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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. 2223-18
November 22, 2022

This Report requires corrective action. See pages 21-27.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on September 23, 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. §§ 300.151 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, Special Education Ombud, Principal, Special Education Director, District’s Attorney, Special Education Teacher-Case Manager and Secondary Special Services Coordinator;
- 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 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 address all areas of need, including Student’s diagnosis of attention deficit hyperactivity disorder (ADHD) and its potential impact on learning;
 - b. Failed to collect needed data to determine Student’s present levels and needs so as to develop an appropriate IEP that provided a free appropriate public education (FAPE);
 - c. Failed to develop measurable annual goals reasonably calculated to allow Student to make progress;
 - d. Failed, at least annually, to modify goals to reflect Student’s needs and present levels of academic and functional performance;
 - e. Failed to consistently implement accommodations and modifications outlined on IEP; and;
 - f. Failed to ensure implementation and efficacy of reading programs and other strategies and supports to assist Student in learning.
2. Whether the District failed to develop and implement behavioral supports on the IEP and a Behavioral Intervention Plan (BIP) for a Student with behavioral needs to receive a FAPE,

in violation of 6.31.2.11(F) NMAC and 34 C.F.R. § 300.324 (a)(2)(i), specifically whether the District:

- a. Failed to timely develop and modify, as needed, an individualized behavior plan (BIP) and instead punished Student for behaviors that were a manifestation of disability; and
 - b. Failed to provide appropriate behavior interventions and supports to assist Student in managing behaviors to allow Student access to curriculum,
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. At the time of the complaint filing, Student was thirteen years of age, in eighth grade, and attending middle school in the District.
2. Student was initially evaluated and determined eligible for special education under the categories of specific learning disability (SLD) and other health impaired (OHI) because of a diagnosis of attention deficit hyperactive disorder (ADHD) in 2018.
3. The evaluator from the April 15, 2018 evaluation noted that Student had a severe discrepancy in reading. Student became easily frustrated with the inability to use Student's considerable academic skills and knowledge because of reading limitations. Student also had significant deficits because of severe ADHD.
4. The evaluator also noted, "If some significant interventions are not made, it appears that [Student] may be at some risk for sacrificing [Student's] opportunity for [Student's] formal education."
5. Student was reevaluated in 2021, and additional evaluations were in process during this investigation.
6. Student's SLD needs were in the areas of basic reading, reading comprehension, reading fluency, math problem solving and written language.
7. Since sixth grade, Student had missed a significant amount of school. In sixth grade, Student missed 96 days (online school due to Covid), in 7th grade, Student missed 59 days and to date in 8th grade, Student has missed 56 days of school.
8. Often when Student came to school, Student did not attend all classes or left the classroom and never returned.
9. Student does not want to be in special education anymore and refuses to use the assistive technology and other supports provided.

10. When queried about reasons why Student did not want to be in special education, Student indicated that Student does not need the help or does not want to be pulled out or stand out from peers.
11. Parent believed Student was embarrassed because of poor reading skills, frustrated and overwhelmed, and sensitive to peer perceptions and that was the reason for Student's behaviors, refusals and absences.
12. The District has provided a combination of inclusion classes with special education supports including an aide and small group instruction in the resource room.
13. The excessive number of absences and refusal to engage have limited the District's ability to collect data to determine if the plan is effective or if other strategies or supports would be helpful for Student.
14. Everything the District has tried, including all of Parent's suggestions, has made little impact on Student's participation or progress.
15. There was a noticeable improvement in work completion and attendance when Student was only required to attend in the mornings as part of the suspension.
16. Student had many friends, was well liked by classmates and could be a leader.
17. Student needed frequent reminders to stay on task and complete work, sometimes every three minutes to get to work.
18. Incomplete work pulled Student's grades down. Student made minimal effort to complete or catch up on missing work.
19. Although teachers reported Student was capable of completing the work, especially with assistive technology (AT) supports, accommodations, and modifications, Student had difficulty focusing and completing work.
20. When asked, Student would participate in class discussions and be very knowledgeable about certain topics.
21. Teachers reported that Student was respectful to teachers, staff and other students in the classroom but was often disrespectful to other staff and students during transitions.
22. Student was often found roaming the halls and hanging out in the restroom.

Development and implementation of IEP

23. On December 1, 2021, there was a Review of Existing Evaluation Data. On December 16, 2021, the District also requested consent to complete a comprehensive evaluation of Student. Parent consented to a Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP) which were completed that day.
24. On September 7, 2021, the assessments were reviewed at Student's annual IEP meeting.
25. Parent did not attend this meeting; another eligibility meeting was scheduled for September 24, 2021.

