefit from some assistance provided at home through a computer program thirty minutes a day, five days a week. The program was provided to Student, but Student did not complete the program at home. This was, in part, because Grandparent stated neither she nor Student were provided with training on how to use the program. Since Student did not use the program and the District did not follow up with Student to see why Student was not using the program, it is impossible to determine the efficacy of that program. This was a supplemental program to assist Student and was not because Student was eligible for special education services because of a CAP deficit.

With respect to the efficacy of the writing and math educational programming, the Reading and Math Specialists and Sped Teacher agreed that Student was making progress in math and writing. This was disputed by the Teacher. A methodology choice was within the discretion of the District if it can be determined that the use of the chosen methodology provided FAPE.

The District erred in not starting special education services at the beginning of the year with Student. The lack of available staff does not excuse the District's failure to provide Student the specialized instruction required by the IEP. Moreover, the District erred by not including a written language goal and additional services, if needed, when that was an area of eligibility as determined by the IEP team.

c. Failed to obtain sufficient and necessary data to determine Student's needs so as to develop an appropriate IEP that provided a free appropriate public education (FAPE)

Districts must have sufficient information to determine if a child is eligible for special education services and the child's needs. 34 C.F.R. § 300.305 (a)(2). Each IEP must contain: "A statement of the child's present levels of academic achievement and functional performance (PLAAFP), including --

1. How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
2. For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities."

34 C.F.R. § 300.320 (a)(1).

The PLAAFP must be inclusive and provide a baseline that outlines the child's needs, including both academic and nonacademic areas. This statement should also provide relevant background information about the child's areas of need, strengths, interests, and learning style. 34 C.F.R. § 300.324 (a).

The PLAAFP on Student's IEP listed inconsistent results. At one point in the PLAAFP, Student was reading at a first-grade level, elsewhere, data indicated that Student was at beginning third grade level. In math, Student had difficulty with addition, subtraction, multiplication and division but the Math Specialist indicated Student had gaps that caused some difficulties in achievement at grade level math. However, the Student had demonstrated mastery of some of those skills using the ALEKS program. Because of the discrepancies in the PLAAFP and the notation that Student needed support in math, reading and written language without information about Student's specific skill deficits and needs, the District should have requested permission to conduct additional assessments to determine Student's actual present levels. Without accurate information, the District cannot develop appropriate goals and provide the needed specialized instruction to allow Student to make progress on all goals and to receive FAPE. A comprehensive evaluation is "in the pipeline" but when there were discrepancies in Student's present levels, the District should have immediately requested consent for additional assessments instead of waiting until Grandparent requested the comprehensive assessments. This was a substantive violation of IDEA.

d. Failed to ensure adequate progress on goals or modify IEP goals from year to year if insufficient progress and timely provide progress reports

Progress reports must be provided documenting the progress made on each goal on a child's IEP. 34 C.F.R. § 300.320 (a)(3) When Student is not making progress on their goals, the IEP team needs to meet to modify the goals or determine the need for additional supports and services. 34 C.F.R. § 300.324 (b)(ii)(A).

The District did not provide consistent quarterly progress notes as required by Student's IEP. There were progress notes in written language when Student did not have a written language goal but there were several missing progress notes in the area of reading or math. District stated that Student had made progress in all areas but failed to provide the data in support of this assertion or the corresponding progress notes to the investigator. Without that information and the inconsistent PLAAFP information included on the IEP, it is difficult to determine if Student has been making progress on all goals. Moreover, although Student has been eligible in the area of written language, there was no goal in that area. There were minor changes in the reading goal for Student and the math goal did change from year to year. Failure to prepare and provide consistent progress notes to Grandparent with data to support the progress and not have appropriate goals in all areas of need was a violation of the IDEA.

e. Failed to consider needs of Student instead of staffing needs in determination of special education services and Student's difficulties with online learning

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." *Endrew 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. *Endrew 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. *Endrew 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).

