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NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
SPECIAL EDUCATION DIVISION  
Complaint Resolution Report  
Case No. 2223-36  
Roswell Independent School District  
March 10, 2023

**This Report requires corrective action. See pages 22-26.**

On January 11, 2023, 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.<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 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;

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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;
- interview with the Parents on February 7, 2023;
- interview with the District’s Director of Special Education, Assistant Principal, and three special education teachers on February 23, 2023; 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 properly developed and implemented the Student’s IEP, pursuant to 34 C.F.R. § 300.322; 34 C.F.R. § 300.323; and 6.31.2.11(B) NMAC.
2. Whether the Student’s IEP is tailored to their unique needs and reasonably calculated to enable the Student to make progress appropriate in light of their circumstances pursuant to 34 C.F.R. § 300.320, 34 C.F.R. § 300.324, and 6.31.2.11(B) NMAC.
3. Whether the Student’s placement and services are provided in the least restrictive environment appropriate for the Student’s needs, pursuant to 34 C.F.R. § 300.114 through 300.120 and 6.31.2.11(C) NMAC.
4. Whether the District’s actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE), in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

### **General Findings of Fact**

1. The Student is currently 18 years old and in the 11<sup>th</sup> grade for the 2022-23 school year.
2. A review of existing evaluation data (REED) was completed on August 17, 2020. Through the REED process, it was established that additional data was needed to determine eligibility and/or develop an appropriate educational program for the Student. The additional assessments were administered in September 2020 and a report of the findings was finalized on October 2, 2020. As a result, the Student was identified as a student with a disability under the primary classification of Specific Learning Disability (SLD). The areas in which the Student qualifies are reading comprehension, reading fluency, math calculation skills, and math problem solving.
3. During the first semester of the 2021-22 school year, the Student had an IEP that included goals related to reading, math, and post-secondary employment. The Student's services included 30 minutes a week of student led "TAP work" on reading and math skills.
4. TAP (Teaching to Academic Potential) is a classroom consisting of a small group of students with a disability who attend TAP to receive academic support from a special education teacher in core and/or elective classes. Depending on eligibility and the severity of a student's disability, all students with a disability have at least 30 minutes of TAP services on their IEP (*per* interview with the District). On an IEP, TAP services are described as student led, as needed, or pull-out. If TAP is described as "student led" on the IEP, the student is allowed to determine on a daily basis whether they need support from the TAP teacher or not. Generally, if TAP services are on a "student led" basis and the Student wants to attend TAP, the student first attends their general education class, then, after instruction and/or an assignment has been given, the student is free to go to TAP to get support from the TAP special education teacher. Once the student has received the support they need, the student is free to return to the general education classroom. The District considers TAP differently than traditional special education services that are provided in the resource classroom.
5. The Student ended the first semester of the 2021-22 school year with a 2.375 grade point average (GPA). The Student's grades that raised a concern included:
  - a. Chemistry – C (72%)
  - b. English – D (63%)
  - c. Geometry – D (64%)
  - d. Spanish II – C (72%)
  - e. World History and Geography – D (60%)
6. On January 13, 2022, an IEP meeting was held. Relevant portions of the IEP include:

- a. The Student continues to have deficits in reading and math. The Student struggled to keep up with academic rigor in English and math even with TAP and tutoring support. It is recommended that the student pull out for math and English.
- b. The Student has a number of accommodations, including, in part:
  - i. Opportunity to work with a peer buddy
  - ii. Opportunity to retake assignments (up to three times) and quizzes/tests (up to two times).
- c. The IEP contains four goals to support reading, math, post-secondary employment, and post-secondary education. The Student's present levels and goals are detailed below:
  - i. Area of Need - Reading
    - 1. Present Levels: The present levels include assessment data from September 2020, the Student's Brigance Reading scores from September 2021, and a then-current comment from the Student's English teacher. The comment indicates the Student struggles with reading comprehension despite using resources and support.
    - 2. The IEP indicates the reading goal is carried over from the Student's previous IEP (IEP date September 28, 2021). The goal states:
      - a. [Student] will analyze 3[rd] through 10<sup>th</sup> grade text and be able to answer comprehension questions [with 80% accuracy].
  - ii. Area of Need – Math
    - 1. Present Levels: The present levels include assessment data from September 2020, the Student's Brigance Math scores from September 2021, and a then-current comment from the Student's math teacher. The comment indicates the Student uses supports and free tutoring but continues to struggle in math.
    - 2. The IEP indicates the math goal is carried over from the Student's previous IEP (IEP date September 28, 2021). The goal states:
      - a. Given 10 geometry problems, a reference tool with formulas and examples, and/or video link, [Student] will be able to use basic math calculation skills to solve geometric problems [with 70% accuracy].
  - iii. Area of Need – Post-Secondary Employment