26. At that meeting, Parent expressed concern about Student's poor reading. Parent reported that Student had been diagnosed with dyslexia and was prescribed glasses.
27. The District requested an evaluation for Irlen Syndrome. Parent declined until it was determined if glasses helped.
28. The assessment results noted that Student had difficulty with decoding, mispronounced words, and was easily frustrated but performed excellently in areas that did not involve reading.
29. Student's combined score on the Reynolds Intellectual Assessment Scales (RIAS) was 101, with deficits in basic reading with a score below 40, less than the 1st percentile. The examiner noted that "[Student] cannot read for information, cannot read the words, so [Student] cannot comprehend what is printed."
30. Student could solve word problems that were read to Student with a standard score (SS) of 80; however, Student was not fluent with math facts (SS 75) but understood patterns in math (SS 95).
31. When spelling was included in the written expression score, Student was below the 1st percentile with a SS of 64.
32. The examiner proposed some accommodations and modifications for Student within the classroom which included the use of speech to text and text to speech software and having Student demonstrate knowledge verbally rather than in writing.
33. Student's eligibility remained the same in two categories: SLD and OHI.
34. Student's most recent IEP was developed on August 22, 2022, and completed on August 29, 2022.
35. The present levels of academic achievement and functional performance (PLAAFP) did not provide information about Student's reading level, skills or written language needs. It noted that Student could access computer platforms and applications and follow simple directions. Student had mastered addition and could find the mean or average. However, Student needed assistance with division and 2-3 equation math problems were challenging for Student. Student needed several visual and verbal cues to stay focused or to complete independent work. The PLAAFP noted Student was capable of completing work when focused and organized.
36. The IEP did not outline the strategies that were being implemented to increase Student's attendance, work completion and progress on IEP goals. It did not describe how Student's ADHD impacted learning except Student struggled to stay focused and complete work.
37. Student received reading services in the resource room. Since Student was initially identified, the District had used the Reward Reading program, which was an evidence based and research validated reading program that began at a third-grade reading level.
38. Recent evaluations indicated Student's reading level was below a third-grade level.
39. Student was offered tutoring in reading after school but Student would not participate.

40. Each Teacher provided input on Student's performance within their classrooms. The consensus of the Teachers was if Student would focus, Student could complete the work. There was an aide present in the general education classroom but Student would not ask for help. Staff stated that Student needed guidance and reminders to complete work and stay on task but Student was a nice young man.
41. The District offered transportation, daily access to social worker or counselor, and the opportunity to check in with the social worker during any time of the school day. The district also provided tutoring to assist Student in attending school and completing work.
42. Student did not consistently use any of the District's suggestions or supports.
43. Student had been taught coping strategies and could ask for breaks, accommodations and modifications to assist Student, but Student rarely used those supports.
44. The District reported that prior to Covid closures, Student had been making progress and was not a behavior problem in the classroom. Student's behaviors usually occur with staff that do not know or work with Student during transitions.
45. The IEP noted that Student's behavior did not impede learning.
46. This school year, Student has exhibited some maladaptive, possibly illegal activities at school.
47. Additional assessments were requested, and consent was provided at the end of September 24, 2022 IEP meeting. The assessments were recently completed but have not been reviewed by the IEP team.
48. The District has not sought suggestions from outside professionals about how to address Student's school refusal.
49. The District has convened three IEP meetings already during the 2022-2023 school year and revised Student's BIP but Student was still struggling to complete work.
50. Since Student's behavior incidents usually involved staff that did not work with Student, all staff has received training on Student's IEP needs, goals, supports and services.
51. Student was trained three times on August 30, September 6 and September 12 on how to use AT supports; Student refused to use the supports.
52. Student was making minimal progress on all goals but according to the District, that was because Student was absent so often, not because the services and supports were not appropriate.
53. There have been concerns raised that the District has not considered Parent's schedule when scheduling meetings. Parent has attended and participated in the majority of meetings. When Parent was not able to attend a meeting, the District would reconvene a meeting at a later date so Parent could participate.
54. Student had eight goals in the August 22, 2022 IEP. This was an increase from the four math, reading, emotional and written language goals in the September 7, 2021 IEP.
55. Student's new goals included:

Math: Use all four operations to solve multi-step equations;

Reading: Identify sounds in a vowel combination to read real words in text;

Employment: Apply math calculation to solve multi-step word problems using multiplication and division;

Emotional: Learn coping strategies for in school interactions contingent upon meeting with counselor to have no behavior referrals;

Written Language: Write 2-3 structurally correct sentences to clarify a single concept;

Reading Comprehension: Use comprehension strategies to determine the meaning of words and use context clues to write 2-3 sentences to check for understanding;

Reading Fluency: Read 5-10 words correctly in a paragraph; and

Functional: With three verbal prompts, complete and turn in assignments.

56. Student would also receive accommodations and modifications including visual aids, reminders and short instructions (1-2 steps).

Development, implementation and modification of BIP plans

57. Prior to seventh grade, Student exhibited no behaviors that warranted an FBA or BIP. When School resumed after Covid closures ended, Student quickly began exhibiting behaviors.

