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NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
SPECIAL EDUCATION DIVISION  
Complaint Resolution Report  
Case No. C2223-23  
December 22, 2022

**This Report requires corrective action. See pages 20-21.**

On October 24, 2022, a complaint was filed with the New Mexico Public Education Department's 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;

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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.

- review of the District’s compliance with federal IDEA regulations and state NMAC rules;
- interviews with the Parents and Parents’ advocate; 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 no 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. For this reason, the Complaint Investigator did not investigate the following issues raised by the complainant: the development and implementation of the Student’s 2020-2021 IEP, and the development of the Student’s 2021–2022 IEP.

**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 the Student’s Individualized Education Plan (IEP) to enable Student to be involved in and make progress in the general education curriculum, by failing to:
  - a. ensure that Student’s IEP was accessible to each regular and special education teacher, related services provider, and any other service provider who was responsible for its implementation, and/or failing to ensure that each such responsible party was informed of his or her specific responsibilities for implementing the IEP and providing accommodations, modifications and supports to Student, as required by 34 C.F.R. §300.323(d); and 6.31.2.11(B)(1) NMAC;
  - b. provide Student with special education and related services, in accordance with Student’s IEP, as required by 34 C.F.R. §300.323(c)(2) and 6.31.2.11(B)(1) NMAC;
  - c. review and revise, as appropriate, Student’s IEP to determine if Student’s annual goals are being achieved, as required by 34 CFR § 300.324(b)(1); and 6.31.2.11(B)(1) NMAC; and
  - d. monitor Student’s progress toward meeting the annual goals and/or provide progress reports to Parents in a timely manner, as required by 34 C.F.R. §300.320; and 6.31.2.11(B)(1) NMAC.
2. Whether the District failed to afford the Parents an opportunity to inspect and review any education records related to the Student, including, as appropriate, providing copies of requested education records to Parents, as required by 34 C.F.R. §§300.501(a) and 300.613; and 6.31.2.13(B) NMAC.

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**

1. The District is a local education agency under State law and, as such, is responsible for developing and implementing the IEPs of eligible special education students enrolled in the District.
2. The Student who is the subject of this complaint investigation is currently 11 years old and resides with the Parents. Student is currently in the 6th grade and attends an elementary school in the District (the School).
3. The Student was enrolled in the 5th grade in the District during the 2021-2022 school year and attended school in-person.
4. During the 2021-2022 year, Student received special education and related services under an IEP developed by the District on April 20, 2021.
5. Student's April 20, 2021, IEP provides, in relevant part, as follows:
  - a. Student is eligible to receive special education and related services under the disability classification of (OHI).
  - b. Student was prescribed medication to treat Attention Deficit Hyperactivity Disorder (ADHD).
  - c. The IEP provides that Student's behaviors impede Student's learning, and that the IEP includes goals and objectives and positive behavior interventions, strategies and accommodations to address the behavior.
  - d. Present Levels of Academic Achievement and Functional Performance (PLAAFP):
    - i. Math: "[Student] sometimes struggles with math tests." Student's teacher believes "her issues on tests are more influenced by focus and anxiety issues rather than not understanding math concepts."
    - ii. General Education: Student often needs additional time and some one-on-one help to get a new skill.
    - iii. Transition to 5th grade in-person: it was indicated that school staff was concerned that social issues may resurface once Student is in-person at School for 5th grade.
    - iv. Executive Functioning: Student had "focus and attention issues in the general online classroom," even though Student completed all of her work in a timely manner.
    - v. Social and Emotional Functioning: Student received social and behavioral support individually throughout the 2020-2021 school year in a virtual

environment. Parent reported that at the beginning of the school year Student was having meltdowns, especially in math class where Student struggles, but that these meltdowns decreased as the year went on.

- e. Annual Goals were developed in the following areas:
  - i. Mathematics: solving multi step word problems;
  - ii. Social and Emotional: controlling impulsive behavior;
  - iii. Executive Functioning: displaying productive school behavior by controlling impulsive statements to others and not being distracted by surrounding activities when taking tests.
- f. Instructional Accommodations or Modifications: Student was provided with many accommodations in the areas of Environment, Instructional Material, Assignment/Homework, Testing, Behavior Supports, and Instructional Strategies.
- g. Extended School Year services were not needed by Student.
- h. IEP Progress Documentation: Student's progress will be reported to parents at the time of school report cards, at school-wide parent conferences, and at IEP annual review.
- i. Special Education Services:
  - i. Academic Support/Executive Functioning services for 2 hours per week in the regular education and special education settings.
  - ii. Math services for 2 hours per week in the regular education and special education settings.
- j. Related Services:
  - i. Social & Behavior Support for 30 minutes per week in the special education setting.
- k. Prior Written Notice (PWN) dated April 20, 2021, was attached to Student's IEP and provides, in relevant part, as follows:
  - i. Proposed goals/objectives, service times and accommodations and modifications were reviewed, discussed, modified, and agreed-upon.
  - ii. Parent elected to keep Student in the District's Online Academy for the 4<sup>th</sup> grade, and the IEP team agreed that IEP goals could be appropriately supported through virtual instruction and services.
  - iii. The IEP team agreed that Student's special education services would be provided through a combination of virtual sessions/classes and remote learning supports including supported practice plans, homework packets and written or oral feedback from teachers, office hours, online instructional links, and would be provided to support at-home practice with goals.

