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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. 2223-28
Los Lunas Public Schools
January 31, 2023

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

On December 8, 2022, there was a complaint filed with the New Mexico Public Education Department's (NMPED) 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 on January 12, 2023;
- interview with the District’s Elementary School Principal, Special Education Director, Inclusion Support Coach, and Counsel on January 17, 2023;
- 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. For this reason, the Complaint Investigator did not investigate any issues raised by the Complainant that occurred outside of the investigation timeline or incidents of bullying involving staff.

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 protect Student from bullying resulting in the Student not receiving a meaningful educational benefit, in violation of 34 C.F.R. § 300.17 and 6.31.2.8 NMAC.
2. 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 eleven years old and in the fifth grade for the 2022-23 school year.
2. The Student was initially evaluated on September 14, 2021. As a result of the evaluation, the Student is identified as a student with a disability under the primary disability classification of Specific Learning Disability (SLD).
3. An IEP meeting was held on October 19, 2021 to create the Student’s first IEP. Relevant portions of the IEP include:

- a. The IEP contains three measurable annual goals to support reading, writing, and math.
 - b. The Student receives 525 minutes/week of special education services in the special education setting to support the Student's achievement of their IEP goals.
 - c. All accommodations and modifications are to aid the Student's success in reading, writing, and math.
4. On January 20, 2022, the Parent sent an email to District staff regarding a concern that the Student was being bullied. The Student's teacher at the time responded to the Parent's email and said they were aware of the bullying and were addressing it. The Parent responded with gratitude.
5. On January 26, 2022, the Parent emailed District staff again regarding an incident in which the Student's chair was pulled out from underneath them by another student. On January 27, 2022, the District promptly addressed the matter and the other student involved was disciplined.
6. Additionally, on February 4, 2022, during a staffing meeting, the Student's then-current special education teacher and the inclusion support coach discussed the bullying concerns. It was decided that the Student and the other student involved in the January incidents would no longer be permitted to sit near one another or transition between classes together.
7. The District contends that the Student indicated in daily group checks throughout January and February that they felt safe at school and that they did not feel bullied.
8. On February 8, 2022, an IEP meeting was held to discuss a referral for an occupational therapy (OT) and physical therapy (PT) evaluation and to discuss completing a functional behavior assessment (FBA). The referral for the additional assessments came from the school's inclusion support coach after they noted concerns with the Student's physical abilities and social interactions on the playground. As a result, the IEP team agreed to conduct a PT evaluation and an FBA. There is no indication the bullying concerns or the possible educational impact on Student, if any, were addressed at the IEP meeting.
9. On February 23, 2022, the Parent emailed the District staff regarding a concern that the Student was still being bullied by the same student involved in the January incidents. In the email, the Parent requested a meeting with the other student and their parents. The Parent's email was forwarded and discussed with the administration. Additionally, the classroom teacher addressed the incident with the Student the next day. The District indicated a meeting was not held with the parents of the other student due to FERPA concerns.
10. On March 29, 2022, a PT evaluation was completed. The evaluation concluded, in part, the Student exhibited motor delays and qualified for PT services.

11. On April 20, 2022, an FBA was completed to determine the Student's "social awareness." The Student was observed in numerous classroom settings by the social worker. The observation notes indicate, in part, there were times the Student did not recognize situational demands or social cues. However, overall, the Student's responses to social situations and their surroundings were typical of their peers and no recommendations were necessary.
12. On April 20, 2022, an IEP meeting was held to discuss the results of the PT evaluation and FBA. The IEP was amended to include two PT/motor skill related goals and PT related services. There is no indication the bullying concerns or the possible educational impact on Student, if any, were addressed at the IEP meeting.
13. On May 12, 2022, an incident occurred with the Student. The same student involved in the January incidents hit the Student in the face. The District promptly addressed the matter and the other student involved was disciplined
14. On May 17, 2022, there was a report of teasing occurring on the bus between numerous students. All students involved, including the Student, were talked to by the administration.
15. The Student's end of year progress report shows they made progress towards their reading, writing, and math IEP goals. In fact, the Student exceeded the identified target percentage for both the reading and math IEP goals.
16. On August 31, 2022, during the 2022-23 school year, the Parent emailed District staff regarding a concern that other students were "putting their hands on" the Student on the bus. Upon receiving the Parent's email, the District's counselor spoke with all students involved. The Student was told to let the staff know if anything else happens. Additionally, the bus driver changed the assigned seats so that the Student was no longer sitting near the other students.
17. An annual IEP meeting was held on September 12, 2022. The IEP is substantially similar to the Student's previous IEP with only changes noted in the student profile and present levels sections. The following was noted when reading the new IEP:
 - a. The progress noted in the September 12, 2022 IEP indicates that the Student regressed on their reading and math skills from the previous progress report at the end of the 2021-22 school year. Additionally, the Student had yet to achieve their writing goal. As a result, all of the Student's IEP goals remained the same, without any revision to special education services or supplementary aids.
 - b. There is no indication the bullying concerns or the possible educational impact on Student, if any, were addressed at the IEP meeting.
18. A prior written notice (PWN) attached to the September 12, 2022 IEP, includes, in part:
 - a. The Parent proposed, and the District accepted, if the Student is required to be disciplined, it must be appropriate for the Student. For example, due to the

Student's motor deficits, the District should not take away recess but offer recess at an alternate time.