1. Present Levels: The present levels include the findings of a September 2021 career self-assessment – Student has an interest in art.
2. The IEP indicates the post-secondary employment goal is carried over from the Student’s previous IEP (IEP date September 28, 2021). The goal states:
  - a. [Student] will research two job fields related to art given an exemplar and write a short summary.
- iv. Area of Need – Post-Secondary Education
  1. Present Levels: The present levels indicate the Student is currently enrolled in yearbook. It also includes the Student’s current grades in all of their classes.
  2. Goal: [Student] will research requirements for [an] art portfolio for a college of interest.
- d. The following special education is to be provided to the Student through May 27, 2022:
  - i. TAP work on target reading and math skills when student led: 30 minutes/week in the special education setting;
  - ii. English: 180 minutes/week in the special education setting; and
  - iii. Geometry: 180 minutes/week in the special education setting.
- e. The Student is to receive the same special education as detailed above between August 4, 2022, and January 13, 2023, with the exception that “geometry” has changed to “algebra.”
- f. Progress is to be reported on a quarterly basis.
7. A prior written notice (PWN) attached to the January 13, 2022 IEP includes, in part:
  - a. The Team accepted placement in instructional setting 2 (40-79% of the day in the regular classroom setting) because the Student requires a moderate level of services to support the Student in English and math curriculum at a slower pacing.
  - b. The Student is still in need of TAP support to work on grade level skills in correlation with reading and math skills.
8. On April 4, 2022, the Parent emailed the District regarding the Student’s class registration for the 2022-23 school year. The Parent stated the class registration did not include any special education classes and requested that the Student be enrolled in a special education class for math, English, and science.
9. According to the Parent, shortly after the April 4, 2022 email, they were told verbally by the District’s assistant principal that the District was given permission by NM PED to no

longer offer special education classes to District students. The District denies the allegation.

10. During the interview with the District, the District informed the Investigator that, effective for the 2022-23 school year, the school was making a change to the “platform” of the resource classrooms. When asked what kind of changes were made, the District indicated that previous to the 2022-23 school year students who were scheduled into the resource room for special education services (not TAP services) were getting all of their IEP identified instruction in the resource room instead of the general education classroom. For example, instead of a student attending the general education math classroom, the student would attend the resource room for all of their math instruction at the same time they would have attended the general education math class. To be implemented at the beginning of the 2022-23 school year, all students that did not have a moderate/severe disability were going to be pushed back into an instructional setting with general education teachers; students “true LRE,” according to the District. For example, instead of a student attending resource room math, the student would receive math instruction from the general education teacher, in the general education classroom, and go to TAP after instruction, if needed. If a student needed more support, the student would be scheduled into an “intervention class” instead of an elective class. In this case, for example, a student would attend both the general education math class and would also attend intervention for special education instruction in math during a different class period. The Student would forego an elective to attend intervention. The Investigator asked if the decision to “push back” a student to the general education classroom was made by each student with a disability’s IEP team prior to the decision being made. The District claimed it was an IEP team decision. However, the District also indicated that special education staff were tasked with scheduling IEP meetings for all similarly situated students prior to the start of the 2022-23 school year so that the special education services changes could be made on all students’ IEPs, with no indication all similarly situated students IEP teams were consulted beforehand.
11. The District claims a progress report was provided to the Parent on April 14, 2022. However, no progress reports was provided to the Investigator to align with that timeframe nor is there any documentation supporting the District’s claim. The Parents assert they never received a progress report in April 2022.
12. The Student received the special education services indicated on their IEP through the end of the 2021-22 school year.
13. The Student ended the second semester of the 2021-22 school year with a 3.250 GPA. Student received a “C” or better in all classes.
14. The progress reports that were relevant to the second semester of the 2021-22 school year only included progress as of May 25, 2022, for the Student’s then-current reading and

math goals. No progress was noted for the Student's post-secondary employment or post-secondary education goals. The progress noted for the Student's reading and math goals was not measurable to either goal. Specifically, the progress noted was the Student's then-current grades in their English and Geometry classes. There is no indication the May 25, 2022 progress report was provided to the Parent.