- I. The April 20, 2021, IEP team meeting was attended virtually by Parents, Special Education Teacher, Regular Education Teacher, LEA Representative, Clinical Counselor, and the District's Online Academy Director.
6. Student attended school in-person for 5<sup>th</sup> grade during the 2021-2022 school year.
7. In late September 2021, Parents sent an email to the District's Coordinator of Student Services indicating they had concerns with the implementation of the Student's IEP. The Coordinator responded that if there were concerns about Student's IEP, she suggested requesting an IEP meeting. In October, 2021, parents again expressed concerns with the implementation of the Student's IEP and her service times.
8. On October 28, 2021, the Principal responded that they would be happy to schedule an IEP meeting to discuss the Student's special education services. The Parents responded to this email, indicating that they were not interested in changing Student's hours, services, or accommodations. The Parents stated that it appeared that Student was being pulled out of class for ELA services that were not listed on the IEP and were not needed by Student. The Principal agreed to look into the situation.
9. On October 29, 2021, the School Counselor sent an email to Parents indicating that Student was receiving academic support/executive functioning services and not ELA services. The confusion was due to the fact that Student's previous Case Manager's tight schedule required her to have Student come to the ELA resource class to receive her academic support/executive functioning service minutes. The School Counselor further explained that there was more flexibility in the current case manager's schedule and that Student was receiving her services at the end of the day.
10. The Special Education Teacher's schedules for the times in question do indicate that Student was being pulled out to the special education classroom on occasions during ELA, but the schedules also note that Student was there for executive functioning/academic support services. The confusion is understandable, but the documentation does not indicate that Student was receiving ELA services rather than executive functioning/academic support services. All of the written statements from District staff on this issue consistently state that Student did receive her special education service minutes for executive functioning and academic support.
11. The District's Coordinator of Student Services reports that the District's policies and procedures regarding a student's IEP provide access to the IEP to all of the special education student's teachers and service providers in multiple ways. The District's policies provide that prior to the beginning of school, the general education and special education teachers, case managers and related services providers meet and discuss the special education students who will be attending their classrooms and receive copies of their IEPs. Accommodations and services are also displayed in the District's Power School alerts. A hard copy of the IEPs are provided by the case manager to each teacher and

related services provider. And special education teachers also have access to the IEP through the District's software management system. A review of the District's Power School alert regarding the Student indicates that Student is identified as having an IEP and also identifies the special education services and accommodations provided for Student.

12. The District's documentation includes written statements from all of Student's regular and special education teachers, and her related services provider, which all state that they were aware of Student's IEPs, and had access to Student's IEPs, and implemented the goals, accommodations and services provided for Student in Student's IEPs.
13. The District's documentation includes general education class schedules for the 2021/2022 and 2022/2023 school years. The documentation also includes a schedule for Student's special education teacher. The schedules indicate that during the 2021/2022 school year, Student attended school in-person and received Student's math and academic/executive functioning special education service minutes in the general education and special education classrooms, as set forth in Student's April 20, 2021, IEP.
14. The documentation also includes the service logs of the District's LCSW, which indicate that the LCSW provided Student's social behavioral services to Student in the special education setting, as set forth in Student's IEP.
15. The documentation also includes a detailed report from Student's homeroom and general education teachers describing the manner in which the teachers implemented each of Student's classroom accommodations.
16. On May 4, 2022, at the end of Student's 5th grade year, Student's IEP team met for the annual review of Student's IEP. School and Parent records indicate that the meeting began with a review of Student's progress and Student's present levels of academic achievement and functional performance. School staff indicated that Student was doing very well with her goals and progress, but Parents expressed their concerns that she was not doing as well as indicated by School staff. Parents also expressed concern about Student's behavior at home.
17. District provided PWN to the Parents regarding the IEP team meetings held on May 4, 2022, which provides, in relevant part, as follows:
  - a. At the meeting, a proposal was made by District staff to exit Student from special education services because of the great progress made by Student and because Student met all of her previous goals and is at or above grade level in all academic areas. The District recommended that Student be exited from special education services and referred to a Section 504 plan. The Parents disagreed with exiting Student from Special Education because they felt that the District did not provide enough evidence to support Student being exited from services. Parents requested that Student continue to receive special education services to work on grade level standards through aligning goals in the area of math. Due to the Parent

request for more information, the IEP team rejected the proposal to exit Student until additional data is collected and analyzed.