- b. The Parent requested, and the District accepted, that an emergency IEP meeting be held if the Student is involved in a physical altercation with another student(s).
19. On September 28, 2022, the Parent emailed District staff regarding a concern that other students were harassing/abusing the Student for the "last three weeks." Upon receiving the Parent's email, the District's counselor spoke with all students involved. The Student was encouraged to change their seat on the bus and to inform staff if anything else happens.
 20. On October 25, 2022, the administration documented an incident in which the Student's glasses and lunch tray were thrown off the table during lunch. The District indicates the actions taken by the other student involved were not "directed at [the Student]," as they were not specifically targeted; the Student's glasses and lunch tray just happened to be nearby and the Student was coincidentally impacted.
 21. On December 7, 2022, the Parent called the school to report an incident that occurred on the bus. The Parent indicated other students were punching the Student's bus seat and "flicked [the Student's] breast."
 22. The District provided the Investigator with the footage recorded on the bus. The Investigator noted the following, in chronological order:
 - a. Student B is seen touching the top of the Student's head. Shortly after, the bus driver is heard saying "no fighting" and for Student B to keep their hands to themselves.
 - b. Student B and Student C appear to be punching the back of the Student's seat repeatedly. The bus driver is heard asking if Student B needs to move to the front of the bus.
 - c. At one of the stops, the bus driver is heard asking a different student exiting the bus about the Student. The audio is inelible.
 - d. At a subsequent stop, Student C exits the bus.
 - e. Student D appears to touch on or near the Student's stomach or leg multiple times. Within seconds after the initial contact, Student D is seen touching or "flicking" the Student's breast twice. Immediately after, the Student is seen laughing. Student D then flicks the Student's breast at least four more times within a 30 second interval.
 - f. Students B and D exit the bus.
 - g. At the last stop, the Student exits the bus and does not report anything to the bus driver.

23. On December 8, 2022, an emergency IEP meeting was held to discuss the bus incident. The IEP was amended to include special transportation given the bus incident that occurred on December 7, 2022.
24. The PWN attached to the December 8, 2022 IEP Addendum, includes, in part:
 - a. A functional behavior assessment (FBA) will be conducted.
25. On December 12, 2022, an internal email amongst District staff was sent regarding an incident in which a teacher saw another student flinging a toy at the Student. When the teacher approached the Student, they indicated the other student was hitting and throwing wood chips at them. The other student was talked to and told they would be written up if their behavior continued. The District stated this incident was not reported to the Parent.
26. The most recent progress report dated December 16, 2022 indicates the Student has made progress on their academic goals since the implementation of the new annual IEP.
27. As of this writing, the Parent has not provided consent for the FBA to be completed.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to protect Student from bullying resulting in the Student not receiving a meaningful educational benefit, in violation of 34 C.F.R. § 300.17 and 6.31.2.8 NMAC.

School districts have an obligation to ensure that a student with a disability who is bullied continues to receive FAPE. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013). An appropriate response to bullying of a student with a disability is to “convene the IEP team to determine whether . . . the student’s needs have changed such that the IEP is no longer designed to provide meaningful educational benefit.” *Id.*

In this case, there have been numerous concerns made by the Parent regarding the alleged bullying of the Student. In each instance, District staff responded to the Parent, investigated the incidents, and addressed the incidents with all students involved, in some capacity. However, there is no indication that the alleged bullying was discussed within the IEP Team at any point before the December 7, 2022 emergency IEP meeting to determine if the alleged bullying was impacting the Student’s ability to receive a meaningful educational benefit. Moreover, at the emergency IEP meeting, there is no indication a discussion commenced regarding the impact of the alleged bullying on the Student but rather only a discussion about providing special education transportation to the Student so that they would no longer ride the bus with the alleged bullies. *See Colton Joint Unified Sch. Dist.*, 117 LRP 52248 (SEA CA 12/20/17) (*holding that a district’s*

investigation into bullying is distinct from the IEP team's obligation to address the impact of bullying on the student's FAPE). The District failed to meet its obligation to convene an IEP Team meeting and determine whether the alleged bullying was having an impact on the Student's ability to receive a meaningful educational benefit.