58. When Student returned to in person instruction at the start of the 2021-2022 school year, Student consistently struggled with behavior and was subject to disciplinary actions.

59. On December 9, 2021, the District completed an FBA and developed and implemented a BIP.

60. Most of Student's behaviors were of an oppositional, defiant, or disrespectful nature.

61. The behavior the plan focused on was reducing negative interactions with staff to escape or avoid adults.

62. Student's frequent absences prevented District from collecting data to determine the effectiveness of the BIP.

63. On May 2, 2022, Student brought a Nerf gun to school in a backpack and told other students it would be used after school.

64. Another student took the gun out of the Student's backpack and showed it around. Ultimately, the gun was reported to the administration and Student was suspended for the remainder of the 2021-2022 school year.

65. A manifestation determination review was completed on May 10, 2022 and it was determined that Student's actions in bringing the Nerf gun to school were not a manifestation of Student's disability, and therefore, Student could be suspended.

66. The Parent appealed the decision to the Superintendent which was upheld.

67. On May 10, 2022, an IEP addendum meeting was held. Student's schedule was modified with IEP services for the remainder of the 2021-2022 school year.

68. At the beginning of the 2022-2023 school year, Student was still subject to a suspension because of the Nerf gun incident the previous school year.
69. On September 19, 2022, Student returned to school full time.
70. Since Student returned to school, Student was suspended for five days because Student had alcohol in school and was intoxicated.
71. The District has attempted to update the FBA to determine the antecedents for Student's behaviors and intervene before the behaviors escalate but the oppositional, defiant behaviors have continued.
72. On October 6, 2022, the BIP was revised again at an IEP meeting and finalized on October 20, 2022. Neither Parent nor Student attended those IEP meetings.
73. The new BIP used four cards to remind Student of expected behavior. The District reported thus far, the new plan has been effective but because of chronic absences, it is difficult to determine its effectiveness long term.
74. There were at least twelve disciplinary referrals during the 2021-2022 school year. Student had received 6.5 out of class suspension (OCS) days before the suspension at the end of the school year.
75. The disciplinary referrals included: disrespectful, tardies, leaving campus (1.5 OCS), disturbing class, tardies, disrespectful (1 day OCS), disturbing class (1 day OCS), horseplay (1 day OCS), truancy (1 day OCS), disrespect, truancy (1 day OCS) and disrespect.
76. Additional incidents included:
 - May 6, 2022: Refused to return safety equipment
 - May 6, 2022: Making out under the bleachers
 - May 9, 2022: Went down wrong stairs, ignored directions from teacher and called teacher an inappropriate name.
77. Student has had 14 disciplinary referrals during the 2022-2023 school year and was suspended for having alcohol and being intoxicated at school.
78. On November 11, 2022, there was a manifestation determination review. It was determined that Student's behavior was not a manifestation of Student's disability.

Discussion and Conclusions of Law

Issue No. 1

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 address all areas of need, including Student’s diagnosis of attention deficit hyperactivity disorder (ADHD) and its potential impact on learning;
- b. Failed to collect needed data to determine Student’s present levels and needs so as to develop an appropriate IEP that provided a free appropriate public education (FAPE);
- c. Failed to develop measurable annual goals reasonably calculated to allow Student to make progress;
- d. Failed, at least annually, to modify goals to reflect Student’s needs and present levels of academic and functional performance;
- e. Failed to consistently implement accommodations and modifications outlined on IEP; and;
- f. Failed to ensure implementation and efficacy of reading programs and other strategies and supports to assist Student in learning.

- a. Failed to address all areas of need, including Student’s diagnosis of attention deficit hyperactivity disorder (ADHD) and its potential impact on learning.

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). 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. 34 C.F.R. § 300.304 (b). The child must be assessed in all suspected areas of disability. Id. 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. 300.305. 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).

Student’s initial evaluation in 2018 noted both a severe reading deficit and ADHD diagnosis. The evaluator noted in that evaluation, “If some significant interventions are not made, it appears that [Student] may be at some risk for sacrificing [Student’s] opportunity for [Student’s] formal education.” Prior to the start of seventh grade, Student was not a behavior problem and was making progress on all goals. However, when the 2021-2022 school year began, Student refused to complete work, had frequent absences and was unable to focus and stay on task. Student was evaluated last year, and Student still had significant delays in reading, math and written language. Student’s frequent absences, inappropriate behavior and work completion were evident all last year and have increased this year, but these areas were not assessed last year nor was consent

for a psychological evaluation to determine the reasons behind those behaviors sought until September of 2022. These issues may be directly related to Student's ADHD diagnosis or some other undetermined needs. However other than strategies to increase focus which are not outlined in the IEP, the District has not determined the impact of the ADHD diagnosis or other undetermined needs on Student's learning.