15. No IEP meeting was held or attempted to be scheduled for the Student prior to the decision made to discontinue reading and math special education services in the resource classroom for the 2022-23 school year. Furthermore, the Parent indicates they were never consulted regarding the decision to place the Student in the general education classroom.
16. The first day of the 2022-23 school year was August 4, 2022.
17. Between the first day of school and September 21, 2022, according to the District's "TAP log," the Student attended TAP eight times. Seven of the eight times the Student attended TAP was for reading support; one time was for math support. On average, according to the District, the Student would attend TAP for 20-30 minutes each date in attendance.
18. Outside of TAP, the Student did not receive any special education services for reading or math.
19. On August 23, 2022, the Parent sent an email requesting an IEP meeting regarding some concerns with the Student's educational programming.
20. On September 21, 2022, an IEP meeting was held to address the Parent's concerns regarding math and update the schedule of services. Relevant portions of the IEP include:
  - a. The IEP is to be in effect through January 13, 2023.
  - b. The Student Profile section was mostly unchanged from the previous IEP. The only change was the following additional language:
    - i. The Student has not used TAP for math this year. The Student is failing math but with TAP and accommodations, the Student's grade should improve.
    - ii. It is recommended the Student use their accommodations and pull out to TAP for more one-on-one help.
  - c. The Student is not on target with graduation requirements. The Student will need to pass their math class in order to catch up on credits.
  - d. The only change to the Student's accommodations/modifications was the addition of providing slower pacing/chunking for assignments and providing tests in chunks.
  - e. The Student's present levels were not updated for their reading or post-secondary goals. Nor were the goals changed in any way.
  - f. The Student's present levels in math were unchanged other than the addition of a new comment regarding the Student's 30% in their Algebra class. Additionally,

one word of the math goal was updated. Instead of giving the Student 10 geometry problems, the Student was to be tested on 10 algebraic problems.

- g. The Student's special education services changed to the following:
    - i. TAP Reading: 60 minutes/week in the special education setting
    - ii. TAP Math: 90 minutes/week in the special education setting
    - iii. Case Management/Academic Monitoring: 45 minutes/week in the special education setting
  - h. The Student was to be educated in the regular classroom for more than 80% of the school day (instructional setting 1).
21. The District was asked to explain what case management/academic monitoring was. The special education teacher indicated the purpose of the additional special education service was to pull the Student twice a week to go over their grades and any missing assignments and discuss what steps needed to be taken to improve their grades if needed. The service was added because of the Student's struggling math grade.
22. A PWN attached to the September 22, 2022 IEP includes, in part:
- a. The team rejected placing the Student in instructional setting 1.
  - b. The team placed the Student in instructional setting 2.
  - c. The team agrees the Student will have case management to support them in checking their academic progress and encourage self-advocacy and independent skills.
  - d. The team developed a plan to support the Student's academic progress. The Student will pull to TAP for math from an elective class. The Student will be able to study for math tests prior to taking the test and the test will be broken into small chunks.
23. On October 10, 2022, the Parent sent an email to the District regarding the Student's failing grade in math.
24. On November 16, 2022, the Parent sent an email to the District regarding the Student's 22% in math class and a concern that the Student was not being pulled out of class for TAP.
25. The District responded to the Parent on November 18, 2022. The District stated the math teacher removed the Student's low test grades and inputted grades for other work that had since been completed. With those changes, the Student's grade was now a 76% but the Student would need to retake the tests. Additionally, the Student was pulling out of their first period class to attend TAP and would continue to do so. The District also informed the Parent that the Student would be graded on a bell curve going forward (e.g., if the Student earns 70% in math, the grade will be changed to 100% in the gradebook).
26. The District claims progress reports were provided to the Parent on November 18, 2022. However, no progress reports provided to the Investigator align with that timeframe nor is there any documentation supporting the District's claim.



27. Between September 22, 2022, when the new IEP was implemented, and the end of the 2022 calendar year, the District's "TAP log" indicates the Student attended TAP fourteen times between September 29 and December 15, 2022. Of those fourteen times, only two times were for support in math; all other twelve times were for reading support. In addition, the Student was pulled to work on math in TAP seven additional times between October 6 and December 14, 2022. On average, each TAP session was for 20-30 minutes. In total, the documentation provided by the District indicates the Student attended TAP for math nine times for a total of 225 minutes and TAP for reading twelve times for a total of 300 minutes over a 12-week period (based on 25-minute TAP sessions).
28. The Student ended the first semester of the 2022-23 school year with a 3.125 GPA. Student received a "C" or better in all classes except for math which the Student received a 60% (D) in. The D was not based on the bell curve.
29. The District provided a number of progress reports with varying dates during the first semester of the 2022-23 school year to the Investigator. The following was noted regarding each IEP goals noted progress:
- a. There were two different reading progress reports provided by the District and one different progress report provided by the Parent. All three progress reports differed from one another. Specifically, all three had different dates of progress and different progress related comments. None of the progress comments on any of the progress reports were measurable to the reading goal.
  - b. Similar to the reading progress reports, there were three different math progress reports provided that all differed. Specifically, the progress reports provided by the District contained different wording for the math IEP goal and all three reports had different dates of progress and different progress related comments. None of the progress comments on any of the progress reports were measurable to the math goal.
  - c. The District provided two different progress reports for both the postsecondary employment and postsecondary education goals. The first report of progress for both goals was in September 2022, nine months after the goals had been implemented, and the progress noted was "no progress." Further, like the reading and math progress, the two progress reports differed from one another in dates and comments.

There is no indication the progress reports provided to the Investigator were ever provided to the Parent. Additionally, given the varying contents of the progress reports, it is unclear what progress reports contain the most accurate detail of the Student's progress.