It is the obligation of the District to develop and implement an IEP for Student that provides FAPE. The District did not provide FAPE to Student at the start of the 2021-2022 school year because there was no available SE Teacher. That situation was remedied in November. There was no written language goal on the IEP nor documentation on the IEP about why Student did not need a written language goal. The District's explanation was language was part of Student's

reading program or there was a different SE teacher last year. Grandparent and Teacher both reported Student's difficulties with online learning and there was no follow up with District other than one training to ensure Student was actually able to access online learning. Grandparent requested but was denied an AT assessment to determine if Student needed AT devices or services to allow Student to access the curriculum. The lack of qualified staff, lack of appropriate goals and failure to consider Student's needs for AT devices or services impacted Student's receipt of a FAPE and were a violation of IDEA.

f. Failed to develop goals aligned with State standards that would allow Student to make yearly progress on goals

A child's annual IEP must include measurable annual goals, both academic and functional that meet the child's needs that result from the child's disability and allow the child to participate in and make progress in the general education curriculum. The IEP goals must address all of the child's needs that result from the child's disability. 34 C.F.R. § 300.320 (a)(2). Annual goals should reflect what is reasonably expected to be accomplished during the annual IEP period. *Letter to Butler*, 213 IDELR 118 (OSERS 1988). The annual goals should be specific to be able to determine progress made and the specific skills need to achieve progress on goals. 64 Fed. Reg. 12, 471 (1999).

Student's goals in reading, writing and math on the April 2022 IEP were as follows:

1. Student's math goal for 5th grade was to add, subtract, multiply and divide greater than 2 digits.
2. Student's reading goal was to demonstrate reading fluency and comprehension at a third grade reading level orally and in writing.
3. Student's writing goal was to organize, compose and edit a written response to an assigned topic with five sentences using a writing rubric using appropriate vocabulary, capitalization and punctuation.

These goals did not reflect the State standards for an ending 4th grade student and beginning 5th grade student. These goals were reflective of Student's present levels on the April 28, 2022 IEP with respect to the information provided by the SE Teacher and Math and Reading Specialists. It was reported that Student had been making progress on the reading goal and was expected to be at grade level by the end of 5th grade. Student was mastering some of the earlier gaps in math concepts that were essential for successful completion of 5th grade math concepts. The writing goal was reflective of the State standards. These goals from the April 28, 2022 IEP were specific, individualized and measurable and demonstrated what Student needed to master to make yearly

progress. Student's previous IEP goals were not appropriate and were addressed in 2d. There was no violation of IDEA with the goals on the April 28, 2022 IEP.

g. Failed to consider necessary factors in the least restrictive analysis for Student or provide instruction and services in the Student's least restrictive environment

The IDEA requires that a district must ensure that a child with a disability, to the maximum extent appropriate, is educated with children who are nondisabled. Removal should only occur when the education of that child in regular classes, with the use of supplementary aids and services, does not allow progress on goals. 34 C.F.R. § 300.114 (2). A student's least restrictive environment (LRE) must be determined on an individual basis as determined by the child's IEP. *Letter to VanWart*, 20 IDELR 1217 (OSEP 1993). Some of the factors to be considered in an LRE analysis include:

1. Whether the district has made reasonable efforts to accommodate the child in a regular classroom.
2. The educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special class. Educational benefits are considered to be both academic and nonacademic in nature, encompassing socialization opportunities, which can include the development of social and communication skills, an increased sense of self-esteem, language development, and role modeling.
3. The possible negative effects, including those the child would have on other students in the class.

Oberti v. Board of Education of the Borough of Clementon School District., 995 F.2d 1204 (3d Cir. 1993).

The Teacher noted that Student was not able to complete 4th grade work independently without extensive, often one-to-one assistance from the Teacher. Teacher often needed to act as a scribe for Student and all texts were read to Student or Student used audio books. Student's present levels in reading, math and writing as noted on the IEP ranged from significantly delayed to approaching grade level work. These factors were considered by the IEP team in determining that Student needed special education services within the resource room. That placement allowed Student to make progress on goals. Student's placement was not a violation of the IDEA.

The District is in violation of IDEA in 2b, 2c, 2d and 2e. Corrective action is required.

Issue No. 3.

Whether the District denied Parent procedural safeguards, including meaningful parental participation, in the development of Student's IEP in violation of 34 C.F.R. § 300.322, 34 C.F.R. § 300.500; 34 C.F.R. §300.501(b) and 6.31.2.11(B)(2), 6.31.2.13(A) and 6.31.2.13(C) NMAC, specifically whether the District,

- a. Failed to consider Parental concerns raised at multiple IEP meetings;
- b. Terminated the IEP meeting early or required members left the IEP meeting before all IEP issues were addressed or resolved;
- c. Failed to implement or discuss decisions made during the December, 2021 IEP meeting and agreed to in the prior written notice (PWN) from that meeting in subsequent meetings;
- d. Misrepresented or mischaracterized parental input on the IEP;
- e. Modified goals and service times outside of the IEP meeting without Parental involvement; and
- f. Failed to consider the appropriate standards for the need for extended school year (ESY) services?

a. Failed to consider Parental concerns raised at multiple IEP meetings

Parents are mandatory members of the IEP team and are afforded the opportunity to participate in any and all IEP meetings. 34 C.F.R. § 300.321 (a); 34 C.F.R. § 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*, 757 F.3d 1173 (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*, 392 F.3d 840 (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).

