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**NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
SPECIAL EDUCATION DIVISION  
Complaint Resolution Report  
Case No. 2223-38  
Rio Rancho Public Schools  
April 21, 2023**

**This Report requires corrective action. See pages 16-18.**

On January 30, 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 parties agreed to participate in mediation and extend the Complaint Resolution Report (CRR) deadline in order to focus on mediation. The CRR deadline was extended from March 21, 2023 to April 21, 2023. The SED has investigated the complaint and issues this report pursuant to 34 C.F.R. § 300.152 (a)(5) and 6.31.2.13(H)(5)(b) NMAC.

**Conduct of the Complaint Investigation**

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

- review of the complaint and supporting documentation from complainant;

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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 responses to the allegations, together with documentation submitted by the District at the request of the PED's independent complaint investigator;
- review of the District’s compliance with federal IDEA regulations and state NMAC rules;
- District Questionnaire Answers completed by the District’s SEIL and Social Worker on March 30, 2023;
- interview with the Parent on March 31, 2023;
- interview with the District’s Social Worker and the Student’s previous Special Education Instructional Leader, individually, on April 5, 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 implemented the Student’s IEP, pursuant to 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 District conducted timely manifestation determination reviews, pursuant to 34 C.F.R. § 300.530(e).
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 eleventh grade for the 2022-23 school year.
2. A review of existing evaluation data (REED) was completed on April 6, 2021. Through the REED process, it was established that additional data was not needed to determine eligibility and/or develop an appropriate educational program for the Student. Based on the previous evaluation dated March 9, 2015 and the previous psychological evaluation dated April 17, 2018, the Student was identified as a student with a disability under the primary classification of Emotional Disturbance (ED) and secondary classification of Other Health Impairment (OHI).
3. There are multiple IEPs relevant to the period of this investigation. The first IEP is dated February 23, 2022. Relevant portions of the IEP include:
  - a. The Student's behavior impedes their learning or that of others. The Student requires a behavior intervention plan (BIP).
  - b. The IEP contains two annual goals to support math and emotional/behavior skills.
  - c. The Student has a number of accommodations, including, in part:
    - i. "Other" accommodations:
      1. Opportunity to request to speak with a trusted adult;
      2. One five-minute wellness break when frustrated; and
      3. The opportunity to see the social worker.
    - ii. Positive behavioral interventions and supports include, in part:
      1. Clearly defined expectations with teaching, monitoring, and praise/reward for compliance;
      2. Positive reinforcement;
      3. Frequent cues to redirect behavior; and
      4. Private discussion regarding behavior.
  - d. In part, the Student is to receive 20 minutes/week of social work-related services in the special education setting through February 22, 2023. The services can be provided in an individual and/or group setting.
4. A BIP attached to the February 23, 2022 IEP includes, in part:
  - a. The Student's "problem behavior" is that they do not respond appropriately to non-preferred directives. The function of the behavior is to avoid undesired tasks and/or gain peer attention.
  - b. Intervention strategies include: seating near instruction and/or near the door; speaking with the Student in the hallway; clearly state expectations; redirection;

contact the Parent; and social work, case manager, and/or special education instructional leader (SEIL) supports.