30. On January 4, 2023, an annual IEP meeting was held.
31. Both the District and the Parent provided a copy of the January 4, 2023, IEP to the Investigator. The two IEPs are identical except for the two postsecondary goals. The

relevant portions of the IEP, including the differences between the post-secondary goals, include:

- a. The Student Profile section was not updated.
- b. The Student was marked as being on target to graduate.
- c. All the accommodations remained the same.
- d. None of the Student's present levels were updated for any of the four IEP goals.
- e. The reading goal was changed to: [Student] will read grade level text and be able to retell the story in a short summary with 80% accuracy.
- f. The math goal only changed in that instead of requiring the Student to solve geometric problems, the Student had to solve Algebra II concepts.
- g. The postsecondary employment goal differed in the District and Parent IEP copies. Specifically:
  - i. The District IEP goal reads: [Student] will research the requirements and expectations including skills, salaries, and benefits needed to be a professional artist.
  - ii. The Parent IEP goal reads: [Student] will research the requirements and expectations of becoming a painter.
- h. The postsecondary education goal differed in the District and Parent IEP copies. Specifically:
  - i. The District IEP goal reads: Utilizing skills learned in art class, [Student] will create a portfolio to include at least three of [their] own various pieces of artwork.
  - ii. The Parent IEP goal reads: [Student] will begin making [their] own portfolio with one or two pieces a year.
- i. The only change to services was that the Student was to receive 60 minutes/week of case management instead of 45 minutes/week.

32. A PWN attached to the January 4, 2023, IEP includes, in part:

- a. The team rejected placing the Student in instructional setting 1.
- b. The team placed the Student in instructional setting 2 to receive TAP, Math, and English pull out.
- c. All other aspects of the January 2022 IEP continue to align with the Student's present levels and postsecondary vision.
- d. The Student was given new goals for math, reading, postsecondary employment, and postsecondary education. The goals are measurable and align with the Student's present levels and student/family postsecondary vision.
- e. The Parent signed the PWN at the conclusion of the IEP meeting.

33. The Parent did not receive a copy of the January 4, 2023, IEP or PWN until January 31, 2023. The envelope that contained the January 4, 2023, IEP and PWN that was mailed to

the Parent was postmarked January 27, 2023. Despite sending the IEP twenty-three days after the IEP implementation date, the District is unsure why the IEP mailed to the Parent differs from the District's IEP. The Parent was unaware the District was utilizing different postsecondary goals than what was written in the IEP provided to them until the Investigator inquired about it.

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

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

**Whether the District properly developed and implemented the Student's IEP, pursuant to 34 C.F.R. § 300.322; 34 C.F.R. § 300.323; and 6.31.2.11(B) NMAC.**

#### **Development of IEP – Parent Participation**

A district must afford a parent the opportunity to participate in IEP meetings. 34 C.F.R. § 300.322; 6.31.2.11(B)(2) NMAC; and 6.31.2.13(C) NMAC. Placement decisions must be made by a group, including the parents. 34 C.F.R. §§ 300.116; 300.327; and 300.501(b).

Predetermination occurs when, prior to an IEP meeting, district members of the IEP team unilaterally make decisions regarding the student's identification, evaluation, placement, and/or FAPE.

During the spring of 2022, the District made a unilateral decision regarding the Student's placement for the 2022-23 school year. The decision was made without the input of the Parent and outside of an IEP meeting. The District indicated that the Student would no longer be offered special education services in the resource room because, like many other students with a disability at the District, the Student's true LRE was the general education classroom. The District's determination regarding the Student's placement should have been made at an IEP meeting amongst the IEP team, including the Parent.

Moreover, while the District made this unilateral determination, the District failed to provide the proper notice to the Parent prior to the change in placement. See 34 C.F.R. § 300.503. Instead, the District refused to allow the Student to participate in special education classes, other than TAP, for the 2022-23 school year without making any changes to the Student's IEP or notifying the Parent of the same.

The District's action of unilaterally determining the Student's 2022-23 placement and failing to provide the proper notice before changing the Student's placement is a violation of the IDEA and NMAC regulations.

### Development of IEP – Contents

An IEP must include (1) a statement of present levels of academic performance; (2) a statement of measurable annual goals; (3) a description of how the student's progress toward meeting the annual goals will be measured; (4) a statement of special education and related services and supplementary aids and services to be provided; (5) an explanation of the extent to which the student will participate with their nondisabled peers; (6) a statement of necessary accommodations on statewide and districtwide assessments; (7) the projected start date for services and modifications, along with the anticipated frequency, location, and duration; (8) postsecondary goals; and (9) a statement regarding the age of majority. 34 C.F.R. § 300.320.

The three IEPs relevant to this investigation lack the necessary content, to some degree.