Grandparent stated that decisions were made at the December 15, 2021 IEP meeting that were not incorporated into Student's IEP. The District delayed the completion of the IEP meeting until February 11, 2022 and failed to consider and address Grandparent's concerns. While there were different stated reasons for the delays in scheduling an IEP meeting to complete Student's IEP, an IEP was ultimately developed with the involvement of Grandparent. After Grandparent wrote a seven-page letter on March 8, 2022 to District outlining concerns, the District used the Special Services Coordinator as a facilitator at the April 28, 2022 IEP meeting. At this meeting, the facilitator went through line by line all of the concerns outlined in the March 8, 2022 letter. The facilitator also verified that Grandparent understood the decisions made, and while Grandparent may not have agreed with all decisions included in Student's IEP, Grandparent fully participated

in the development of Student's IEP. While the District may not have considered and addressed all of Grandparent's suggestions or concerns at all IEP meetings, The District, considered and addressed all of Grandparent's concerns even if they were not incorporated in the IEP. There was no violation of IDEA.

b. Terminated the IEP meeting early or required members left the IEP meeting before all IEP issues were addressed or resolved

See Issue 3a. The following members are required members and must attend the IEP meeting for a particular student.

1. The parents of the child.
2. Not less than one general education teacher of the child (if the child is or may be participating in the general education environment).
3. Not less than one special education teacher of the child or, where appropriate, not less than one special education provider of the child.
4. A district representative who: i) is qualified to provide, or supervise, the provision of specially designed instruction to meet the unique needs of children with disabilities; ii) is knowledgeable about the general education curriculum; and iii) is knowledgeable about the availability of district resources.
5. An individual who can interpret the instructional implications of evaluation results.
6. At the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate.
7. Whenever appropriate, the child. 34 C.F.R. § 300.321 (a).

Mandatory IEP team members may be excused from all or part of the IEP meeting if the parent in writing, consents to the excusal and the member submits in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting. 34 C.F.R § 300.321 (e)(2).

IEP meetings were scheduled for a certain period of time. At the conclusion of the scheduled time, certain members of the IEP team needed to leave because of other commitments. The IEP meeting on December 15, 2021 was not completed at the end of the scheduled time because of a lengthy discussion of Student's present levels and needs. The plan was to reconvene the meeting as soon as possible but the next available time for the next IEP meeting was February 11, 2022. The District indicated that scheduling conflicts prevented reconvening the IEP meeting at an earlier date. Required members were at all IEP meetings and excusal was not sought when members left because the scheduled time for the IEP meeting had lapsed and another IEP

meeting with all required IEP team members would need to be reconvened. At the last IEP meeting on April 28, 2022, the meeting lasted at least four hours to ensure all of Grandparent's concerns were addressed and an IEP was finalized.

The delays in scheduling the annual IEP until December 15, 2021 when Student's annual IEP was September 23, 2021 was, in and of itself, a violation of IDEA. Furthermore, it is clear that the District did not provide sufficient time to conduct a full IEP meeting as it had to table the December 15, 2021 meeting because District members of the team had other conflicting meetings or activities. The delay was only made worse because the IEP team was not reconvened until February 11, 2022 and the team did not incorporate the decisions made at the December 15, 2021 IEP meeting into the final IEP. These actions deprived parent of the opportunity to engage in the process of developing the IEP for Student.

c. Failed to implement or discuss decisions made during the December 15, 2021 IEP meeting and agreed to in the prior written notice (PWN) from that meeting in subsequent meetings

See Issue 3a. IEP team decisions are made by a consensus or general agreement of the members, there is no requirement for a vote on provisions of the IEP. The IDEA's goal of cooperative educational planning contemplates educators and parents coming together to develop an agreeable educational plan. The IDEA does not allow participants to vote on the appropriate IEP. *Buser v. Corpus Christi Independent School District*, 20 IDELR 981 (S.D. Tex. 1994), *aff'd*, 22 IDELR 626 (5th Cir. 1995), *cert. denied*, 110 LRP 66347, 516 U.S. 916 (1995). When consensus cannot be reached, the District will make the decision and provide a PWN reflecting the decision. 34 C.F.R. § 300.503(a).