- c. Consequences include:
  - i. First offense: State expectations and give the Student two minutes to make a positive choice.
  - ii. Second offense: Restate expectations, have the Student repeat the expectations, and give the Student two minutes to make a positive choice.
  - iii. Third offense: Contact the social worker, case manager, and/or SEIL for support.
  - iv. If the behavior continues, the Parent should be contacted and contact an administrator or security, as needed.
5. The first day of the 2022-23 school year was August 5, 2023. The IEP and BIP dated February 23, 2022 were still in effect.
6. On September 21, 2022, the Student received a discipline referral regarding an incident that occurred on September 20, 2022 for a behavior disruption. Specifically, on September 20, 2022, the Student was sleeping in class and did not complete their classwork. As a result of the behavior violation, the Student received one day of in-school suspension (ISS) to take place on September 22, 2022.
7. On September 29, 2022, the Student received a discipline referral for being tardy to class. At that point in time, the Student had been tardy seven different times. As a result of the behavior violation, the Student received a partial day of ISS (class period one, two and three) to take place on October 3, 2022.
8. A functional behavior assessment (FBA) was conducted on September 30, 2022, pursuant to an agreement made by the IEP Team during the 2021-22 school year. The FBA indicates, in part:
  - a. The Student's "interfering behavior" is being off task during class (e.g., on their phone, sleeping, defensive, or talking with peers). When the Student is off task, they are often a distraction to others.
  - b. The most effective interventions include one-on-one support, breaks, and allowing peer interaction once work is completed. Other effective interventions include communication with the Parent and allowing the Student to use their phone once work is completed.
  - c. The Student's behavior suggests a BIP is warranted.
9. An IEP meeting was held on September 30, 2022 to discuss the results of the FBA and amend the IEP accordingly. The Student's IEP was amended to include the accommodation of note taking on an electronic device.
10. The BIP attached to the IEP did not change from the previous BIP.

11. The PWN attached to the September 30, 2022 IEP Amendment includes, in part:
  - a. The BIP presented at the meeting is appropriate to meet the Student's needs.
12. On October 13, 2022, the Student received a discipline referral regarding an incident that occurred on October 11, 2022 for a behavior disruption. Specifically, on October 11, 2022, the Student was sleeping in class and did not complete their classwork. The Student received a warning for the behavior violation.
13. The Student received another discipline referral on October 13, 2022 for ditching first and second class periods. As a result of the behavior violation, the Student received one day of ISS to take place on October 14, 2022.
14. Another IEP meeting was held on October 13, 2022 to create a new annual IEP. Relevant portions of the IEP include:
  - a. The Student's present levels and goal were updated for their emotional/behavior related needs.
  - b. No other relevant changes were made to the IEP.
15. The BIP attached to the IEP did not change from the previous BIP.
16. The PWN attached to the October 13, 2022 IEP includes, in part:
  - a. The BIP is appropriate for meeting the Student's academic and emotional needs.
17. On October 24, 2022, the Student received a discipline referral regarding an incident that occurred on October 21, 2022 for a behavior disruption. Specifically, on October 21, 2022, the Student was rude and refused to complete the requested classwork. The referral also noted the Student is continuously off task, watches wrestling on their laptop, sleeps in class, and talks back to the teacher. As a result of the behavior violation, the Student received two days of ISS to take place on October 25, 2022 and October 26, 2022. The Student was also required to sign an electronic device agreement.
18. The electronic device acknowledgement agreement that the Student and Parent signed on October 24, 2022, indicates if the Student uses their cell phone/electronic devices without authorization during instructional time the Student may be subject to a discipline referral and the device may be confiscated. The following is also noted:
  - a. First offense: The Student may retrieve the device at the end of the day.
  - b. Second offense: The Parent may retrieve the device at the end of the day.
  - c. Subsequent violations may result in the device being confiscated and held for the remainder of the school year.
19. On October 26, 2022, the Student received a discipline referral regarding an incident that occurred on October 21, 2022 for a behavior disruption, ditching, habitual chronic disruption, and violation of a behavior contract. Specifically, the referral indicates the Student continuously shows defiance, makes inappropriate comments in class, leaves class to go to the restroom but doesn't return, and doesn't put their phone away when asked.

Because the referral was not provided to the administrator until five days after the incident, the Student only received a warning.