First, the present levels in the January 2022 IEP include reading and math testing scores from four months prior to the IEP, not necessarily *present* scores. Additionally, the testing scores noted are vague in that a person unfamiliar with the IEP or the Student is unable to identify what the Student's present levels actually are – it doesn't pass the "stranger test." See *Mason City Community School District*, 46 IDELR 148 (SEA IA 2006). Relatedly, the present levels noted in the September 2022 IEP include no measurable data. Instead, the reading and math present levels report on the Student's difficulty in keeping up with the academic rigor and there are no updates to the Student's present levels related to their postsecondary goals. Finally, the Student's present levels were not updated at all in the January 2023 IEP; leaving the Student's current status a mystery.

Secondly, the January 2023 postsecondary education goal indicates the Student is to utilize the skills learned in art class to progress on the goal. However, the Student has never been enrolled in art class, nor are they currently enrolled in art class, making the goal, as written, inappropriate.

Third, the January 2022 IEP lacks the necessary detail regarding the TAP reading and math services to be provided to the Student. An IEP must include sufficient information so that the district's level of commitment is clear. 71 Fed. Reg. 46,667 (2006). Here, reading and math TAP services are lumped together for 30 minutes of instruction a week. It is unclear if the Student will receive 15 minutes of reading and 15 minutes of math or if the Student will receive a different division of time between the two subjects. Moreover, in the September 2022 and January 2023 IEPs, the Student has "case management/academic monitoring" services. It is unclear what that service is, why it is needed, or how the District provides it.

It is important to note, no matter if TAP services are student led or not, the District has an obligation to ensure every student with TAP services included on their IEP receives the number of minutes specified. If a student fails to attend TAP because the District gave them the option to attend TAP only when the student deemed necessary (e.g., on a student led basis), the District is

at risk of implementation and FAPE concerns. The District should ensure that student receives the services if they are needed to access the general curriculum. Additionally, the District should be cautious when including 30 minutes of TAP services on all students' IEPs, as it calls into question whether the IEP is individualized and based on the student's unique needs.

Fourth, the January 2023 IEP provided to the Parent differed from the District's copy, calling into question which postsecondary IEP goals were intended to be implemented. The PWN indicates new postsecondary goals were developed but it does not give specific details about the new postsecondary goals to demonstrate the Parents were or should have been aware of the specifics of the postsecondary goals.

Moreover, the District failed to provide the Parents with a copy of the IEP until nearly a month after the IEP meeting. 34 C.F.R. § 300.322. While the IDEA does not specify a timeframe in which the IEP must be provided, the District's one-month delay in sending the IEP, and sending an incorrect IEP, is clearly unreasonable.

#### Development of IEP – Prior Written Notice

A district must provide PWN before it proposes or refuses to initiate a change to the identification, evaluation, educational placement, or provision of FAPE of a student. 34 C.F.R. § 300.503.

A PWN must include, in part, a description of the action proposed or refused by the district and an explanation of why the district proposes or refuses the action. *Id.*

At the conclusion of each IEP meeting, the District offered a PWN. However, the September 2022 and January 2023 PWNs contain incorrect information that contradicts the contents of the IEPs. Specifically, both PWNs indicate that the IEP Team rejected placement in instructional setting 1 (80% or more of the day in the regular classroom), even though the opposite was true. Additionally, the January 2023 IEP includes the same exact language as the January 2022 PWN in that it indicates the IEP Team proposes placement in instructional setting 2 (40-79% of the day in the regular classroom) so that the Student could attend "TAP, Math and English pull out." However, the IEP Team did not propose for the Student to attend math and English pull out, only TAP pull out was proposed in January 2023. The January 2023 PWN also states all other aspects of the January 2022 IEP continue to align with the Student's present levels of performance and postsecondary goals. There is no indication that is true as all goals were updated, despite the lack of updates to the Student's present levels.

The point of a PWN is to provide sufficient details to allow parents to participate in the decision-making process in an informed way. While the Parents were in attendance at all IEP meetings and have been actively involved in their child's education, the District's PWNs don't meet the requirements of the IDEA.

## Implementation of IEPs

A district must implement a student's IEP with all required components. 34 C.F.R. § 300.323(c).

### *A. Special Education Services*

The IEP that was in effect at the beginning of the 2022-23 school year is dated January 13, 2022. The IEP includes 30 minutes/week of TAP services in reading/math and 180 minutes/week of pull-out services in English and Algebra 2 each.

Between August 4, 2022, and September 21, 2022, the Student received no special education services for English or Algebra 2. Moreover, notwithstanding the issues with the description of TAP services, the District admitted the Student was not going to TAP for math services prior to September 21, 2022.

Additionally, once the services were updated in the September 2022 IEP, the Student did not attend the specified weekly minutes of TAP for reading or math between September 22, 2022, and December 31, 2022. On average, the Student attended 300 minutes of TAP for reading and 225 minutes of TAP for math in total, far less than the 90 minutes of math and 60 minutes of reading a week that was required by the IEP.