Additionally, it appears that at the time of the September 2022 IEP meeting that the Student had regressed on their reading and math goals and was not making appropriate progress on their writing goal. When a student fails to make progress within a reasonable period of time, the district must convene an IEP meeting to address the lack of progress. 34 C.F.R. § 300.324(b)(ii)(A). At the annual IEP meeting, the IEP Team should have either changed the IEP goals, adjusted the Student's services, or, at the very least, discussed the Student's regression and lack of progress – none of which occurred.

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

Issue No. 2

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 Court in *Andrew F.* stated that a district must offer an IEP that is “reasonably calculated to enable the child to receive educational benefits.” *Andrew F. v. Douglas County School District. RE-1*, 137 S. Ct. 988 (2017). Failure to do so may result in a denial of FAPE. The question here is whether the District's failure to address the bullying and/or the lack of progress impacted the Student's receipt of an educational benefit in light of their circumstances.

Bullying

The Office of Civil Rights stated a decline in grades, the onset or an increase in behavior outbursts, including emotional outbursts, or an increase of absences may be a manifestation of the effects of bullying. *Dear Colleague Letter: Responding to Bullying of Students with Disabilities*, 64 IDELR 115 (OCR 2014).

Here, there is no evidence that the alleged bullying impacted the Student's grades, caused the Student to regress or fail to progress on their IEP goals at the start of the 2022-23 school year, resulted in an increase in behaviors, or caused the Student to be absent from school. Thus, the District's failure to address the possible educational impact the bullying had on the Student amounts to a procedural violation and not a deprivation of FAPE.

Regression/Lack of Progress

While the IEP Team did not revise the Student’s IEP to address the regression and lack of progress, since the implementation of the September 2022 IEP, the Student has made progress on their IEP goals. In fact, it appears from the most recent progress report that the Student is nearing achievement of their reading and math IEP goals and progressing on their writing goal. Thus, because the Student has made progress despite the District’s failure to address the same at the September 2022 IEP meeting, the Student has not been denied FAPE.

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

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. § 300.17 and 6.31.2.8 NMAC	The District failed to convene an IEP meeting to determine whether the alleged bullying impacted the Student’s ability to receive meaningful educational benefit.
34 C.F.R. § 300.324(b)(ii)(A)	The District failed to address the Student’s regression and lack of progress.

Required Actions and Deadlines

By February 10, 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 April 10, 2023, and reported to the SED no later than April 17, 2023. All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the state complaint case number and step number.

Corrective Action Plan

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
1.	As described above, the District will submit a written assurance to the PED Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan (CAP).	February 10, 2023	Written Assurance Letter/Email	February 10, 2023
2.	The District Special Education Director and the school principal shall meet with the SED Education Administrator assigned to the District and the SED CAP Monitor to review the Complaint Resolution Report, the Corrective Action Plan, and any other measures that the District plans to take to ensure that the violations are corrected and do	February 20, 2023	Notes from the meeting prepared by District	February 27, 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>
	not recur. The District Director has the discretion to include other District or school administrators or personnel in this meeting. The District Director shall be responsible for arranging this meeting with SED.			
3.	<p>The District shall arrange training for District staff (including special education teachers, special education administrators, and related service personnel) to be provided by a person with expertise in special education who is approved by NMPED.</p> <p>The training shall address the following special education topics:</p> <ul style="list-style-type: none"> (1) How to respond to incidents of bullying of students with disabilities, including convening an IEP meeting to determine whether the effects of the bullying have changed the student's needs; (2) How to respond to a lack of progress or regression, including convening an IEP meeting to address the same. 	April 10, 2023	<p>Submission of proposed trainer and trainer's resume and proposed presentation for NMPED approval.</p> <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>March 1, 2023</p> <p>March 13, 2023</p> <p>April 17, 2023</p>
4.	<p>The District shall convene a facilitated IEP meeting for the Student. The facilitated IEP meeting shall address:</p> <ul style="list-style-type: none"> • The educational impact, if any, on Student as a result of the bullying incidents; • The Student's progress on their IEP goals; 	March 6, 2023	<ol style="list-style-type: none"> 1. Invitation to facilitated IEP meetings, 2. IEPs, 3. Prior Written Notices, and 4. Agenda for facilitated IEP team meetings 	15 days after the IEP meeting is held

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
	<ul style="list-style-type: none"> • Whether the IEP goals are appropriate or need revisions in light of the Student’s current progress; • Whether the Student is in need of different special education services or supplementary aids to enable the Student to make progress; • Whether ESY services are necessary for the provision of FAPE. <p>The Facilitator shall be independent of the District and shall be selected from the PED list of approved facilitators. The Facilitator shall be paid for by the District.</p> <p>The FIEP meeting shall be held on a date and time that is convenient for the parent. The parent will be provided with a copy of the IEP and PWN at the conclusion of the FIEP meeting.</p> <p>The District shall also ensure that the IEP team includes, but is not limited to, parents, special education teacher, general education teacher, and any related services providers.</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/ 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