While it is a challenge to develop an IEP for a Student with these behavioral and academic needs, the District failed to timely conduct additional assessments to determine whether Student really wanted out of special education services as repeatedly requested or was Student overwhelmed, frustrated and shutting down because of the disabilities and inappropriate services as Parent suggested. An individual student's needs may change over time which is one of the reasons for reevaluations. Without additional information on Student's ADHD and any other undetermined needs and the impact that may have on educational progress and performance, Student's needs were not being met. The delays in completing assessments in all areas of disability was a violation of the IDEA.

b. Failed to collect needed data to determine Student's present levels and needs so as to develop an appropriate IEP that provided a free appropriate public education (FAPE).

Every IEP for a student must contain "[a] statement of the child's present levels of academic achievement and functional performance, including --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)" 34 C.F.R. § 300.320 (a)(1). This statement of PLAAFP assists in determining the needs of an individual student to develop annual goals to allow the student to receive FAPE and make progress in the general education curriculum. *Bakersfield City School District*, 51 IDELR 142 (SEA CA 2008). The FAPE standard requires an IEP that is reasonably calculated to allow the child to make progress in light of the child's circumstances. *Andrew F.* The PLAAFP must be comprehensive and provide a baseline that reflects all of the child's needs, both academic and nonacademic. This also should include relevant background information about needs, strengths, interests and learning styles. 34 C.F.R. § 300.324 (a). The PLAAFP must be individualized to reflect the unique needs and abilities of a particular student. *Letter to New*, 211 IDELR 464 (OSEP 1987).

The PLAAFP outlined in the August 22, 2022 IEP did not provide a complete description of Student's academic and nonacademic abilities and needs. The PLAAFP indicated that Student was able to complete and finish classwork but was easily distracted and often tardy or left class early. The PLAAFP from the IEP and all addendums listed Teachers' comments about Student's performance within the classroom. The consistent message was Student was rarely in class and

when in class would not complete the required work. Student was rarely a behavior issue in class; Student just sat down in the classroom and did not complete the work Student was capable of completing successfully. The PLAAFP did not outline Student's reading level, skills or written language skills. There was limited information about math abilities. Given the lack of sufficient PLAAFP, it was unclear what information the District used to develop Student's goals.

The District reported that the frequent absences prevented the collection of data. Without information about Student's present abilities and needs, it is impossible to develop goals and determine the necessary services and supports for a student to receive FAPE. Those absences and incomplete work should have triggered additional assessments to determine the reasons for Student's school refusal. Child find is an ongoing obligation for Districts because the needs of eligible students may change over time. 34 C.F.R. § 300.111 (a)(1)(i). Last year, when the frequent absences, behaviors warranting disciplinary action and incomplete work became issues, the District should have conducted additional assessments. (See 1a). The assessment data along with the information about Student's performance, or lack thereof, would have provided information to assist the IEP team in developing an appropriate IEP that would provide a FAPE to Student. This failure prevented the IEP team from reviewing the necessary information to develop appropriate goals.

c. Failed to develop measurable annual goals reasonably calculated to allow Student to make progress.

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 needed to achieve progress on goals. 64 Fed. Reg. 12, 471 (1999). 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).

In the September 22, 2022 IEP, Student had eight goals in all subtests of reading, math, written language, emotional and functional. Student's excessive absences and failure to complete work have limited Student's progress on educational goals. The District has attempted but has been unable to change Student's behavior to allow Student to make educational progress. The IEP failed to address Student's OHI needs and the impact ADHD had on Student's educational

performance. Without an understanding of Student's needs in all areas of disability, it is impossible to develop goals that provide a FAPE. The District's failure to develop appropriate goals is in violation of IDEA.

d. Failed, at least annually, to modify goals to reflect Student's needs and present levels of academic and functional performance.

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 IEP must include measurable annual goals, including academic and functional goals, that meet the student's needs that result from the disability to allow the student to be involved in and make progress in the general education curriculum and meet each of the educational needs that result from the disability. 34 C.F.R. § 300.320 (a)(2)(i). Annual goals should reflect what a student with a disability can reasonably accomplish within the next year with the provision of special education services. *Letter to Butler*, 213 IDELR 118 (OSERS 1988). When goals do not vary from year-to-year, it can suggest that a student was not receiving FAPE. *Damarcus S. v. District of Columbia*, 67 IDELR 239 (D.D.C. 2016).

Student has significant deficits in reading, math and written language. The evaluation from 2021 indicated that Student could not read for information. If Student could not read the words, then Student could not comprehend what was printed. Although Student was not fluent in math facts, Student was able to complete story problems read to Student, and was able to understand math patterns. When considering spelling, Student's written language skills were below the 1st percentile. Student has been receiving services in reading, math and written language since 2018 with minimal progress and there has been little change in Student's goals since that time until this most recent IEP.