### *B. Progress Reporting*

All three IEPs relevant to the time period of this investigation required the District to report on progress to the Parent on a quarterly basis. There is no documentation to show that the District provided progress reports to the Parent between January 2022 and December 2022. The only documentation of progress reports being provided came directly from the Parent. The progress reports were attached to the January 2023 IEP, which was provided to the Parent at the end of January 2023. The progress reports provided to the Parent contained progress on old goals with progress dates of December 2020, March 2021, and June 2021 – all irrelevant to the Student's then-current goals.

Moreover, the progress reports provided to the Investigator by the District are insufficient and confusing.

The information within a progress report should use the same method of measurement set forth in a student's IEP goals. *See Seattle Sch. Dist.*, 113 LRP 19336 (SEA WA 04/03/13).

Here, none of the progress was measurable to the goals, there are varying reports of progress that make it difficult to determine the Student's actual progress, and progress wasn't reported on at all for a period of nine months on the postsecondary goals.

The District's disorderly progress reporting causes great concern for the validity and timing that progress reporting is actually completed and has made it impossible to determine whether the Student is progressing or not.

In conclusion, the failure of the District to offer special education services, as required in the January 2022 IEP, and provide progress reports in accordance with all three relevant IEPs results in an implementation failure.

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

### **Issue No. 2**

**Whether the Student's IEP is tailored to their unique needs and reasonably calculated to enable the Student to make progress appropriate in light of their circumstances pursuant to 34 C.F.R. § 300.320, 34 C.F.R. § 300.324, and 6.31.2.11(B) NMAC.**

The IDEA requires a district to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of their circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). In order to analyze the adequacy of an IEP, the two-prong standard established by the *United States Supreme Court in Board of Education v. Rowley*, is considered. 458 U.S. 176 (1982). The first prong determines whether the IEP development process complied with the IDEA's procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 206-207. If both prongs are met, the IEP is appropriate. *Id.* at 207.

The question here pertains to the September 2022 and January 2023 IEPs. For both IEPs, the development process did not comply with the IDEA's procedures, as noted in Issue No. 1. The second prong is discussed below.

#### ***A. September 2022 IEP***

According to the District, the purpose of the September 2022 IEP meeting was to address the Parent's concerns regarding the Student's math grade and to update the schedule of services based on the District's decision to no longer offer pull-out services in math and English, a decision that was made solely by the District outside of an IEP meeting prior to the start of the school year.

Prior to the updated September 2022 IEP, the Student was in need of English and math pull out services, as detailed in the January 2022 IEP. Nothing changed between the end of the 2021-22 school year and the start of the 2022-23 school year to suggest the Student was no longer in need of those services, other than the District's push to get students back into the general education

room and only primarily use TAP services. To further support this assertion, the September 2022 IEP, although scarcely updated, includes a comment that the Student is failing math; not attending TAP, as required by the IEP; and is not on track to graduate. All of this raises red flags regarding the decision to no longer offer resource room pull out services for the Student. However, the District ignored the red flags and continued to push toward reducing and limiting resource room services to students with disabilities, instead of basing its considerations on the Student's individual needs.

Despite the increased TAP services identified in the IEP, the Student continued not to attend TAP, as required, and continued to fail their math class, again raising red flags to the Student's educational programming.

#### *B. January 2023 IEP*

The January 2023 IEP did not include any *present* levels of performance. Instead, the present levels were copied from previous IEPs. Without an accurate understanding of the Student's present levels and needs, it is impossible to develop an appropriate education plan.

For these reasons, the District failed to develop IEPs that were reasonably calculated to allow the Student to make progress appropriate in light of their circumstances.

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

#### **Issue No. 3**

**Whether the Student's placement and services are provided in the least restrictive environment appropriate for the Student's needs, pursuant to 34 C.F.R. § 300.114 through 300.120 and 6.31.2.11(C) NMAC.**

Children with disabilities must be educated with their nondisabled peers to the maximum extent appropriate. 34 C.F.R. § 300.114(a). Children with disabilities may only be removed from the regular education environment "if the nature or severity of the disability is such that education in [the] regular [classroom] with the use of supplementary aides and services cannot be achieved satisfactorily." *Id* at (ii).

A district must ensure placement decisions are made by a group of persons, including the parents. 34 C.F.R. § 300.116(a)(1). Placement decisions should be individualized and based on the student's IEP. *Id* at (b).

#### **Continuum of Alternative Placements**

Before the start of the 2022-23 school year, the District's goal was to get all students "back to their LRE." Specifically, the District's intent was for students similarly situated to the Student to



receive their instruction in the general education classroom and pull-out to TAP, if needed. Alternatively, or in conjunction with TAP, the students who need additional services would have an intervention class scheduled instead of an elective class.