- b. The District proposed an updated comprehensive educational evaluation for Student. Student's previous educational evaluation was in 2019. The team determined that additional information regarding Student's educational achievement and processing is necessary to determine eligibility for special education. The exceptionality's to be considered are OHI and Specific Learning Disability (SLD).
  - c. Parents expressed concerns that Student has not mastered 5th grade standards in math, and that meeting 6th grade level demands could exacerbate the impact of her ADHD and anxiety disorder. The IEP team agreed to continue to implement Student's current IEP pending the results of the comprehensive educational evaluation along with a review of school data and Student's progress towards Student's IEP goals.
  - d. Parents requested time to discuss changes to Student's IEP, so the IEP team agreed to table the meeting and re-schedule it for a later date.
  - e. Student's IEP team meeting was re-scheduled and held on May 26, 2022.
  - f. The IEP team agreed to decrease special education services in math to 1 hour per week, decrease executive functioning services to 1 hour per week, and decrease Behavioral Support Services to 30 minutes per week. The reason for the services was to target below grade level skills in math to ensure that Student is able to access the 6th grade curriculum and to support Student's social-emotional needs. Special education support would be provided through small group targeted instruction in the general education classroom with daily check-ins to support executive function goals in the resource room.
  - g. The IEP team agreed on proposed goals and objectives and accommodations for Student.
18. The documentation indicates that the District conducted a re-evaluation of the Student on June 3, 2022.
19. On August 25, 2022, Student's Multidisciplinary Evaluation Team (MET) team met to review the Student's recent evaluation results and continue the discussion regarding Student's eligibility and need for special education services. The evaluation results indicate that Student's overall intellectual ability is in the average range, and Student is in the average to high average range in all academic areas. A medical note also indicates that Student continues to have a diagnosis of ADHD and generalized anxiety disorder. The evaluation did not indicate a SLD in math. The IEP Team Eligibility Determination form signed by the MET indicates that Student is eligible for special education services and identifies Student's exceptionality as OHI.

20. Student’s IEP team then met to review and revise Student’s May 26, 2022, IEP. This meeting resulted in a signed Addendum to Student’s May 26, 2022, IEP. The August 25, 2022, IEP Addendum identifies the IEP team’s agreed changes to Student’s IEP, in relevant part, as follows:

- a. Executive Functioning Goal: Student will write in her agenda daily.
- b. Math Goal: Student will independently complete multi step word problems and calculations at the 6th grade level.
- c. Instructional accommodations were agreed upon and included.
- d. Special Education Math services were continued for 1 hour per week in the general education classroom.
- e. Special Education Executive Functioning services were decreased to 15 minutes per week in the general education classroom.
- f. Social Behavior Supports were continued for 30 minutes per week in the general education and special education classrooms.
- g. The IEP team agreed to continue implementing all other provisions of Student’s May 26, 2022, IEP.

21. Student’s grades and progress reports for 5th and 6th grades are as follows:

**STUDENT’S GRADES**

Year/Sem./Quarter	ELA	Math	Science	Soc. St.	Music	Orch.
2021/2022 S1	B	C	B	B+		B
S2	B	B-	B+	A-	A	A
2022/2023 S1	A-	C+	B+	A+	NR	NR
S2						

**STUDENT’S PROGRESS REPORTS**

Progress Rep.	Math	Social/Emotional	Executive Functioning
2021/2022 Q1	N/A	N/A	N/A
Q2	Progress	Obj. 1-Met Goal Obj. 2-NR	Obj. 1-NR Obj. 2-NR
Q3	Progress	Obj. 1-Met Goal Obj. 2-NR	Obj. 1-Progress Obj. 2-Progress
Q4	Progress	Obj. 1-Met Goal Obj. 2-NR	Obj. 1-Progress Obj. 2-Progress
2022/2023 Q1	Obj. 1-Progress Obj. 2-Progress	Obj. 1-Progress:70% Obj. 2-Met Goal	Progress

22. The above chart indicates that Student’s grade report for 5th grade shows that Student is doing well academically and is progressing from grade to grade. The semester 1 grades for 6th grade show some progress over all except for Math which is slightly lower than



the end of 5th grade. The semester 2 grades for Student's 6th grade year have, of course, not yet been reported. The documentation includes a Class Score Detail for Student in Math for 5th grade which shows that Students class scores are a bit erratic and do show many Ds and Fs. However, the final calculated grades average out as Bs and Cs. Student's teachers report that Student continues to receive mostly As and Bs in Student's other subjects during the current semester.

23. The documentation includes Student's scores on the iMSSA Assessment for Math during the relevant time period for this complaint investigation as follows:
  - a. Middle of the Year 2021-2022: 538, which is in the upper range of Needs Support and is significantly below School and District averages but above the state-wide average;
  - b. End of the Year 2021-2022: 549, which is in the mid-range of Near Target and is still below School and District averages but above the state-wide average; and
  - c. Beginning of the Year 2022-2023: 656, which is in the upper range of Near Target and is on par with School and District average scores and well above the state-wide average.
24. The chart identifying Student's Progress Reports indicates that Student is progressing in all goal areas, and in the area of Social/Emotional Student has met at least one of the objectives for the relevant time period in both school years. However, several of the progress reports for Social/Emotional and Executive Functioning were not prepared or provided to Parents. Also, it should be noted that many of the reports have inaccurate dates and express Student's progress with general observations that don't tie into the criteria for mastery, and very little hard data.
25. After the IEP team meeting on May 4, 2022, when School staff indicated their belief that due to Student's progress, Student was no longer eligible to receive special education services, Parents sent an email to School staff on May 16, 2022, expressing their lack of confidence in Student's academic progress and requesting to see or have copies of certain documents from Student's education file prior to the next IEP team meeting. The documentation requested by Parents is as follows:
  - a. Documentation of the REED, Re-Evaluation of Existing Data, process (eligibility determination decisions and worksheets), and documented explanations for recommendations.
  - b. Latest iMSSA scores with all detail available.
  - c. Imagine Math Student Progress Report and Standards Report.
  - d. Record of data for service time related to math and executive functioning from current and prior case managers.
  - e. Documentation of accommodations.
  - f. Copies of IEP updates and progress notes regarding goals, except for Q1 progress notes from the School Social Worker.

