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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Animas Public Schools
Case No. C2223-25
January 6, 2023

This Report requires corrective action. See pages 12-14.

On November 9, 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.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 the 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 and District Special Education Director; and
- research of applicable legal authority.

Limits to the Investigation

Federal regulations and state rules limit the investigation of state complaints to violations that occurred not more than one year prior to the date the complaint is received. 34 C.F.R. § 300.153(c); 6.31.2.13(H)(2)(d) NMAC. Any educator ethics issues, or any alleged ADA or Section 504 disability discrimination issues, are not within the jurisdiction of this complaint investigation and, as a result, were not investigated.

Issues for Investigation

The following issues regarding alleged violations of the IDEA, its implementing regulations and State rules, are addressed in this report:

1. Whether the District failed to provide a copy of the Parent and Child Rights Procedural Safeguards Notice to the Parents, in violation of 34 C.F.R. § 300.504 and 6.31.2.13(D)(3) NMAC;
2. Whether the District failed to conduct a comprehensive initial evaluation of the Student, in violation of 34 C.F.R. § 300.301 and 6.31.2.10(D) NMAC;
3. Whether the District failed to provide an independent educational evaluation at public expense, in violation of 34 C.F.R. § 300.502 and 6.31.2.10(D)(2)(f) NMAC;
4. Whether the District failed to develop and implement the Student’s IEP, in violation of 34 C.F.R. §§ 300.323–300.328 and 6.31.2.11(B) NMAC; and
5. 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. Student is a prekindergarten student eligible for special education under the classification of Autism and Speech Language Impairment.
2. Starting in February 2022, Student's regular education prekindergarten teacher began exchanging notes with Parent about Student displaying behaviors (throwing themselves to the floor, throwing classroom items, hitting other students, and screaming as a form of task refusal), incontinence, and communication deficits.
3. Teacher and Parent continued their written communication about Student's needs into the 2022-2023 school year including Student's periodic need for 1:1 instruction.
4. Benchmark testing using the Early Childhood Observation Tool ("ECOT") was administered on February 1, 2022. Student generally received scores in the Older Toddler and Early Three Year Old range for physical development, literacy, mathematics, science, socialization, and learning approaches.

Evaluations

5. On September 21, 2022, Parent called the District and verbally requested an initial evaluation of the Student. Parent said that they placed the call to the District because Parent suspected Student had autism.
6. The following day, the District provided Parent with a consent form to conduct an evaluation. Parent signed and returned the consent form to the District on September 23, 2022.
7. The consent form contained a checklist of assessment options. The boxes checked off on the consent form were: (a) speech and language assessment; and (b) occupational therapy evaluation. Towards the bottom of the form, it indicates that Parent was giving permission for Student "to be evaluated to determine if [Student] has a need for special education services."
8. Parent reported that when they asked the District why the evaluation was limited to speech and occupational therapy assessments, the District did not provide an explanation.
9. District's response to the complaint stated that the District did not seek to conduct a comprehensive initial evaluation but rather collect data to determine if Student may have a disability. District's position is that if the "IEP determination team" had determined that Student may be eligible for special education services based on a review of the existing data, then the District would have gone forward with a more comprehensive, multidisciplinary evaluation.

10. District did not provide Parent with a copy of the Procedural Safeguards Notice following the parental request for an evaluation. The District acknowledges this oversight in its response to the state complaint.
11. Parent filled out an educational history form on September 23, 2022. The reasons Parent listed for referring their child for an evaluation was “speech and developmental delays.”
12. A speech language evaluation was completed September 28, 2022. Testing found that Student had significant delays in oral expression, listening comprehension, and functional language use skills. The speech language pathologist concluded that Student was eligible for speech language therapy.
13. A district-conducted occupational therapy evaluation was finalized on October 4, 2022. Student showed deficits in fine motor skills and refused to participate in gross motor tasks. The occupational therapist recommended Student receive 90 minutes a month of occupational therapy services.
14. Later that month on October 21, 2022, Parent emailed the District’s Special Education Director asking why the District had not conducted a psychological assessment of Student. Parent reported that Director called Parent in response to the email and the parties agreed to conduct an IEP Team meeting.
15. Parent obtained a private psychoeducational evaluation of Student. The evaluation report, dated October 24, 2022, offers a diagnostic impression of Autism Spectrum Disorder, Level 2 due to Student’s atypical social communication, restricted interests, and difficulty transitioning. Student was tested in areas such as social responsiveness and adaptive behavior but standardized testing in intelligence and academic skills was unsuccessful due to student nonparticipation.
16. The outside evaluator recommended that Student receive specially designed instruction (in basic reading, writing, and math) and speech language therapy.
17. Parent said in their interview that they did not voice their disagreement with the District’s evaluation or request an independent educational evaluation (“IEE”) at public expense before arranging for the parentally funded evaluation.
18. Parent said they were not aware of their right to request an IEE during the timeframe in which the various evaluations were conducted.