Districts are required to ensure a continuum of alternative placements is available for students with disabilities. 34 C.F.R. § 300.115. The continuum begins with full integration in the general education classroom with no supplementary aids and services and increases to more restrictive settings. For example, a continuum may look like the following, in part:

1. General education classroom without supplementary aids and services
2. General education classroom with accommodations and modifications
3. General education classroom with pull out services in a resource room
4. Part time in the general education classroom but most of the time spent in another setting
5. Self-contained classroom with participation with non-disabled peers in nonacademic and extracurricular activities

Based on conversations with the District, it appears that the District believes pull-out TAP services are less restrictive than pull-out services to a resource room. That is not the case. In both circumstances, a student is pulled from the general education classroom to attend a different classroom with only other students with disabilities, whether that is called the resource room or TAP room. Either way, a student who receives special education services in the TAP room or resource room is not attending the general education classroom on a full-time basis. The District’s push to utilize TAP services in the TAP room over “intervention” classes in the resource room does not change a student’s placement on the continuum.

In Student’s circumstance, the District unilaterally decided the Student was best serviced in the TAP room instead of the resource room. As discussed above, the change in location to the TAP room does not change the Student’s placement on the continuum. Instead, the deduction in the special education service hours resulted in a change of placement.

It is important to note, the District’s new practice of replacing electives with intervention classes, instead of pulling a student from an academic class, as previously done by the District, has the potential to cause LRE and FAPE concerns. Specifically, removing electives from the schedule of a student with a disability may decrease their opportunity to participate with their nondisabled peers, changing their LRE. Each decision must be made on an individualized basis, with the IEP team, instead of becoming a District practice. *See Beaverton School District, 117 LRP 47499 (SEA OR 07/24/17) (finding that removing electives from the student’s schedule denied the student their least restrictive environment).*

## Student's LRE

As discussed under Issue No. 1, prior to the start of the 2022-23 school year, the District unilaterally determined the Student's placement and failed to provide PWN to the Parents. The District's decision to place the Student back into the general education classroom, despite their success in the resource room for math and English, was not based on the Student's individualized needs but rather the District's push to return all students similarly situated to the general education classroom.

The District is required by the IDEA to include the Parents in all placement determinations and consider the Student's individualized needs. The District should have considered the parent's position on the change of placement by convening an IEP team meeting or seeking a written agreement with the parent to amend the placement identified in the IEP. As the District failed to do so, the Student's change of placement to the general education classroom for the 2022-23 school year was inappropriately determined.

**As to Issue No. 3, the District is cited, and Corrective Action is required.**

## Issue No. 4

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

To determine whether FAPE was provided, the United States Supreme Court in the *Rowley* case, established a two-part test:

1. Has the district complied with the procedures set forth in the IDEA?
  2. Is the IEP reasonably calculated to enable the child to receive an educational benefit?
- If the two-part test is satisfied, FAPE was provided. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (1982).

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

The failure to implement an IEP can result in a denial of FAPE. 34 § C.F.R. 300.17. However, an IEP need not be perfectly implemented to provide a student with FAPE. A minor discrepancy does not amount to a denial of FAPE. *See I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Schs.*, 70 IDELR 86 (8th Cir. 2017).

## Change in Placement

The District's action of predetermining placement before an IEP meeting, failing to hold an IEP meeting to discuss the Student's placement with the Parent, and failing to provide the Parent notice of the change in placement before August 2022 impeded the Parent's opportunity to participate in the decision-making process and deprived the Student of an educational benefit, as there is no indication the decision was based on the Student's unique needs.

#### IEP Contents - Present Levels of Performance

All three IEPs lack the necessary detail, including clear baselines and/or present levels, to establish adequate IEP goals. Present levels and baselines provide a benchmark for measuring progress toward the IEP goals. None of the present levels in the three IEPs allow Student's progress to be evaluated, denying the Student FAPE. *See Ravenswood City Sch. Dist. v. J.S.*, 59 IDELR 77 (N.D. Cal. 2012).

#### PWNs – Incorrect Descriptions

As stated under Issue No. 1, the Parents attended each IEP meeting for the Student and appear to have had a good understanding of the actions proposed and refused by the District, despite the incorrect PWNs. Thus, there is no finding that the faulty PWNs amount to a denial of FAPE.

#### Special Education Services

The District failed to provide the special education services detailed in the January 2022 IEP for a seven-week period. Moreover, the District failed to provide the required minutes of reading and math TAP services detailed in the September 2022 IEP. The failure to implement the IEPs was not a minor discrepancy in either situation and it deprived the Student of an educational benefit.

#### Progress Reports

Even though the Parents participated in all IEP meetings, the District's failure to provide progress reports to the Parents stripped their ability to meaningfully participate in the decision-making process. However, even if progress reports were provided to the Parents every quarter, the lack of established present levels and the deficient, unmeasurable comments on progress raises concerns that the Parents could meaningfully participate at all.