In addition, Student has significant ADHD concerns and has ongoing difficulties with focus, completion of work and attendance. The District reported that they have implemented strategies to assist Student with improving focus and task completion but those are not noted on the IEP. The goals on Student's IEP that might address Student's ADHD were to turn in assignments, learn coping strategies and have no disciplinary referrals. Without more information about the impact of Student's ADHD on learning and any other needs Student may have and a plan of how to address those impacts, the goals were ineffective.

Student also had significant absences. Moreover, when Student attended class Student would often leave for a drink or to go to the restroom and would never return or remain in class but complete no work. Frequently, Student was disrespectful to teachers and staff that did not work with Student directly. These actions resulted in disciplinary actions including suspensions. The Student had a BIP which had been revised multiple times without a decrease in behaviors; Student's inappropriate behaviors have increased during the 2022-2023 school year. A recent psychological evaluation indicated that Student may have some additional mental health diagnoses that may impact on Student's behaviors.

Student's needs are complex and may require a multi-faceted approach to address all of Student's needs. In the recent IEP, more goals were added to address Student's reading deficits and Student's behavioral referrals and work completion. However, since that IEP, Student has continued to have difficulties in those areas. The recent psychological evaluation may provide more information on how to address Student's complex needs. However, the goals on Student's IEP do not reflect Student's academic and functional performance needs as required by the IDEA.

e. Failed to consistently implement accommodations and modifications outlined on IEP.

The IEP must include the special education, related services and supplementary aids and services to be provided to the Student. All of these required services are provided to enable the child:

1. To advance appropriately toward attaining the annual goals;
2. To be involved in and make progress in the general education curriculum in accordance with this section and to participate in extracurricular and other nonacademic activities; and
3. To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

34 C.F.R. § 300.320 (a)(4).

The IEP must be implemented with all required components as soon as possible. 34 C.F.R. § 300.323 (c). The IEP must be in effect at the beginning of the year. 34 C.F.R. § 300.323 (a).

Student had access to all accommodations and modifications outlined in the IEP. Student repeatedly informed District personnel that Student no longer wanted to be in special education and would not use the AT or other accommodations and modifications provided in the IEP. Student knew how to access the accommodations and modifications on the IEP; however, Student chose not to use those supplemental aids and services. Given District's

continued efforts to afford Student appropriate accommodations and modifications, Student's refusal to use the supplemental aids and services did not constitute a violation of IDEA.

f. Failed to ensure implementation and efficacy of reading programs and other strategies and supports to assist Student in learning.

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. 71 Fed. Reg. 46,665 (2006). However, the Supreme Court in *Endrew F* held that the IEP must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988 (U.S. 2017). See also *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 102 S. Ct. 3034, 458 U.S. 176 (U.S. 1982). When a student is not making appropriate progress with a particular methodology, the district should reconvene the IEP team to discuss whether a different methodology would be more effective. *Falmouth School Department v. Mr. and Mrs. Doe*, 81 IDELR 151 (1st Cir. 2022).

Prior to the pandemic, Student had been making progress on all IEP goals with the use of the reading program. This reading program chosen by the District was designed to address reading deficits such as Student's. Since schools have reopened after Covid, Student has had excessive absences, been suspended for a period of time and failed to complete classwork when Student attended classes. The IEP team has had multiple meetings to address Student's needs and increasing behavior concerns. Tutoring with supplemental reading materials was offered to Student but Student refused to participate. Student has also refused to use AT or supplemental aids and services provided by the District. There was no evidence that the reading program chosen by the District was not effective with Student.

Additional needs have arisen in the past two years that are impacting Student's learning. A psychological evaluation was recently completed and the preliminary results suggest that Student may have some additional mental health needs that may be impacting learning. An IEP team meeting is planned for the end of November to review those results and discuss ways to address Student's needs to allow progress on Student's goals. The District has been attempting various strategies to address Student's complex needs and had previously provided an effective means of addressing Student's reading deficits. For this reason, there was no violation of IDEA.

As to issues 1a, 1b, 1c, 1d, the District is cited. Corrective action is required.

Issue No. 2.

Whether the District failed to develop and implement behavioral supports on the IEP and a Behavioral Intervention Plan (BIP) for a Student with behavioral needs to receive a FAPE, in violation of 6.31.2.11(F) NMAC and 34 C.F.R. § 300.324 (a)(2)(i), specifically whether the District:

- a. Failed to timely develop and modify, as needed, an individualized behavior plan (BIP) and instead punished Student for behaviors that were a manifestation of disability; and**
 - b. Failed to provide appropriate behavior interventions and supports to assist Student in managing behaviors to allow Student access to curriculum.**
- a. Failed to timely develop and modify, as needed, an individualized behavior plan (BIP) and instead punished Student for behaviors that were a manifestation of disability.**