The District provided a PWN to Grandparent after the December, 2021 IEP meeting but the PWN was not provided to the Investigator. The annual IEP was not finalized nor implemented until after the conclusion of the February 11, 2022 IEP meeting. Until the IEP is finalized at an IEP meeting, decisions can change as discussion continues or more information becomes readily available. That is what happened here. After Grandparent provided the letter on March 8, 2022, the IEP team met again for over four hours on April 28, 2022 to discuss Grandparent's concerns and modify the IEP. Grandparent attended all IEP meetings and her concerns were addressed in the April 28, 2022 IEP meeting. However, the delays in scheduling IEP meetings and time constraints for IEP meetings prior to the April 28, 2022 IEP meeting deprived Grandparent of meaningful parental participation.

d. Misrepresented or mischaracterized parental input on the IEP

Participation includes a consideration of parent's suggestions, and as appropriate, incorporating those suggestions into the IEP. *Deal v. Hamilton County Board of Education*, 392 F. 3d 840 (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). Consideration of parents' suggestions does not mean the District has to include or agree with all of a parent's suggestions. *Blackmon v. Springfield R-XII School District*, 198 F.3d 648 (8th Cir. 1999).

While Grandparent may have believed that parental input provided was not incorporated accurately in the IEP, at the final IEP meeting in April, 2022, the facilitator went line by line through Grandparent's concerns outlined in that letter. An advocate participated in the meeting with Grandparent to ensure Grandparent's concerns were heard. The facilitator took the time to address all of Grandparent's concerns and verified that Grandmother's issues were heard and considered. There was no violation on this record.

e. Modified goals and service times outside of the IEP meeting without Parental involvement

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 Grandparent asserted that Student's goals and service times were changed outside of the IEP meeting, there was no evidence that the April 28, 2022 IEP was not implemented as written.

A written language goal was added to Student's IEP after the February 11, 2022 IEP. There was a lengthy discussion about the amount of services Student needed in the area of written language but the IEP listed a goal, the amount of services and the location of those services and there was no evidence those services were not provided as written in the IEP nor that the IEP was changed after the IEP meeting. A different written language goal was added to the April 28, 2022 IEP. There was no evidence that Student had not received services to address that goal. There was no violation of IDEA.

f. Failed to consider the appropriate standards for the need for extended school year (ESY) services

A district must ensure that ESY services are available as needed to provide a FAPE. The decision regarding the need for ESY services must be made by the IEP team on an individual basis. 34

C.F.R. § 300.106 (a). IDEA does not provide a standard for determination of the need for ESY services; however, States may establish standards. *Letter to Myers*, 213 IDELR 255 (OSEP 1989). A common standard for the ESY need has been regression and recoupment. 71 Fed. Reg, 46, 582 (2006).

In this case, the District used regression and recoupment as the basis for the need for ESY services. The State of New Mexico has not mandated any other standard to consider and therefore, the District was within its discretion to review Student's regression and recoupment to determine that Student did not need ESY services. The Teacher provided data that did not agree with the data from the SE Teacher and Specialists, but the District reviewed all data to determine Student's need for ESY services and found that Student was not eligible. Student was provided with online and other supplemental materials during the summer months. There was no violation of IDEA.

The District was in violation of IDEA in Issue 3b and 3c. There were no violations of 3a, 3d, 3e and 3f. Corrective action is required.

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.

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 violated issues 1a, 1b, 1c, 2b, 2c, 2d, 2e, 3b and 3c. The District did not violate 2a, 2f, 2g or 3a, 3d, 3e and 3f. There were delays in completion of Student's IEP. The first meeting was

in December and the last meeting when Student's annual IEP was finalized was not until February 11, 2022 and modified on April 28, 2022, when a written language goal was finally added to Student's IEP. Without comprehensive assessments and an accurate, thorough understanding of Student's present levels of performance, Student's IEP may not have been reasonably calculated to allow Student to make progress in light of Student's circumstances. Moreover, not all Student's needs were addressed in the IEP. Student had a documented written language need without an IEP goal. The district opined that written language was addressed through the reading curriculum but that curriculum was not individualized to Student's needs. There was a substantive denial of FAPE on this record.