IEP Team meeting

19. The District sent Parent an IEP Team meeting invitation on October 24, 2022.
20. Parent signed the invitation and wrote in that they never received a copy of the Procedural Safeguards Notice from the District. District concedes in their response that a copy of the Procedural Safeguards Notice was not included with the IEP Team meeting invitation.

21. The purpose of the meeting listed in the invitation was “initial IEP development.”
22. The parties met for the IEP Team meeting on November 2, 2022.
23. In the morning before the meeting started, Parent emailed a copy of the private evaluation to a District special education teacher.
24. A copy of the Procedural Safeguards Notice was provided to Parent at this meeting.
25. Following a review of the evaluations, Student was deemed eligible for special education.
26. An IEP was developed which called for 90 minutes a month of occupational therapy, 30 minutes a week of speech therapy, and contained six IEP goals targeting deficits in speech-language and motor skills. An educational assistant was also assigned to address Student’s behaviors in the classroom as needed.
27. Another meeting was held on November 16, 2022 to further review the psychoeducational evaluation directly with the private psychologist. Two additional IEP goals in the areas of social emotional and adaptive behavior were added to the IEP following this meeting.
28. A facilitated IEP meeting was convened on December 7, 2022. No substantive changes were made to the IEP during this meeting.
29. Parent reported that there were no issues with the development or implementation of the IEP.
30. Parent stated that Student is responding well to their special education programming and related services. Student is periodically pulled out of class for 1:1 instruction with a special education teacher. Parent noticed an improvement in Student’s speech such as talking in full sentences and conversing with other students. District staff provided Parent weekly updates as to Student’s educational progress. When Student is displaying emotional difficulties, staff take Student into another classroom to deescalate.
31. The District produced updated ECOT scores on December 5, 2022. Student is making progress in developing their skills in physical development, literacy, mathematics, science, socialization, and learning approaches.
32. Since the filing of this report, the District conducted training on MLSS interventions and special education procedures as well as revising their protocols for handling evaluation requests.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to provide a copy of the Parent and Child Rights Procedural Safeguards Notice to the Parents, in violation of 34 C.F.R. § 300.504 and 6.31.2.13(D)(3) NMAC.

School Districts are required to provide parents of a child with a disability the procedural safeguards notice under certain circumstances, including when there is an initial referral or parent request for an evaluation. 34 C.F.R. § 300.504(a)(1). Notice of IDEA procedural safeguards is meant to assure parents participate in the IEP process and are aware of their rights. *T.R. v. Sch. Dist. of Philadelphia*, 4 F.4th 179, 184 (3d Cir. 2021).

In this case, Parent requested an initial evaluation of Student by calling the District on September 21, 2022 and asking that Student be assessed for special education and related services. In response, the District sent Parent an evaluation consent form but there was no copy of the Procedural Safeguards Notice included with the form. The District acknowledged in its response that it failed to provide Parent with notice of the procedural safeguards after the Parent requested an evaluation. Based on these facts, the District committed an IDEA procedural violation.

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

Issue No. 2

Whether the District failed to conduct a comprehensive initial evaluation of the Student, in violation of 34 C.F.R. § 300.301 and 6.31.2.10(D) NMAC.

An evaluation to determine whether a student is a child with a disability and in need of special education must assess in all areas of the student's suspected disability. 34 C.F.R. § 300.304(c)(4); 6.31.2.10(E)(4) NMAC. Similarly, schools must use a variety of assessments and strategies to gather information about the functional, developmental, and academic needs of the student. 34 C.F.R. § 300.304(b)(1); 6.31.2.10(D)(2)(d)(iv) NMAC. Testing that is limited in scope may not constitute a full and individual evaluation if there is insufficient evaluative information to determine the nature and extent of a child's special education needs. *A.W. ex rel. H.W. v. Middletown Area Sch. Dist.*, No. 1:13-CV-2379, 2015 WL 390864, at *10–13 (M.D. Pa. Jan. 28, 2015).

Here, the District completed testing of Student's speech and motor abilities while Parent obtained assessments in the areas of social responsiveness and adaptive behavior. Yet Student's classroom behaviors, learning deficits (as captured in the February 2022 ECOT scores), and the

parental concerns that Student was developmentally delayed warranted additional testing in intelligence and academic skills. The District's position that the speech and occupational therapy evaluations were part of data collection to determine if Student may have a disability is unpersuasive. The scope of testing is determined by the suspected disability and the student's needs. While Student's speech and motor skills were assessed via District evaluations, evidence of other suspected disabilities and Student's needs (as reflected in the parental request to evaluate, the educational history filled out by Parent, and Student's disruptive classroom behaviors) necessitated further testing to determine if Student had autism or was developmentally delayed. Moreover, the use of intervention strategies cannot be used to delay or deny a full and individual evaluation to a child suspected of having a disability, especially in this case where the Student's learning deficits, speech delays, and behavioral needs provided an ample basis to suspect a disability.