#### Delivery of January 2023 IEP

Alone, the District's delay in providing the January 2023 IEP a month after the IEP meeting did not deprive the Parent of meaningful participation, as they attended the IEP meeting. However, providing an incorrect IEP to the Parent with different goals than what was discussed did deprive the Parent of the opportunity to participate in the decision-making process.

For the reasons stated above, the District's procedural violations amounted to a denial of FAPE when considering the three prongs identified in 34 C.F.R. § 300.513(a)(2).

### IEPs Reasonably Calculated

As discussed above, the District failed to comply with IDEA procedures. Additionally, as discussed under Issue No. 2, the September 2022 and January 2023 IEPs were not reasonably calculated to allow the Student to make progress. Thus, the Student was denied FAPE.

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

### Summary of Citations

<b>IDEA/State Rule Provisions Violated</b>	<b>Description of Violation</b>
34 C.F.R. § 300.116; 34 C.F.R. § 300.322; 34 C.F.R. § 300.327; 34 C.F.R. § 300.501(b); 6.31.2.11(B)(2) NMAC; and 6.31.2.13(C) NMAC	The District predetermined the Student's placement and failed to afford the Parents the opportunity to participate in the decision-making process regarding the Student's educational placement.
34 C.F.R. § 300.503 and 6.31.2.11(C)(2)(h) NMAC	The District failed to provide proper notice before it proposed to change the Student's educational placement.
34 C.F.R. § 300.320 and 6.31.2.11(B)(1) NMAC	The District failed to develop the Student's IEPs with the required contents.
34 C.F.R. § 300.320; 34 C.F.R. § 300.324; and 6.31.2.11(B) NMAC	The District failed to develop IEPs that were reasonably calculated to allow the Student to make progress appropriate in light of their circumstances.
34 C.F.R. § 300.114 and 6.31.2.11 NMAC	The District improperly determined the Student's least restrictive environment.
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 FAPE.

### Required Actions and Deadlines

**By March 21, 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](mailto: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 March 10, 2024, and reported to the SED no later than March 24, 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**

<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 Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan (CAP).	<b>March 21, 2023</b>	Written Assurance Letter/Email	<b>March 21, 2023</b>
<b>2.</b>	The District Special Education Director, and the school principal shall meet virtually 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 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 virtual meeting with SED.	<b>March 31, 2023</b>	Notes from meeting prepared by District	<b>April 7, 2023</b>
<b>3.</b>	The District Special Education Director will meet with the students' special education teachers, general education teachers, any related service personnel, school special education coordinator/lead, and school principal to review the Complaint Resolution Report to ensure that those persons understand the complaint, the violations that were found, and the corrective actions that will be taken to address the violations.	<b>April 7, 2023</b>	Notes from meeting prepared by District	<b>April 14, 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>
	<p>This plan may also include revision of policies and procedures, supplemental training related to identified areas of improvement, direct coaching of special education personnel, and periodic review placement determinations and notice.</p> <p>PED will monitor the implementation of the plan until all areas of improvement have been sufficiently addressed. PED has the discretion to require additional file review, training, and support based on the results of this audit and subsequent improvement plan.</p>		Documentation of implementation of the Improvement plan.	<b>The plan shall include deadlines for related document submission</b>
<b>5.</b>	<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 the PED.</p> <p>The training shall address the following special education topics:</p> <ul style="list-style-type: none"> <li>(1) Convening an IEP meeting, including the parents, before deciding regarding a student’s placement;</li> <li>(2) Notice requirements following a change in placement;</li> <li>(3) The required contents of an IEP, including present levels of performance;</li> </ul>	<b>May 26, 2023</b>	<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><b>April 14, 2023</b></p> <p><b>April 28, 2023</b></p> <p><b>June 2, 2023</b></p>



<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>
	(4) Requirements to implement an IEP as written; (5) How to measure and report on progress so that it is measurable to the IEP goal; (6) How to draft detailed PWNs; (7) How to appropriately determine a student's LRE.			
<b>6.</b>	<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"> <li>• The Student's progress on their previous IEP goals;</li> <li>• The Student's present levels of performance, including baseline data to create measurable goals;</li> <li>• Appropriate IEP goals based on the Student's present levels;</li> <li>• Whether the Student needs different special education services or supplementary aids to enable the Student to make progress;</li> <li>• Whether the Student needs compensatory education to place the Student in the position they would have been in had the District provided the appropriate and/or required services;</li> <li>• The Student's LRE.</li> </ul> <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>	<b>April 10, 2023</b>	1. Invitation to IEP meetings, 2. IEPs, 3. Prior Written Notices, and 4. Agenda for IEP team meetings	<b>15 days after the FIEP meeting is held</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>
	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.			

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:

*Timothy Crum*

Deborah Dominguez-Clark ← For  
Director, Special Education Division