A BIP is not defined within IDEA or the regulations but is often a part of the educational program that addresses behaviors that impact a student's learning. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSERS 2022). The BIP should include a description of the behaviors that interfere with learning and the positive behavioral supports that reinforce positive behavior and eliminate or reduce the negative behaviors that interfere with learning. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSERS 2022). The IDEA does require that behavior that impedes learning should be addressed and the IEP should consider the use of positive behavioral interventions and supports. 34 C.F.R. § 300.324 (a)(2)(i). When a student has behavioral needs, the IEP should consider those needs when developing, reviewing and revising the IEP. *Questions and Answers on Endrew F. v. Douglas County School District RE-1*, 71 IDELR 68 (EDU 2017); and *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016). Although the IDEA does not mandate a BIP or specific behavioral goals, consideration of academic progress and behavior supports can support a finding that a FAPE was provided to

student. *See Lathrop R-II School District v. Gray*, 611 F.3d 419 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1471 (2011). Districts can impose disciplinary action against a special education eligible student, but those disciplinary actions cannot adversely affect the goals and objectives in the IEP and must not be discriminatory. *OSEP Memorandum 95-16*, 22 IDELR 531 (OSEP 1995).

The August 22, 2022, IEP noted that Student did not have any behaviors that impacted learning and Student would follow the District discipline plan even though Student had been suspended since the previous Spring and had just returned to school. After that IEP was developed, Student was still exhibiting behaviors that interfered with learning and resulted in additional suspensions. Student was frequently absent and/or tardy for classes. When Student was in class, Student was not disruptive but would sit and do nothing. Student did not access the supplemental aids and services offered and most assignments were incomplete. Student was also frequently disruptive or disrespectful to other authority figures during transitions. These actions resulted in detention and other disciplinary actions including suspensions.

In May, 2022, Student brought a Nerf gun to school and was suspended throughout the remainder of that school year and part of the 2022-2023 school year. A manifestation determination review was completed and it was determined that the behavior was not a manifestation of Student's disability. This Fall, when Student returned to school full time, Student's absences increased and disruptive or disrespectful behavior also increased. Student was suspended for five days when a bottle of alcohol was discovered and Student was intoxicated. On November 11, 2022, another manifestation determination was completed, and it was determined that those behaviors were not a manifestation of Student's disability. At that meeting, there was a brief discussion about the recent psychological evaluation and some of the preliminary findings that suggested Student may have some additional mental health diagnoses. There was not sufficient evidence to suggest that these MDR processes or the decisions of the MDR teams were inappropriate.

On December 10, 2021, an FBA was completed, and a BIP was developed to address Student's behaviors. On February 19, 2022, there was another addendum meeting, to discuss Student's continuing behaviors and revise the BIP. Since Student returned to school full time on September 19, 2022, Student has had fourteen disciplinary actions and has been absent more days than Student has attended. The BIP was revised again during the IEP meeting and the District began the use of a card system for visual cues to remind Student of appropriate behaviors and what to do to prevent negative behaviors. This plan appeared to be working but Student's misbehavior outside of the classroom and frequent absences made collecting data on the plan's efficacy difficult. At the last MDR, the team again discussed revising the BIP and would plan on reviewing the FBA, BIP and recent psychological evaluation during the meeting in November to determine what other supports could be implemented to assist Student. The MDR team noted that most of

Student's misbehaviors occurred during transitions from class to class. BIPs often require multiple revisions before Student's behavior can be managed.

Student's absences, failure to complete assigned work and refusal to use the AT and other supplemental aids and supports have negatively impacted Student's learning. When behavior became an issue, the District developed and revised the FBA and BIP. A psychological evaluation was recently completed and will be reviewed at the end of November. Student's needs are complex and it was challenging to develop a plan that would help Student when Student no longer wanted or needed special education services. The psychological evaluation should provide some additional information that could assist the IEP team in developing an IEP that would provide a FAPE. Student was subject to discipline for violation of the code of conduct, and when Student had been removed for ten days, the District properly conducted an MDR and determined that the behavior in question was not a manifestation of Student's disabilities. Student's disabilities may impact on Student's behavioral choices, but the new psychological evaluation should assist the District in help addressing the impact that Student's disabilities have on behaviors and learning. There was no violation of IDEA.

b. Failed to provide appropriate behavior interventions and supports to assist Student in managing behaviors to allow Student access to curriculum

See 2a. FBAs and BIPs are not required components of the IEP. 34 C.F.R. § 300.320. See also 71 Fed. Reg. 46,629 (2006). Triggers that may suggest the need for an FBA and BIP are behaviors that "interferes with the important teaching and learning activities of school." 64 Fed. Reg. 12,405 and 64 Fed. 12,586 (1999). Truancy is also a factor that may trigger the need for a BIP or additional supports and services through the IEP. The IEP team must determine whether the absences are caused by the disability and/or the lack of appropriate services or whether the truancy is social maladjustment. *Springer v. The Fairfax County School Board*, 134 F.3d 659 (4th Cir. 1998).