26. The District’s documentation indicates that on May 18, 2022, Student’s Special Education Teacher and Case Manager sent the following documents to the Parents: beginning, middle and end of year iMSSA short-cycle assessment scores, Imagine Math benchmark assessment and Student’s previous IEP. The teacher also provided the executive functioning daily check-in schedule for Student.
27. On May 19, 2022, Parent sent an email to Student’s teacher stating that Parent had not received documentation that accommodations were delivered, documentation that service times for executive functioning were provided, or the standards report for Imagine Math. The Parent also requested an explanation of the process that was followed by the District to reevaluate existing data on Student and an explanation of why District proposed to exit Student from special education at the May 4, 2022, IEP team meeting.
28. District staff report that at the May 26, 2022, IEP team meeting, District staff provided all of the documents requested by Parents that the District maintains, and also discussed the results of the assessments taken by Student.
29. On May 27, 2022, the parent sent an email to District staff again requesting to review or have copies of previously requested documents they had not received, as follows:
  - a. “Record of pull out services related to math and executive functioning, including those from prior case managers” . . . [The School Social Worker] “graciously provided us with hers last week.”
  - b. “Notes and other documentation of the Re-Evaluation of Existing Data with explanations for the district’s recommendation to dismiss from services.”
  - c. “Imagine Math Standards Report.”
30. The District’s Coordinator of Student Service responded to Parent’s email and stated that the District was gathering the information Parents requested, some of which would need to be redacted, and indicated she would be glad to meet with Parent in June to review it. The District and the Parents met on June 14, 2022, to review the documents, and copies of the remaining documents were provided to Parents.

### **Discussion and Conclusions of Law**

#### **Issue No. 1**

**Whether the District failed to implement the Student’s Individualized Education Plan (IEP) to enable Student to be involved in and make progress in the general education curriculum, by failing to:**

- a. ensure that Student’s IEP was accessible to each regular and special education teacher, related services provider, and any other service provider who was responsible for its implementation, and/or failing to ensure that each such responsible party was informed of his or her specific responsibilities for implementing the IEP and providing accommodations, modifications and supports to Student, as required by 34 C.F.R. §300.323(d); and 6.31.2.11(B)(1) NMAC;**
- b. provide Student with special education and related services, in accordance with Student’s IEP, as required by 34 C.F.R. §300.323(c)(2) and 6.31.2.11(B)(1) NMAC;**
- c. review and revise, as appropriate, Student’s IEP to determine if Student’s annual goals are being achieved, as required by 34 CFR § 300.324(b)(1); and 6.31.2.11(B)(1) NMAC; and**
- d. monitor Student’s progress toward meeting the annual goals and/or provide progress reports to Parents in a timely manner, as required by 34 C.F.R. §300.320; and 6.31.2.11(B)(1) NMAC.**

Issue 1(a)

Students with disabilities who are eligible under the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 CFR §300.1(a), and 6.31.2.7(B)(19) NMAC. “Central to IDEA is the requirement that local school districts develop, implement, and annually revise an individualized education program (IEP) calculated to meet the eligible student’s specific educational needs. 20 U.S.C. § 1414(d).” *Thompson R2-J School Dist. v. Luke.*, 540 F.3d 1143, 1144 (10th Cir. 2008).

The IDEA and State rules provide that a student’s IEP must be accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation. 34 CFR § 300.323(d)(1); 6.31.2.11.B(1) NMAC. Public agencies must also ensure that each regular teacher, special education teacher, related services provider, and any other service provider who is responsible for the implementation of a child's IEP is informed of her specific responsibilities related to implementing the child's IEP and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the child's IEP. 34 CFR § 300.323(d)(2); 6.31.2.11.B(4)(b) NMAC. The obligation to inform staff members of their responsibilities concerning implementing a child's IEP includes the duty to inform substitutes of their specific responsibilities. *See, e.g., Douglas County Sch. Dist.*, 70 IDELR 111 (SEA NV 2017). This certainly requires affirmative action on the part of a school district.