There were also a number of procedural violations. 1. The incomplete and inaccurate records that were provided to the Investigator. 2. The lapse in the IEP on September 22, 2021 but an IEP was not completed until February 11, 2022. 3. The delays or refusals to complete requested assessments without proper PWNs. 4. There were delays in implementation of Student's IEP because of staffing issues and failure to include a written language goal and services in Student's IEP. 5. The inconsistent statements in the IEP regarding Student's PLAAFP impacted the development of an appropriate IEP triggering the need to seek consent for additional evaluations instead of waiting until the Grandparent requested an evaluation. Also, if there is a reason to suspect that Student may need AT services or devices, an AT assessment should be completed or PWN provided. Neither was done at the first request for an AT assessment. 6. The agreement to complete assessments but no evidence of consent or timeline for completion of AT, OT and comprehensive evaluations. These procedural violations deprived the Student of an educational opportunity and denied Student an educational benefit.

Grandparent was a participant in all IEP meetings and the District, at least at the April 28, 2022 IEP meeting, ensured that Grandparent's voice and issues were heard and considered. The inconsistencies in the PLAAFP were concerning and those inconsistencies should have triggered further discussion or assessments prior to the completion of Student's IEP. District personnel, with the exception of the Teacher, reported that Student made progress on all goals during the 2021-2022 school year, but without progress notes or some other data to verify progress, it cannot be determined that Student has made progress. The District was unable to provide quarterly progress notes on all goals for this Student. That violation deprived Grandparent of meaningful parental participation. For all of these reasons, there were multiple procedural violations that rose to the level of a denial of FAPE.

As to Issue 4, the District is cited and Corrective Action is required.

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
<p>34 C.F.R. § 300.111, 34 C.F.R. § 300.306 and 34 C.F.R. § 300.101 and 6.31.2.10 (A), (F)(1) and 6.31.2.8 NMAC,</p>	<p>The District failed to timely evaluate Student in all suspected areas of disability and gather the necessary data to determine Student’s needs and develop an appropriate IEP specifically when the District,</p> <p>Failed to complete an occupational therapy (OT) evaluation;</p> <p>Failed to complete a cognitive and academic evaluation, including a dyslexia assessment; and</p> <p>Failed to complete a requested assistive technology (AT) assessment.</p>
<p>34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC</p>	<p>The District failed to develop and implement an IEP that allowed Student to make educational progress in, specifically when the District,</p> <p>Failed to ensure timely implementation and efficacy of computer auditory development, writing services and math educational programming;</p> <p>Failed to obtain sufficient and necessary data to determine Student’s needs so as to develop an appropriate IEP that provided a free appropriate public education (FAPE);</p> <p>Failed to ensure adequate progress on goals or modify IEP goals from year to year if insufficient progress and timely provide progress reports;</p> <p>Failed to consider needs of Student in determining special education services and Student’s difficulties with online learning.</p>
<p>34 C.F.R. § 300.322, 34 C.F.R. § 300.500; 34 C.F.R. §300.501(b) and 6.31.2.11(B)(2), 6.31.2.13(A) and 6.31.2.13(C) NMAC</p>	<p>The District denied Parent procedural safeguards, including meaningful parental participation, in the development of Student’s IEP, specifically when the District,</p>

IDEA/State Rule Provisions Violated	Description of Violation
	<p>Terminated the IEP meeting early or required members left the IEP meeting before all IEP issues were addressed or resolved; and</p> <p>Failed to implement or discuss decisions made during the December, 2021 IEP meeting and agreed to in the prior written notice (PWN) from that meeting in subsequent meetings;</p>
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 21, 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 November 7, 2023 and reported to the SED no later than November 21, 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 21, 2022	Written Assurance Letter/Email	November 21, 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.	December 2, 2022	Notes from meeting prepared by District	December 9, 2022
3.	The District Special Education Director will meet with Student's	December 9, 2022	Notes from meeting prepared by District	December 16, 2022

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
	special education and general education teachers, 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.		that include the District attendees, their staff positions and date of meeting.	
4.	<p>District shall complete a comprehensive evaluation which shall include an AT and OT assessment to ascertain Student’s individual needs and PLAAFP in all areas.</p> <p>Any evaluations conducted after September 30, 2022 may serve to satisfy this requirement, but an AT and OT evaluation must be conducted if not already completed as part of the evaluation conducted after September 30, 2022.</p>	December 9, 2022	Signed parental consent form and evaluation report.	Within 15 days of completing evaluation report.
5.	District shall create a Home Support Plan to ensure that Student is able to access online programs independently and if further training or supports are needed, those will be provided. Also, if Grandparent is to assist with supports at home, the District will ensure that Grandparent has the necessary skills and equipment needed to assist Student with auditory processing needs and any other needs of Student to access educational content and curriculum.	January 6, 2023	IEP or PWN containing the written Home Support Plan	15 days after the FIEP meeting is held