20. On November 7, 2022, the Student received a discipline referral regarding an incident that occurred on November 4, 2022 for a behavior disruption. Specifically, on November 4, 2022, the Student began banging on the window of a classroom that other students were being tutored in and tried to enter the classroom even though they should not have been there. As a result of the behavior violation, the Student received two days of ISS to take place on November 9, 2022 and November 10, 2022.
21. On November 14, 2022, the Student received a discipline referral regarding an incident that occurred on November 1, 2022. It is unclear why the referral was not made until nearly two weeks following the incident. The referral does not state what kind of behavior violation occurred. The description of the behavior indicates the Student made inappropriate comments during class. As a result, the teacher sent the Student to speak with the social worker the day of the incident. No other disciplinary action was taken.
22. On November 17, 2022, the Student received a discipline referral regarding an incident that occurred on November 16, 2022 for a behavior disruption, disrespect to school officials, and insubordination to school officials. Specifically, on November 16, 2022, the Student made inappropriate comments during class and would not stop bothering other students. As a result of the behavior violation, the Student received three days of out-of-school suspension (OSS) to take place on November 18, 2022, November 21, 2022, and November 22, 2022.
23. On November 17, 2022, the Parent emailed the then-current SEIL regarding the number of removals. The Parent indicated the social worker said the Student had eight disciplinary removals but the Parent believed the Student had 12 disciplinary removals. The SEIL responded and stated that the official number of disciplinary removals was nine.
24. The SEIL called the Parent on November 22, 2022 to inform them that a manifestation determination review (MDR) would occur given the number of disciplinary removals the Student had been subjected to. It is unclear why the SEIL determined an MDR was necessary after they told the Parent that the Student had only been subjected to nine removals just a few days prior.
25. A review of the records shows that the Student had been subjected to seven days of ISS and three days of OSS, as of November 22, 2022.
26. An MDR was completed on November 28, 2022. The MDR states the following, in part:
  - a. The tenth day of removal occurred on November 18, 2022.
  - b. The May 8, 2019 FBA and February 23, 2022 BIP were considered. *Note: The incorrect FBA date was indicated in the MDR. The September 30, 2022 FBA was actually considered.*

- c. The Student had nine discipline referrals resulting in three days of OSS and nine days of ISS. *Note: The MDR incorrectly states the Student has been subjected to nine days of ISS.*
  - d. The referrals and disciplinary action taken are detailed in the review and includes the same information as is noted above for each of the nine disciplinary referrals. In total, the Student had been subjected to three days of OSS and seven days of ISS.
  - e. The committee found that the conduct in question was caused by or had a direct and substantial relationship to the Student's disability.
  - f. The committee found that the conduct in question was not a direct result of the District's failure to implement the IEP.
27. Following the MDR meeting, an IEP meeting was held. A new annual IEP dated November 28, 2022 was created. Relevant portions of the IEP include:
- a. The present levels related to the Student's emotional/behavior-related needs were updated to include the number of referrals and what disciplinary action was taken.
  - b. No changes were made to the Student's special education and related services except the addition of a small advisory group for 255 minutes/week in the special education setting.
  - c. No other relevant changes were made to the IEP.
28. The BIP attached to the IEP was updated to include the use of a Chromebook to take classroom notes, offer transition supports as needed, and allow the Student access to a safe space for staff support prior to making a poor choice.
29. The PWN attached to the IEP includes the following, in part:
- a. The MDR review determined the Student's behavior disruptions, disrespect to school officials, and insubordination to school officials was a manifestation of their disability.
  - b. The District did not fail to implement the Student's IEP, but the Parent disagrees.
  - c. The Student will no longer be in Spanish class and will attend an advisory class instead.
  - d. The Student's schedule will change so that they may attend the STORM program to support them.
30. On January 17, 2023, the Student was required to watch and take notes on a 52-minute video in their History class. The class period started at 10:16 a.m. Unlike other students, the Student was allowed to take notes on their Chromebook, due to an IEP accommodation. At 10:36 a.m., approximately 20 minutes into the video, the Student submitted their notes via email to the classroom teacher. After submitting their notes, the Student was observed on their Chromebook, presumably not taking notes, and was not

watching the video being projected for the class. At that time, the classroom teacher revoked internet access to the Student's Chromebook. The Student then took out their cellphone and proceeded to watch a different video, allegedly. The classroom teacher "confirmed" the Student was watching an unrelated video on an unapproved device (i.e., the cellphone) and wrote a referral.