In their Complaint, Parents have expressed their concern that the District may be limiting access to Student's IEP by School staff. Parents point to a specific incident in October, 2021, where it appeared that Student was being pulled out of class for ELA services that were not listed on the IEP and were not needed by Student. As discussed in the Statement of Facts above, Student was not actually being provided with ELA services but was receiving Student's special education service minutes in a classroom where other students were receiving ELA services. This appears to be a classroom scheduling issue rather than District staff not being aware of Student's IEP or IEP services. The facts further identify the specific actions taken by the District to ensure that Student's IEP was accessible to District staff and to inform staff of their responsibilities for implementing it. Therefore, it is concluded that the District did not fail to ensure that Student's IEP was accessible to each regular and special education teacher, related services provider, and any other service provider who was responsible for its implementation, and/or failing to ensure that each such responsible party was informed of his or her specific responsibilities for implementing the IEP and providing accommodations, modifications and supports to Student. **As to issue No. 1(a), the District is not cited.**

#### Issue 1(b)

Under the IDEA, eligible students with disabilities are entitled to receive a Free Appropriate Public Education (FAPE) provided in conformity with an IEP developed consistent with the IDEA's procedural requirements and State Rules. *34 CFR § 300.17*. The IDEA and its implementing regulations and State Rules require that the IEP must include annual academic and functional goals designed to meet the student's needs that result from the student's disability, to enable the student to be involved in and make progress in the general education curriculum. *20 USC §1414(d)(1)(A), 34 CFR §§ 300.320(a)(6)(i) and 300.323*. The District must ensure that as soon as possible following the development of the IEP, special education and related services are made available to the student in accordance with the student's IEP. *34 CFR §300.323(c)(2); 6.31.2.11.B(1) NMAC*. This includes all supplementary aids and services, program modifications and accommodations set forth in the student's IEP.

The IDEA's implementation mandate does not mean that a district must perfectly implement a student's IEP in order to provide the student with FAPE. Although school districts should strive to follow IEPs as closely as possible, the IDEA does not require perfect adherence to a child's IEP. Minor discrepancies between the services provided and the services called for by the IDEA do not give rise to an IDEA violation. *Van Dun ex. rel. Van Dun v. Baker Sch. Dist.* 5J, 502 F. 3d 811, 821 (9th Cir. 2007). *See, also I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Schs.*, 70 IDELR 86 (8th Cir. 2017); and *T.M. v. District of Columbia*, 64 IDELR 197 (D.D.C. 2014) ("short gaps" in the student's services did not amount to a material failure to provide related services.).

The Fourth, Fifth, Eighth, Ninth, and 11th U.S. Circuit Courts of Appeal have held that only a material implementation failure will qualify as a denial of FAPE. See *Sumter County Sch. Dist. 17 v. Heffernan*, 56 IDELR 186 (4th Cir. 2011); *Houston Indep. Sch. Dist. v. Bobby R.*, 31 IDELR 185 (5th Cir. 2000), *cert. denied*, 111 LRP 30885, 531 U.S. 817 (2000); *Neosho R-V Sch. Dist. v. Clark*, 38 IDELR 61 (8th Cir. 2003); *Van Duyn v. Baker Sch. Dist. 5J*, 47 IDELR 182 (9th Cir. 2007), *reprinted as amended*, 107 LRP 51958, 502 F.3d 811 (9th Cir. 2007); and *L.J. v. School Bd. of Broward County, Fla.*, 74 IDELR 185 (11th Cir. 2019) (The 11th Circuit held that only material implementation failures are actionable under the IDEA.). In *E.C. v. U.S.D. 385 Andover*, 76 IDELR 212 (D. Kan. 2020), the U.S. District Court noted that the 10th U.S. Circuit Court of Appeals, which includes Kansas (and New Mexico), has not decided whether parents are only entitled to relief for a "material" implementation failure. Based on rulings from other federal Circuit Courts, however, the judge determined the parents would need to prove a significant deviation from the BIP. Because a Kansas district's failure to follow an elementary school student's BIP on three occasions did not cause any lasting harm, the District Court ruled that the student was not entitled to relief for the implementation failures, and the district offered the student FAPE.

A review of the documentation provided by Parents and District, as detailed in the Statement of Facts above, reviewed in light of the Court's analysis in the above referenced Kansas case, *E. C.*, does not lead to a conclusion that Parents have proven District significantly deviated from implementing Student's IEP. There is no evidence in the record to indicate that School staff were not implementing the Student's IEP services and accommodations. Therefore, it is concluded that the District did not fail to provide Student with special education and related services, in accordance with Student's IEP. **As to Issue No. 1(b), District is not cited.**

#### Issue 1(c)

The IDEA and State Rules provide that the parents of a student with a disability are participants along with school personnel in developing, reviewing, and revising the IEP for their student. The regulations also provide that each LEA must ensure that the IEP team reviews a student's IEP periodically, but not less than annually, to determine whether the annual goals for the student are being achieved, and revises the IEP to address any lack of expected progress toward the annual goals, the results of any reevaluation, information about the student provided to, or by, the parents, and the student's anticipated needs. *34 CFR § 300.324(b)(1), and 6.31.2.11(B)(1) NMAC.*