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
	Grandparent shall be included in the creation of this plan.			
6.	<p>District shall review the provision of special education services provided during the 2021-2022 and 2022-2023 school years. District shall consult with Student’s special education teachers to identify missed services due to the delays in both provision of special education services and the failure to provide written language services.</p> <p>District shall create a plan to provide compensatory services for the services missed during this period. All compensatory education shall be provided by November 7, 2023.</p> <p>The plan for compensatory services shall be documented in the PWN(s) for the Facilitated IEP meeting(s) as well the IEP resulting from Step 6.</p> <p>These compensatory services are above and beyond the regular services required by Student’s IEP. The schedule for compensatory services should be developed in collaboration with the parent and can include provisions for services in the summer months.</p> <p>If the District, due to staffing or other limitations, is unable to</p>	<p>December 16, 2022</p> <p>November 7, 2023</p>	<p>Written report of service provision review</p> <p>Documentation of delivery/provision of compensatory education services, including logs of services and progress reports.</p> <p>Prior Written Notice containing plan for compensatory services.</p>	<p>December 16, 2022</p> <p>Monthly from date of compensatory services plan until the compensatory education hours are completed</p> <p>15 days after the FIEP meeting is held</p>

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
	provide the needed IEP and compensatory services as outlined in Student’s IEP and the compensatory services plan, the District is required to contract with a private provider to ensure those services are provided.			
7.	<p>The District will convene a facilitated IEP (FIEP) meeting for Student. The FIEP meeting shall address:</p> <ul style="list-style-type: none"> • PLAAFP; • Additional needs identified as part of the comprehensive evaluation required in Step 4; • Home Support Plan required in Step 5; • Needed Compensatory services identified as part of Step 6; • Appropriate and measurable goals in all areas of need; • Periodic progress reporting plan. <p>The Facilitator shall be independent of the District and shall be selected from the PED list of approved facilitators. The Facilitator shall be paid for by the District.</p> <p>The FIEP meeting shall be held on a date and time that is convenient for the parent. The parent will be provided with a copy of the IEP and</p>	January 6, 2023	<ol style="list-style-type: none"> 1. Invitation to IEP meetings, 2. IEPs, 3. Prior Written Notices, and 4. Agenda for FIEP team meetings 	15 days after the FIEP meeting is held

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
	<p>PWN at the conclusion of the FIEP meeting.</p> <p>The District shall ensure that the FIEP team includes, but is not limited to, parents, special education teacher, and any related services providers.</p>			
8.	<p>The District shall arrange to provide training to District staff (including special education teachers, special education administrators, and related service personnel), on the following special education topics:</p> <ul style="list-style-type: none"> • IEP meeting procedural requirements; • Meaningful Parental Participation; • Developing and implementing an appropriate IEP that includes providing services and supports for all areas of eligibility; • Developing individualized measurable goals that address a student’s individual needs in all areas of disability; • Completing timely assessments in all suspected areas of need and ensuring data that is available to the 	January 20, 2023	<p>Confirmation of the date of the training</p> <p>Confirmation of attendees at the training and plan for addressing provision of training to those staff not in attendance</p>	<p>December 16, 2022</p> <p>January 30, 2023</p>

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
	<p>IEP team in the development of the IEP;</p> <ul style="list-style-type: none"> • Completion of thorough progress notes that provide sufficient information regarding a student’s progress; • The preparation and maintenance of accurate records, including provider logs, meeting notices and other IEP related documents. <p>The training shall be provided by a person with expertise in special education who was not involved in responding to this complaint and who is approved by NMPED.</p>		<p>Submission of proposed trainer and trainer’s resume and proposed presentation for NMPED approval.</p>	<p>December 5, 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/ Michele Bennett

Michele K. Bennett, Esq.
Complaint Investigator

Reviewed by:

/s/ Miguel Lozano

Miguel Lozano, Esq.
Chief Counsel, Special Education Division

Reviewed and approved by:



Deborah Dominguez-Clark
Director, Special Education Division