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NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
SPECIAL EDUCATION DIVISION  
Complaint Resolution Report  
Case No. 2223-20  
December 1, 2022

**This Report requires corrective action. See pages 9-11.**

On October 3, 2022, there was a complaint filed with the New Mexico Public Education Department's (PED) Special Education Division (SED) under the federal Individuals with Disabilities Education Act (IDEA) and the implementing Federal Regulations and State Rules governing publicly funded special education programs for children with disabilities in New Mexico.<sup>1</sup> The SED has investigated the complaint and issues this report pursuant to 34 C.F.R. § 300.152 (a)(5) and 6.31.2.13(H)(5)(b) NMAC.

**Conduct of the Complaint Investigation**

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

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

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<sup>1</sup> The state-level complaint procedures are set forth in the federal regulations at 34 C.F.R. §§ 300.151 to 153 and in the state rules at Subsection H of 6.31.2.13 NMAC.

- interview with the Parent on November 9, 2022;
- interview with the District’s Special Education Director on November 10, 2022;
- interview with the Student’s previous classroom teacher on November 16, 2022; 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 implement Child Find policies and procedures for the Student, in violation of 34 C.F.R. § 300.111 and 6.31.2.10(A) and (D) NMAC.
2. Whether the District failed to conduct an initial evaluation upon request from the Parent to determine if the Student qualifies as a child with a disability within 60 days of receiving informed parental consent, in violation of 34 C.F.R. § 300.301 and 6.31.2.10(D)(1)(c)(i) NMAC.
3. Whether the District failed to provide prior written notice (PWN) of its refusal to conduct an initial evaluation after the Parent’s request for same, in violation of 34 C.F.R. § 300.503 and 6.31.2.10(D)(1)(c)(iv) NMAC.
4. Whether the District’s actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE), in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

### **General Findings of Fact**

1. The Student is currently eight years old and in the third grade for the 2022-23 school year.
2. During the 2021-22 school year, on March 28, 2022, the Student was referred to the Student Assistance Team (SAT) primarily for behavior concerns. The majority of the

Student's behavior concerns were related to the Student's hyperactivity and inattention. In addition, the Student exhibited difficulties with fine motor skills and handwriting. These concerns were noted in the SAT referral documentation.

3. The Parent was provided with a notice and invitation to attend the initial SAT meeting. The notice was dated April 12, 2022.
4. On April 27, 2022, a SAT meeting took place. The Parent, the Student's then-current teacher, and the then-current SAT Chairperson/Social Worker were in attendance. No District representative attended the meeting. At the meeting, it was determined that the Student should be evaluated for special education and related services. The SAT Chairperson/Social Worker provided consent to evaluate paperwork to the Parent at the meeting, and the Parent consented. The meeting was adjourned with the intent to begin the evaluation process for the Student.
5. The documented notes from the initial SAT meeting indicate the following, in part:
  - a. The Parent agrees with testing for attention deficit/hyperactivity disorder (ADHD);
  - b. The teacher and Parent agree that an occupational therapy (OT) evaluation is necessary;
  - c. The "summary/next steps" section which indicates whether a referral for special education evaluation is needed, in part, was not filled out;
  - d. A follow-up meeting was to be held on May 4, 2022;
  - e. No signatures were included to document the participation or attendance of the SAT team.
6. Following the SAT meeting, on April 27, 2022, the then-current SAT Chairperson/Social Worker emailed the Special Education Director, the School Principal, and the Student's then-current teacher, in part, indicating that the Student needed to be tested for ADHD and that "[the Parent's] confirmation on testing" had been obtained. No one responded to the email, nor did an initial evaluation commence.
7. A follow-up meeting was not held on May 4, 2022 or anytime thereafter. The Parent and the Student's then-current teacher indicated they do not recall a discussion regarding holding a meeting on May 4, 2022 despite what the SAT meeting notes indicate.
8. The Student's then-current teacher continued to implement interventions for the Student for the remainder of the 2021-22 school year.
9. The last day of school for the 2021-22 school year was May 25, 2022.
10. The first day of school for the 2022-23 school year was August 11, 2022.
11. The Student has been receiving Layer 2 and Layer 3 Multi-Layered System of Supports (MLSS) interventions in reading since September. The Student has been receiving Layer 2 MLSS interventions in math.
12. The Parent filed a complaint on October 3, 2022.