Student was eligible for special education services under both SLD and OHI. Until 2021, Student was making some progress on goals and not exhibiting any behavior problems that interfered with learning. During the 2021-2022 school year, Student began to exhibit significant behaviors where disciplinary action was imposed. The IEP team continued to meet to discuss strategies and other steps that could be implemented to address the negative behaviors that impacted Student's progress. When Student was not in school, Student was not learning. When Student refused to use the supplemental aids and supports provided, educational progress suffered.

It is impossible to determine, given the available information about Student, whether the changes in Student's behaviors were the result of an improper IEP and/or BIP or whether there

were additional needs or some other reason for the increase in maladaptive behaviors. The District developed and revised the FBA and BIP and requested consent for a psychological evaluation, which has been completed, but not reviewed by the IEP team. The District had tried to implement the BIP but Student's absences make it difficult to determine whether the BIP was effective. The District reported that the new BIP with the use of visual cues appeared effective, but then Student was recently suspended for five days because of alcohol. There was no evidence that the District has not tried to implement the BIP or revise it when it had been determined that it was not effective. Generally, Student's choices have significantly contributed to the effectiveness of the BIP. Despite this, District has continued to work to amend the BIP to address Student's behaviors. There was no violation of IDEA.

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

Issue No. 3.

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

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." *Endrew F. v. Douglas County School District. RE-1*, 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 most recent evaluation indicated Student could not read, even though special education services have been provided since 2018, and Student is now an eighth grader. In addition to Student's SLD in reading, math and written language, Student has severe ADHD, which is not controlled and prevents Student from focusing. Then, beginning last year, Student had frequent absences or when in class, would leave or sit and not complete classwork. Student frequently

violated the code of conduct which resulted in disciplinary action and received a lengthy suspension in the spring of 2022 for bringing a Nerf gun to school. An FBA and BIP were developed and revised but maladaptive behaviors have continued and Student was not making progress. To determine if there was a substantive denial of FAPE, the question to ask is whether the IEP was reasonably calculated to allow the Student to make progress in light of the circumstances.

Prior to the 2021-2022 school year, Student had been making progress, albeit limited progress. Starting in the 2021-2022 school year, Student was refusing special education and the use of supplemental supports and services provided through the IEP. The IEP team has been unable to determine whether the behavior changes that started in the 2021-2022 school year were because of frustration resulting from Student not receiving a FAPE or some other factor that interfered with Student's learning. Significant absences and refusal to use the AT and other supports provided made it very difficult to develop a plan that would allow Student to make educational progress.

The District erred in delaying assessments and determining the impact of Student's ADHD on Student's learning. Also, the incomplete information on the PLAAFP prevented the IEP team from developing appropriate goals for this Student when the IEP team did not have the necessary information about Student's present levels of academic and functional abilities. These failures may have resulted in the increase in Student's inappropriate behaviors and lack of progress on goals. Student's IEP was not reasonably calculated to allow Student to make progress on goals.

There were allegations during the interview that the District did not ensure parent's participation when meetings were scheduled. It appears from this record, that Parent participated in meetings, albeit, not at preferred times and dates. The record also demonstrated that Parent actively participated in the meetings she attended with the assistance of advocates from the special education ombud's office. Parent expressed concerns that Student's was not progressing academically and that the reading program was not effective for Student. Parent was provided meaningful parental participation.

Student did not always receive educational benefit and was denied educational opportunity. It is important to note that it has been primarily Student's choice to not engage services and accommodations provided by the District, not the District's failure to provide needed supports and services. The needs of this Student are complex and the District has attempted to provide the needed services and has taken steps to obtain additional information to develop a plan that will turn things around for Student so that Student could make educational progress. The recent evaluation was the next step of many steps to develop an IEP for this Student that provided FAPE.

With respect to Issue 3, the District committed procedural and substantive violations. 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	<p>The District failed to develop and implement an IEP that allowed Student to make educational progress, when the District</p> <ul style="list-style-type: none"> a. Failed to address all areas of need, including Student’s diagnosis of attention deficit hyperactivity disorder (ADHD) and its potential impact on learning; b. Failed to collect needed data to determine Student’s present levels and needs so as to develop an appropriate IEP that provided a free appropriate public education (FAPE); c. Failed to develop measurable annual goals reasonably calculated to allow Student to make progress; and d. Failed, at least annually, to modify goals to reflect Student’s needs and present levels of academic and functional performance.
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 December 2, 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 22, 2023 and reported to the SED no later than December 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).	December 2, 2022	Written Assurance Letter/Email	December 2, 2022
2.	The District Special Education Director, and the school principal	December 12, 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>
	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 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.			
3.	The District Special Education Director will meet with Student’s special education teacher, principal and teachers 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.	January 6, 2023	Notes from meeting prepared by District	January 13, 2023
4.	Prior to holding the Facilitated IEP meeting required in Step 6 and with parent permission, the District will attempt to arrange a session or sessions with student and a District counselor, social worker, or other behavioral therapist to discuss the following with Student: 1. reasons for leaving class and school;	At least 3 days prior to the FIEP Meeting required in Step 6	Written confirmation that meeting(s) with Student were held or attempted.	Within 7 days of completion of meeting(s)