Neither does the private evaluation adequately address the gaps in testing found in the District evaluations. The private evaluator was unable to complete standardized testing of Student's intelligence and academic skills. Student's behaviors, such as task refusal and limited communication during class, called for IQ testing to rule out whether low cognitive functioning was attributable to Student's learning difficulties. Likewise, academic testing was warranted as Student had shown below-age learning skills when the ECOT was administered on February 1, 2022. For these reasons, the District unreasonably delayed conducting a comprehensive initial evaluation of Student in all areas of suspected disability.

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

Issue No. 3

Whether the District failed to provide an independent educational evaluation at public expense, in violation of 34 C.F.R. § 300.502 and 6.31.2.10(D)(2)(f) NMAC.

Parents have a right to obtain an independent educational evaluation ("IEE") at public expense if the parent disagrees with the evaluation conducted by the school district. 34 C.F.R. § 300.502(b)(1). Upon receipt of the parental request for an IEE, the District must either provide the IEE or request a due process hearing to show its existing evaluation was appropriate. 34 C.F.R. § 300.502(b)(2). Furthermore, when a parent shares an evaluation obtained at private expense with the school district, then the school must consider the results of that evaluation. 34 C.F.R. § 300.502(c)(1). A request for reimbursement of a private evaluation may be denied if the parents fail to make a request for an IEE. *T.G. ex rel. T.G. v. Midland Sch. Dist. 7*, 848 F. Supp. 2d 902, 928–29 (C.D. Ill. 2012), *aff'd sub nom. Giosta v. Midland Sch. Dist. 7*, 542 F. App'x 523 (7th Cir. 2013), *as amended* (Nov. 5, 2013).

Parent in this case did not request an IEE based on a disagreement with the District-conducted evaluation. Parent sought an outside evaluation because they suspected that Student may have autism and Parent was not aware of their right to request an IEE. When Parent contacted the District on October 21 to request that psychological testing be conducted on Student, the District had very little time (three days) to respond to Parent's disagreement with the District evaluations before the private evaluation was completed. The evaluation obtained at private expense was considered by the District and additional IEP goals were added based on the evaluation results. While the Parent's action of obtaining an outside evaluation could be construed as seeking an independent educational evaluation due to missing assessments from the District evaluation, the facts support a finding denying reimbursement of the parent-initiated evaluation because Parent did not submit an IEE request. It should be noted that the District's failure to provide a copy of the Procedural Safeguards Notice may have impacted Parent's awareness of their right to request an IEE.

As to Issue No. 3, the District is not cited.

Issue No. 4

Whether the District failed to develop and implement the Student's IEP, in violation of 34 C.F.R. §§ 300.323–300.328 and 6.31.2.11(B) NMAC.

An initial IEP must be developed within 30 days of a determination that the student is eligible for special education. 34 C.F.R. § 300.323(c)(1). Once an IEP is developed, the special education and related services outlined in the document must be made available to the student. 34 C.F.R. § 300.323(c)(2). A material failure to implement an IEP occurs when there is more than a minor discrepancy between the services a school provides to a child with a disability and the services required by the IEP. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007).

The evidence in this case demonstrates that the District properly developed and implemented an IEP for Student. At the November 2, 2022 IEP Team meeting, the District developed an IEP immediately following the determination that Student was eligible for special education and related services. On November 16, 2022, the District arranged for another meeting to ensure that the private psychologist's input was incorporated into the IEP. Parent reports that District is providing Student with all programming, services, and supports listed in the IEP. District is communicating with Parent on a weekly basis to monitor the implementation of the IEP. Taken together, the District took appropriate steps to develop and implement Student's IEP.

As to Issue No. 4, the District is not cited.

Issue No. 5

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 student eligible for special education is entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. School districts are obligated to provide FAPE for each student eligible in their district. 6.31.2.9(A), 6.31.2.11(I)(2) NMAC. If an IDEA procedural violation occurs, that violation will constitute a denial of FAPE only if it: (1) resulted in a substantive harm to the child or their parents; (2) deprived an eligible student of an IEP; or (3) resulted in the loss of an educational opportunity. *Boutelle v. Bd. of Educ. of Las Cruces Pub. Sch.*, No. CV 17-1232 GJF/SMV, 2019 WL 2061086, at *7 (D.N.M. May 9, 2019). The substantive legal standard for determining whether a District has offered a student FAPE is whether an IEP is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017).