13. On October 4, 2022, the Special Education Director went to the Parent's home to obtain their written consent for an evaluation. The assessments to be conducted included: an intelligence test; academic performance; a speech and language assessment; an OT evaluation; and a behavior and psychological assessment to include ADHD testing. The Parent signed the consent form at that time.
14. As of November 8, 2022 all assessments have been completed. The relevant findings of the assessments include, in part:
  - a. The Student would benefit from OT for deficits in fine manual control, handwriting skills, and typing;
  - b. The Student qualifies to receive speech therapy to improve their articulation skills and correct errored phonemes;
  - c. The Student is in need of specially designed instruction in the area of writing;
  - d. The IEP team should consider eligibility under the Other Health Impairment (OHI) category.
15. On November 15, 2022, there was an IEP meeting 2. The IEP team determined that Student was eligible for special education under the disability category OHI. Relevant portions of the Student's IEP include:
  - a. The IEP contains four measurable annual goals to support writing, communication, occupational therapy, and social emotional needs.
  - b. The Student will receive the following special education and related services:
    - i. Written Language: 120 minutes/week in the regular education classroom
    - ii. Speech: 45 minutes/week in the special education setting
    - iii. OT: 60 minutes/week in the special education setting
    - iv. Psychological Services: 30 minutes/week in the special education setting
16. A PWN was attached to the November 15, 2022 IEP. Relevant portions of the PWN include:
  - a. The Student will receive nine hours of compensatory education in speech.
  - b. The Student will receive six hours of compensatory education in OT.
  - c. The Student will receive six hours of compensatory education in psychological services.
  - d. The Parents agreed that no compensatory services are needed in the area of writing.
17. The District was unable to locate the consent for evaluation documentation that was obtained from the Parent on April 27, 2022. The SAT Chairperson/Social Worker who originally obtained the consent no longer works for the District and could not be reached for comment.

## **Discussion and Conclusions of Law**

### **Issue No. 1**

***Whether the District failed to implement Child Find policies and procedures for the Student, in violation of 34 C.F.R. § 300.111 and 6.31.2.10(A) and (D) NMAC.***

“Child find” is an affirmative and continuing obligation of school districts to identify, locate, and evaluate all children with disabilities residing within the jurisdiction who are in need of special education and related services. 34 C.F.R. § 300.111 and 6.31.2.10(A) NMAC.

Here, the District suspected the Student was a child with a disability on April 27, 2022, when the SAT team recommended, and the Parent agreed, that the Student be referred for an initial evaluation.

There are conflicting accounts as to whether or not the Parent was provided with consent documentation at the April 27, 2022 SAT meeting. The Parent asserts that they provided their written consent for an initial evaluation at the SAT meeting. The Student’s then-current teacher cannot recall whether the Parent was provided and/or signed consent paperwork. However, the email dated April 27, 2022 from the District’s then-current SAT Chairperson/Social Worker supports the Parent’s assertion that consent was in fact provided.

Thus, it is concluded that the District did have the Parent’s consent to evaluate the Student for special education on April 27, 2022. Despite receiving written consent, the District failed to conduct an initial evaluation in violation of its child find duties. Assuming, for the sake of argument, that District did not obtain written consent from the parent at the April 27, 2022 SAT meeting, District’s failure to obtain consent and evaluate Student for over six months after the initial SAT referral for evaluation was unreasonable and a violation of the District’s child find obligations.

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

### **Issue No. 2**

***Whether the District failed to conduct an initial evaluation upon request from the Parent to determine if the Student qualifies as a child with a disability within 60 days of receiving informed parental consent, in violation of 34 C.F.R. § 300.301 and 6.31.2.10(D)(1)(c)(i) NMAC.***

An initial evaluation must occur within 60 days of receiving parental consent for an evaluation. 34 C.F.R. § 300.301 and 6.31.2.10(D)(1)(c)(i) NMAC.

As stated above, the Parent provided their consent for an evaluation on April 27, 2022. Thus, the initial evaluation should have been completed no later than June 26, 2022. However, the District failed to complete the evaluation until November 8, 2022 – 195 days after the Parent provided initial consent.

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

**Issue No. 3**

***Whether the District failed to provide prior written notice (PWN) of its refusal to conduct an initial evaluation after the Parent’s request for same, in violation of 34 C.F.R. § 300.503 and 6.31.2.10(D)(1)(c)(iv) NMAC.***

A district is required to provide prior written notice within a reasonable time before the district proposes or refuses “to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.” 34 C.F.R. § 300.503(a)(2). Before initiating an evaluation, a district must provide notice in accordance with 34 C.F.R. § 300.503 describing the evaluation procedures the district proposes to conduct.

The Student’s SAT team met on April 27, 2022 and recommended that the Student be evaluated for special education. The Parent provided their written consent for the same. As the District intended to evaluate the Student after the April 27, 2022 meeting, the District was required to issue notice detailing what the District proposed to do (i.e., conduct an initial evaluation). While the District failed to evaluate the Student, notice should have been provided before or in conjunction with receiving the Parent’s written consent. No documentation was provided through the course of this investigation indicating that the District provided the Parent with PWN regarding the District’s intent to evaluate the Student.

**As to Issue No. 3, the District cited, and 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.***

A procedural violation results in a denial of FAPE if it: (1) impedes the child’s right to FAPE; (2) significantly impedes the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE; or (3) causes a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

A district is only liable for FAPE if the student is a student with a disability. *D.G. v. Flour Bluff Indep. Sch. Dist.*, 59 IDELR 2 (5th Cir. 2012, unpublished).

Failing to meet child find requirements can deny FAPE to a student whom a district should have identified. The failure to identify may entitle the student to compensatory education. *T.B. v. Prince George's County Bd. of Educ.*, 72 IDELR 171 (4th Cir. 2018).