The documentation indicates that both the School and Parent requested and attended meetings, including IEP team meetings, at various times during the 2021-2022 and 2022-2023 school years. The documentation shows that the District scheduled and held IEP team meetings on April 20, 2021, May 4, 2022, May 26, 2022, and August 25, 2022. The PWNs provided to Parents in

connection with the IEPs held in 2022, evidence proposals that were made by District and Parents, and various proposals made by both the District and Parents were accepted and rejected by the IEP team. Moreover, the Annual Goals and Benchmarks and the Special Education and Related Services in the IEPs were discussed and revised in the May and August, 2022, IEPs. All of these facts are clear evidence that the Student's IEP team did meet to review and revise, as appropriate, Student's IEP during the 2021-2022 and 2022-2023 school years. Therefore, it is concluded that the District did not fail to review and revise, as appropriate, Student's IEP to determine if Student's annual goals are being achieved. **As to Issue No. 1(c), the District is not cited.**

#### Issue 1(d)

The IDEA regulations and state rules require that each student's IEP include a statement of measurable annual goals, including academic and functional goals, and a description of how the student's progress toward meeting the annual goals will be measured and when periodic reports on the progress the student is making toward meeting the annual goals will be provided. *34 CFR §300.320(a)(2) and (3); and 6.31.2.11(B)(1) NMAC*. This requirement is included in the IDEA to allow the IEP team to monitor the student's progress in the areas of need identified in the IEP. The lack of a clear description of how progress will be measured is likely to render the IEP deficient. However, some courts have held that the inclusion of detailed and measurable short-term objectives in a student's IEP remedies any defects in the annual goals. *See, e.g., B.P. and S.H. v. New York City Dep't of Educ.*, 64 IDELR 199 (S.D.N.Y. 2014), *aff'd*, 66 IDELR 272 (2d Cir. 2015, *unpublished*) (Although the annual goals developed for an 11-year-old boy with autism, ADHD, and other disabilities were not measurable when viewed in isolation, the District Court held that the inclusion of detailed short-term objectives cured any substantive defects in the student's IEP.) The IDEA does not specifically require districts to report on a student's progress toward meeting benchmarks or short-term objectives. OSEP has stated that it's up to each IEP team whether to do so and that in some cases it may be an appropriate way to report meaningfully on a child's progress toward meeting annual goals. *See Letter to Lenz*, 64 IDELR 283 (OSEP 2014) (stating that the progress reporting requirement at 34 CFR §300.320(a)(3) pertains only to annual goals). The Student's IEP goals do include benchmarks.

There is nothing in the Federal law that dictates the form or the precise content of the documentation of progress toward meeting IEP goals. Those decisions rest within the discretion of states, local school districts, and educators, based upon the individual circumstances of each student with a disability. Some courts have held that a district need not utilize standardized tests in order to measure a student's progress toward IEP goals. *Jaccari J. v. Board of Educ. of the City of Chicago, Dist. No. 299*, 54 IDELR 53 (N.D. Ill. 2010); and *Pierce v. Mason City Sch. Dist., Bd. of Educ.*, 48 IDELR 7 (S.D. Ohio 2007). As a threshold matter, a student's IEP team needs to decide how to measure progress toward the annual goals identified in a student's IEP. *34 CFR §300.320(a)(3)(i)*. However, report cards for students with disabilities must be at least as

informative and effective as the report cards provided for students without disabilities. *Shenendehowa Cent. (NY) Sch. Dist.*, 114 LRP 23576 (OCR 01/23/14).

The IDEA does set a minimum frequency for reporting on the progress of a student toward meeting his IEP goals, requiring that "periodic reports" be provided. *34 CFR § 300.320(a)(3)(ii)*. See, e.g., *In re: Student with a Disability*, 76 IDELR 167 (SEA DE 2020) (since there was evidence that the January progress report was sent more than a month late, the state ED found that the district was in violation for failing to issue progress reports in a timely manner); *Westerville City Schs.*, 119 LRP 42887 (SEA OH 08/29/19), (finding that an Ohio district failed to consistently provide the progress reports of a sixth-grader with OHI to his parents at the end of each quarter although his IEP stated that the district would provide progress reports on a quarterly basis); and *Oskowis v. Sedona-Oak Creek Unified Sch. Dist. #9*, 73 IDELR 226 (D. Ariz. 2019) (finding that a district complied with the IDEA's reporting requirement by sending the parents three progress reports during the school year).