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>2. reasons Student does not want to participate in special education;</p> <p>3. things that motivate Student;</p> <p>4. things Student would like to achieve during and after high school;</p> <p>5. things that Student believes will help increase participation in class and school.</p> <p>The District may include other individuals with positive relationships with Student in these discussions if the expert determines that this is appropriate.</p> <p>The individual(s) that met with student shall be included in the facilitated IEP meeting to assist the IEP team in identifying possible services, strategies, or other actions that may help support Student’s participation in class, school, and special education services and reinforce positive behaviors.</p>			
5.	<p>The District shall provide the following compensatory education:</p> <p>a. 50 hours of one-to-one math instruction;</p> <p>b. 50 hours one-to-one reading instruction</p> <p>These compensatory services are</p>	November 22, 2023	Documentation of delivery/provision of compensatory education services, including logs of services and progress reports.	Monthly from date of compensatory services plan until the compensatory education hours are completed

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>above and beyond the regular services required by Student's IEP and shall be provided by private providers specializing in literacy and math instruction. The District shall consult with the parents in selecting these providers.</p> <p>The schedule for compensatory services should be developed in collaboration with the parent and can include provisions of services in the summer months.</p> <p>The District shall only continue to fund and provide private services to the extent that Student is attending the service sessions. The District shall notify the PED SED CAP monitor if Student fails to attend 5 consecutive scheduled service sessions without canceling the session with the District or service provider at least one day prior to the sessions. The CAP monitor will determine appropriate action regarding compensatory education and notify the District of the decision.</p>		<p>Prior Written Notice containing plan for compensatory services.</p>	<p>15 days after the FIEP meeting is held</p>
<p>6.</p>	<p>The District will convene a facilitated IEP (FIEP) meeting for Student. The FIEP meeting shall address:</p> <ol style="list-style-type: none"> 1. Review of PLAAFP; 2. Additional needs of Student and services identified 	<p>January 17, 2023</p>	<ol style="list-style-type: none"> 1. Invitation to IEP meetings, 2. IEPs, 3. Prior Written Notices, and 	<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>
	<p>through review of the recent psychological evaluation which shall include consideration of related services targeting Student behavior including social work and other therapies;</p> <ol style="list-style-type: none"> 3. Possible services, strategies and other actions identified as a result of meeting(s) with Student required in Step 4; 4. Accommodations including break times and/or locations; 5. Attendance and work completion; 6. Appropriate and measurable goals in all areas of need including behavior and attendance; 7. Post-secondary Transition; 8. Updated FBA and BIP if needed, as determined by the IEP team; 9. Periodic progress reporting plan to ensure the effectiveness of IEP and BIP and next steps, if progress is not observed; and 10. Parent communication plan. <p>Student shall be invited and included in the FIEP meeting at Student's and Parent's discretion.</p> <p>The Facilitator shall be independent</p>		<p>4. Agenda for FIEP team meetings</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>of the District and shall be selected from the PED list of approved facilitators. The Facilitator shall be paid for by the District.</p> <p>The FIEP meeting shall be held on a date and time that is convenient for the parent. The parent will be provided with a copy of the IEP and PWN at the conclusion of the FIEP meeting.</p> <p>The District shall ensure that the FIEP team also includes the psychiatrist or psychologist that conducted the recent evaluation, the individual(s) noted in Step 4, and any other related services providers.</p>			
7.	<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> <ol style="list-style-type: none"> 1. Developing and implementing an appropriate IEP that includes providing services and supports for all areas of eligibility; 2. Completing timely assessments in all suspected areas of need and ensuring needed data is available to 	February 10, 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>January 13, 2023</p> <p>February 17, 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>the IEP team in the development of the IEP;</p> <p>3. Preparation of a PLAAFP that provides a statement of the child's present levels of academic achievement and functional performance, and how the child's disability affects the child's involvement and progress in the general education curriculum.</p> <p>4. Developing individualized measurable goals that address a student's individual needs in all areas of disability, including behavioral goals; and</p> <p>5. Development of appropriate FBA and BIPs and revising as needed;</p> <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>January 6, 2023</p>

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

Investigated by:

/s/ Michele Bennett

Michele K. Bennett, Esq.
Complaint Investigator

Reviewed by:

/s/ Miguel Lozano

Miguel Lozano, Esq.
Chief Counsel, Special Education Division

Reviewed and approved by:

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

Deborah Dominguez-Clark
Director, Special Education Division