Here, the District's failure to evaluate the student within 60 days of receiving parental consent amounts to a procedural violation that caused substantive harm. Had the District evaluated the Student within 60 days of first receiving parental consent, the Student would have come into the 2022-23 school year with an IEP and began receiving special education and related services. The Student's educational opportunity for the first 96 days of the 2022-23 school year would have been substantively different.

Thus, the Student was denied FAPE starting on August 11, 2022, the start of the 2022-23 school year, and continuing until the implementation of the Student's IEP on November 15, 2022. Notably, the District has taken steps to address the denial of FAPE by incorporating compensatory education services in Student's most recent IEP.

**As to Issue No. 4, the District is cited, and Corrective Action is required.**

**Summary of Citations**

| <b>IDEA/State Rule Provisions Violated</b>         | <b>Description of Violation</b>  |
|--|--|
| 34 C.F.R. § 300.111 and 6.31.2.10(A) NMAC.         | The District failed to implement Child Find policies and procedures for the Student.   |
| 34 C.F.R. § 300.301 and 6.31.2.10(D)(1)(c)(i) NMAC | The District failed to complete an initial evaluation within 60 days after receiving informed parental consent.                                |
| 34 C.F.R. § 300.304(a); 34 C.F.R. § 300.503        | The District failed to provide notice before they proposed to evaluate the Student for special education and related services.                 |
| 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) to the Student. |

### **Required Actions and Deadlines**

**By December 9, 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 May 23, 2023 and reported to the SED no later than June 6, 2023.** All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the state complaint case number and step number.



**Corrective Action Plan**

| <b>Step No.</b> | <b><u>Actions Required by District</u></b>  | <b><u>Complete Actions By</u></b> | <b><u>Documents Required to be Submitted to PED SED</u></b>  | <b><u>Document Due Date</u></b>   |
|-----------------|---|-----------------------------------|--|---|
| 1.              | As described above, the District will submit a written assurance to the PED Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan (CAP).   | <b>December 9, 2022</b>           | Written Assurance Letter/Email   | <b>December 9, 2022</b>   |
| 2.              | The District Special Education Director and the school principal shall meet with the PED SED Education Administrator assigned to the District and the PED SED CAP Monitor to review the Complaint Resolution Report, the Corrective Action Plan, and any other measures that the District plans to take to ensure that the violations are corrected and do not recur. The District Director has the discretion to include other District or school administrators or personnel in this meeting. The District Director shall be responsible for arranging this meeting with SED. | <b>December 16, 2022</b>          | Notes from meeting prepared by District  | <b>December 23, 2022</b>  |
| 3.              | The District shall provide Student with the compensatory education outlined in the November 15, 2022 IEP to include:<br><ul style="list-style-type: none"> <li>(1) 9 hours of speech services;</li> <li>(2) 6 hours of OT; and</li> <li>(3) 6 hours of psychological services.</li> </ul> <p>These compensatory services are</p>  | <b>May 23, 2023</b>               | Documentation of delivery/provision of compensatory education services, including logs of services and progress reports. | <b>Monthly from date of this CAP until the compensatory education hours are completed</b> |

| <b>Step No.</b> | <b><u>Actions Required by District</u></b>  | <b><u>Complete Actions By</u></b> | <b><u>Documents Required to be Submitted to PED SED</u></b>  | <b><u>Document Due Date</u></b>  |
|-----------------|---|-----------------------------------|--|--|
|                 | <p>above and beyond the regular services required by Student's IEP.</p> <p>If the District, due to staffing or other limitations, is unable to provide the needed IEP and compensatory services as outlined in Student's IEP, the District is required to contract with a private provider to ensure those services are provided.</p>   |                                   |  |  |
| <b>4.</b>       | <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"> <li>(1) Child Find procedures;</li> <li>(2) Prior Written Notices; and</li> <li>(3) Evaluation Timelines</li> </ul> <p>The training may be provided by a District special education administrator or other staff member with expertise in special education who is approved by NMPED.</p> | <b>February 17, 2023</b>          | <p>Confirmation of the date of the training.</p> <p>Confirmation of attendees at the training and plan for addressing the provision of training to those staff, not in attendance.</p> <p>Submission of proposed training and trainer's resume and proposed presentation for NMPED approval.</p> | <p><b>January 20, 2023</b></p> <p><b>February 24, 2023</b></p> <p><b>January 6, 2023</b></p> |
| <b>5.</b>       | <p>In order to ensure that valid and reliable data is submitted to NMPED and the Office of Special Education programs, the District shall ensure that it inputs the April 27, 2022 parent consent for evaluation and November 8, 2022 completion of Student's evaluation as part of the District's 80-day data submission in December of 2022.</p>  | <b>December 12, 2022</b>          | <p>Evidence of data submission (i.e., screen shot of data or data report for student)</p>  | <b>December 16, 2022</b>   |

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

Investigated by:

*/s/ Emily Adams*

Emily Adams, 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