In this matter, Parents have alleged that the District failed to monitor Student's progress and provide progress reports to Parents in a timely manner. Specifically, Parents allege that there were no Executive Functioning progress reports prepared for Q2, 2021-2022, and that the Math and Executive Functioning Progress Reports for Q2, Q3 and Q4 do not have any specific, measurable progress data. It is concluded that the documentation supports the Parent's allegations that the District failed to appropriately monitor, document and timely report the Student's progress, or lack thereof, on the Student's IEP goals. Therefore, it is concluded that the District failed to appropriately monitor Student's progress toward meeting the annual goals and/or provide progress reports to Parents in a timely manner, which constitutes a procedural violation of the IDEA. **As to Issue No. 1(d), the District is cited and corrective action is required.**

### **Issue No. 2**

**Whether the District failed to afford the Parents an opportunity to inspect and review any education records related to the Student, including, as appropriate, providing copies of requested education records to Parents, as required by 34 C.F.R. §§300.501(a) and 300.613; and 6.31.2.13(B) NMAC.**

The IDEA seeks to maximize parental involvement in educational decisions affecting their disabled child by granting parents a number of procedural rights. For example, parents are entitled to examine all records relating to their child, *20 U.S.C. §1415(b)(1)*. *Ellenberg ex rel. S.E. v. New Mexico Military Institute*, 478 F.3d 1262 (10<sup>th</sup> Cir. 2007). One of the hallmarks of the IDEA is a parent's procedural right to participate and be involved in the educational decisions made by the IEP team respecting their child. One of those procedural rights involves the review of their child's education records. The IDEA and its implementing regulations and state special education rules grant to parents the right to inspect and review all education records of their child with

respect to the identification, evaluation, educational placement, and the provision of FAPE to the child. 34 CFR §300.501(a); and 6.31.2.13.B NMAC. The IDEA's "procedural guarantees are not mere procedural hoops through which Congress wanted state and local educational agencies to jump. Rather, the formality of the Act's procedures is itself a safeguard against arbitrary or erroneous decision making." *Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036, 1041 (5th Cir. 1989) (internal quotation marks omitted).

The IDEA does not contain a definition of "education records," but adopts by reference the definition of education records in the regulations implementing the *Family Educational Rights and Privacy Act of 1974*, 20 USC §1232g (FERPA). 34 CFR § 300.611(b). Under FERPA, with specifically enumerated exceptions, education records are those records that are: (1) directly related to a student; and (2) maintained by the education agency or institution or by a party acting for the agency or institution. 34 CFR § 99.3. Under FERPA, a "record" includes "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm and microfiche." 34 CFR § 99.3. Neither FERPA nor the IDEA contains a definition of the term "information directly related to a student." It has been suggested that a reasonable definition of the term is synonymous with "personally identifiable information," which is defined under 34 CFR § 99.3. FERPA specifically excludes as education records those records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record, and excludes records maintained by the law enforcement unit of the educational agency or institution that were created by that unit for the purpose of law enforcement. 34 CFR § 99.3.

As stated, in order to be considered an education record, the record must be "maintained" by an educational agency. The U.S. Supreme Court has held that being maintained by an educational agency also means that the records must be kept in one place with a single record of access. *Owasso Indep. Sch. Dist. v. Falvo*, 36 IDELR 62 (U.S. 2002). In order to be considered an education record the issue is not who created or originated the document, it is who maintains the document.

It is also true that not every record maintained by a district relating to a student will satisfy the definition of an education record. It has been held that email that is not in a student's permanent file is not considered "maintained" and thus is not an education record. *S.A. v. Tulare County Office of Educ.*, 53 IDELR 143 (E.D. Cal. 2009); and *Brownsburg Cmty. Sch. Corp.*, 59 IDELR 146 (SEA IN 2012). In *Saddleback Valley Unified Sch. Dist.*, 57 IDELR 298 (SEA CA 2011), it was concluded that incident reports pertaining to a student's injuries maintained in a district's risk management department weren't education records subject to parental inspection. Documents such as test instruments, test protocols and interpretive materials, which do not contain



personally identifiable information of a student are not subject to review by a parent. *Letter to Anonymous*, 111 LRP 18281, 14 FAB 32 (FPCO 2010); *Montgomery County Pub. Schs.*, 111 LRP 55173, 15 FAB 17 (SEA MD 2011).

The IDEA provides that the right to inspect and review education records includes the right to request that copies of their child's education records be provided by a district **if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records.** *34 CFR §300.613(b)(2)* (Emphasis added.). There is no definition in the federal regulations for what "effectively prevent" means, but it has been concluded by OSEP that the term means, for example, that a parent is entitled to receive copies of records when the parent resides too far from the school district to make an inspection in person a reasonable option. *Letter to Kincaid*, 213 IDELR 271 (OSEP 1989). However, parents who have physical access to the records kept by the district do not have the right to obtain copies of those records. *Lyon County Sch. Dist.*, 60 IDELR 83 (SEA NV 2012); and *Bevis v. Jefferson County Bd. of Educ.*, 48 IDELR 100 (N.D. Ala. 2007) (holding that because the parent of a student had physical access to the student's educational records, the Court ruled that the parent was not entitled to copies of the student's 999-page file). The IDEA provides that a district is entitled to charge a fee for copies of education records, provided that the fee does not effectively prevent a parent from exercising the parent's right to inspect and review those records and that the fee is not imposed to reimburse the district for the administrative effort involved in searching for or retrieving the record. *34 CFR § 617*. Finally, the IDEA provides that a district must comply with a request to inspect and review records without unnecessary delay and before any meeting regarding an IEP . . . , and in no case more than 45 days after the request has been made." *34 CFR §300.613(a)*.