The District's failure to evaluate Student's learning skills and intelligence was a substantial IDEA procedural violation because the District had notice that Student was displaying developmental delays that could be symptoms of autism. Yet, the District did not include standard assessments in their evaluation for gauging Student's learning needs and cognitive functioning. Even if Student's apparent deficits at school and the Parent's evaluation request were not sufficient to put the District on notice of Student possibly having a developmental disability, the receipt of the parent-initiated evaluation was a clear indication that Student had autistic symptoms. The failure to obtain necessary information about Student's autism spectrum disorder constitutes a denial of FAPE because: (1) the IEP team was left without evaluative information about Student's academic and cognitive functioning needs to develop appropriate IEP goals; (2) the lack of information denied Student educational opportunities to receive services tailored to students with autism; and (3) parents were deprived meaningful participation in the IEP process because the District's limited evaluations precluded parents from requesting an independent educational evaluation. *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1124–26 (9th Cir. 2016). Therefore, the inadequacy of the District evaluations was a serious IDEA procedural violation that denied Student FAPE.

As to Issue No. 5, the District is cited and Corrective Action is required.

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. § 300.504 and 6.31.2.13(D)(3) NMAC.	The District failed to provide a copy of the Parent and Child Rights Procedural Safeguards Notice to the Parents.
34 C.F.R. § 300.301 and 6.31.2.10(D) NMAC.	The District failed to conduct a comprehensive initial evaluation of the Student.
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 January 16, 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@ped.nm.gov

The file on this complaint will remain open pending the PED’s satisfaction that the required elements of this Corrective Action Plan are accomplished within the deadlines stated. The District is advised that the SED will retain jurisdiction over the complaint until it is officially closed by this agency and that failure to comply with the plan may result in further consequences from the SED.

Each step in this Corrective Action Plan is subject to and must be carried out in compliance with the procedural requirements of the IDEA 2004 and the implementing federal regulations and State rules. Each step also must be carried out within the timelines in the Corrective Action Plan. If a brief extension of time for the steps in the Corrective Action Plan is needed, a request in writing should be submitted to the Corrective Action Plan Monitor. The request should include the case number, the date for the proposed extension, and the reason for the needed extension. The SED will notify the parties of any extension granted.

Please carefully read the entire CAP before beginning implementation. One or more steps may require action(s) in overlapping timeframes. All corrective action must be completed no later than January 6, 2024 and reported to the SED no later than January 20, 2024. 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).	January 16, 2023	Written Assurance Letter/Email	January 16, 2023
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.	January 27, 2023	Notes from meeting prepared by the District	February 1, 2023
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	February 3, 2023	Notes from meeting prepared by the District	February 8, 2023

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>
	corrective actions that will be taken to address the violations.			
4.	<p>The District will conduct a psychoeducational evaluation of the Student including academic and intelligence testing.</p> <p>The District shall promptly seek parental consent prior to conducting the evaluation. If the Parents refuse to provide consent for the evaluation, then the District will provide a written record of the refusal.</p>	Within 30 days of receiving parental consent	<p>Signed parental consent form or written record of Parents refusing to provide consent.</p> <p>Evaluation Report if an evaluation is conducted.</p>	<p>Within 7 days of receiving written decision on consent</p> <p>Within 15 days of completing evaluation report.</p>
5.	If an evaluation is conducted, the District shall convene an IEP meeting to review the Student’s psychoeducational evaluation and consider any necessary revisions and the addition of services in the IEP such as specially designed instruction and academic IEP goals.	Within 15 days of completing the evaluation report.	Prior Written Notice and Revised IEP.	Within 15 days of completing IEP meeting.
6.	<p>The District shall provide training to school building administrators, special education leads, special education staff, and related service providers on the following topics:</p> <ul style="list-style-type: none"> • Provision of Procedural Safeguards Notice; • Responding to Parental Requests to Evaluate; and • Evaluating in all areas of suspected disability. 	March 3, 2023	<p>Confirmation of the date(s) of the training.</p> <p>Confirmation of attendees at the training with submitted documentation of signed attendance sheet from all attendees and plan for addressing the provision of training to</p>	<p>February 3, 2023</p> <p>March 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>Any training conducted after January 1, 2023 may satisfy this provision if the training covered the aforementioned topics.</p> <p>The District may provide this training through a District level staff member who has expertise in special education requirements. This person must be approved by NMPED.</p>		<p>those staff not in attendance.</p> <p>Submission of proposed trainer and trainer’s resume and proposed presentation for NMPED approval.</p>	<p>January 27, 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/ Michael Gadomski

Michael W. Gadomski, 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