In the present matter, the Parents made a request to the District on May 16, 2022, for certain specific documents identified above. As set forth above, the District's obligation in response to the Parent's request was to allow the inspection, or provide copies, of the Student's educational records prior to an IEP meeting and in no case more than 45 days after the Parent's request. While the District was under no obligation to provide copies of the Student's education records to the Parent, the District agreed to provide copies to Parents. A review of the timeline noted in the above Findings of Fact indicates that the District responded to each of the Parent's requests for education records within the time required by the IDEA and State rules and prior to a scheduled IEP team meeting. The last meeting between the District and the parent regarding Parent's document request on May 27, 2022, was June 14, 2022. This was well inside of the 45-day requirement. At this meeting, District staff provided redacted copies of the documents requested by Parents that were maintained as education records of the Student.

There is no evidence in the record or in interviews with the Parents, that the Parents have not been provided with copies of the Student's education records, or that the District has refused to

provide, hide, or destroyed any of the Student's education records. The documentation does not show that the District's practices violated the IDEA or the Parent's right to review and inspect the education records of the Student. Therefore, the documentation does not support a conclusion that the District failed to afford the Parents an opportunity to inspect and review any education records related to the Student, including, as appropriate, providing copies of requested education records to Parents. **As to Issue No. 2, the District is not cited and corrective action is not required.**

### **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.**

The Federal regulations and State rules provide that violations of the IDEA may be based on either substantive or procedural violations. As noted above, the District has been cited for a procedural violation of the IDEA as to Issue No. 1(d). However, proving a procedural violation is only a first step to obtaining relief. In *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1125-26 & n.4 (10th Cir. 2008), the court held that "procedural failures under IDEA amount to substantive failures only where the procedural inadequacy results in an effective denial of a FAPE."; quoting *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996). Congress provided in the 2004 amendments to the IDEA that to find a denial of FAPE based on a procedural violation, the procedural violation must have: (1) impeded the student's right to a FAPE, (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (3) caused a deprivation of educational benefits. 34 C.F.R. §300.513(a)(2).

It is concluded that the Student's progress reports, report cards and District assessments show that the student generally made progress on the Student's goals and objectives during the period in question in this complaint investigation. When a student with a disability is participating in the general curriculum, good report card grades suggest that the student has made progress and such progress, in turn, strongly suggests that the student received FAPE. See *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982). See also *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017) (holding an IEP typically should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade"). However, while good grades can be evidence of compliance with the IDEA's FAPE mandate, they do not end an inquiry into whether a district provided FAPE. The IDEA expressly cautions that: "Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed

or been retained in a course or grade, and is advancing from grade to grade." 34 CFR § 300.101 (c)(1).

In the present matter, the complaint investigator has carefully weighed all of the evidence regarding Student's progress in the general education curriculum and Student's progress on her executive functioning and social behavioral goals, against the District's procedural violation regarding progress monitoring and reporting. After review, it is concluded that the District's procedural violation regarding progress monitoring and reporting does not rise to the level of a substantive violation of the IDEA. Therefore, it is concluded that the District's actions and/or omissions towards the Student did not result in a denial of FAPE. **As to Issue No. 3, the District is not cited.**

**Summary of Citations**

<b>IDEA/State Rule Provisions Violated</b>	<b>Description of Violation</b>
34 C.F.R. §300.320; and 6.31.2.11(B)(1) NMAC.	The District failed to monitor Student's progress toward meeting the annual goals and/or provide progress reports to Parents in a timely manner.

**Required Actions and Deadlines**

**By January 6, 2023**, 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@state.nm.us](mailto:Elizabeth.Cassel@state.nm.us)

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 March 17, 2023, and reported to the SED no later than March 24, 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>
<b>1.</b>	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).	<b>January 6, 2023</b>	Written Assurance Letter/Email.	<b>January 6, 2023</b>
<b>2.</b>	The District shall arrange to provide training to School special education staff (including special education teachers, special education administrators, and related service personnel), on the following special education topics:	<b>March 17, 2023</b>	Confirmation of the date of the training.  Confirmation of attendees at the training and plan for addressing	<b>February 24, 2023</b>  <b>March 24, 2023</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>
	<ul style="list-style-type: none"> <li>• conduct appropriate progress monitoring of students with IEPs,               <ul style="list-style-type: none"> <li>a. student data collection,</li> <li>b. the types and amount of information to include in an appropriate progress report</li> </ul> </li> <li>• Appropriate timing for providing progress reports to parents.</li> </ul> <p>The training shall be provided by a person with expertise in special education who is approved by NMPED. This trainer may be an employee of the District.</p>		<p>the provision of training to those staff, not in attendance.</p> <p>Submission of proposed trainer and trainer’s resume and proposed presentation for NMPED approval.</p>	<p><b>February 10, 2023</b></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/ Wallace J. Calder*

Wallace J. Calder, Esq.

Complaint Investigator

Reviewed by:

*/s/ Miguel Lozano*

Miguel Lozano, Esq.

Chief Counsel, Special Education Division

Reviewed and approved by:

*Timothy Crum*

Deborah Dominguez-Clark ← For

Director, Special Education Division