31. The Student texted the Parent regarding the revoked internet access on the Chromebook at approximately 10:43 a.m.
32. The Student received a discipline referral regarding the incident in History class for inappropriate use of electronic device, disrespect to school officials, and defiance of authority to school officials. Specifically, the Student was using their phone without authorization to do so during class. Once sent to the office, the Student made inappropriate comments to administration and walked out of the office. As a result of the behavior violation, the Student received two days of OSS to take place on January 18, 2023 and January 19, 2023.
33. After the Student left the office, the Student went to the STORM classroom. While there, the Student called the Parent to let them know what happened and then left campus, without permission. As a result, the Student received another referral for insubordination to school officials. The Student only received a warning for the referral because it could not be addressed in a timely fashion, given the Student's early departure from school that day and OSS the following two days.
34. The Parent filed the state complaint on January 30, 2023.
35. An IEP meeting was held on February 2, 2023 to discuss Parent concerns. The Student's IEP accommodations were amended slightly. Specifically, the accommodations regarding speaking with a trusted adult, allowing a five-minute wellness break, and the opportunity to see the social worker were replaced with the use of a visual signal and/or pass to take a break to a specified area and the Student may use the break to contact the Parent.
36. The BIP attached to the IEP was slightly amended. Specifically, the consequences regarding a first offense changed to allow the Student to take a break before stating expectations and then giving the Student two minutes to make a positive choice.
37. The Student received the following social work service minutes in each of the following six months: August – 40 minutes; September – 90 minutes; October – 125 minutes; November – 130 minutes; December – 20 minutes; January – 70 minutes. In total, the Student has received 475 minutes of social work-related services.



## *Discussion and Conclusions of Law*

### *Issue No. 1*

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

A district must implement a student's IEP with all required components. 34 C.F.R. § 300.323(c). A district need not implement a student's IEP perfectly. *See I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Schs.*, 70 IDELR 86 (8th Cir. 2017).

#### *A. Chromebook Accommodation*

As of September 30, 2022, the Student had an IEP accommodation allowing them to use an electronic device (e.g., Chromebook) to take notes with during class. On January 17, 2023, the Student used the Chromebook to take notes on a video they were watching in History class. The Student emailed their completed notes to the classroom teacher at 10:36 a.m. At approximately 10:43 a.m., the Student texted the Parent an image that showed internet access had been revoked on the Chromebook.

The Parent asserts the IEP was not implemented due to the revocation of internet access on January 17, 2023. The Parent only alleges the Chromebook was inaccessible to the Student one time.

There is no evidence that the District failed to allow the Student access to an electronic device or Chromebook to take notes, in accordance with their IEP. The January 17, 2023 incident was the only incident in question and the Student was able to take notes on the Chromebook. It was only after the Student submitted their notes that their internet access was revoked. While questionable whether the teacher appropriately handled situation, the IEP accommodation was provided to the Student. Moreover, the District is not required to implement the IEP perfectly, and one instance is not significant enough to find an implementation failure.

#### *B. Social Work Services*

Throughout the 2022-23 school year, the Student was entitled to receive 20 minutes/week of social work-related services. In total, between the months of August and January, the Student should have received 480 minutes of social work services. The Parent expressed a concern that the number of social work minutes delivered was not accurate. The Investigator reviewed the service log and conducted an interview with the Social Worker to determine if all the service minutes documented were in fact accurate.

There were five dates in which the services provided were inquired about specifically – October 13, October 24, October 26, November 7, and November 17 (all other dates documented were regularly scheduled service times and there was no question to the accuracy of recording). On these dates, the Social Worker indicated “real-time supports” were provided to the Student. The Social Worker indicated that during disciplinary referrals they were called to assist administration, as was required in the Student’s IEP and BIP. While assisting administration, the Social Worker does a variety of things. For example, they may assist the Student in understanding the consequence of their actions, explain what the District expectations are, support the Student in maintaining self-control, etc.

In each of the five incidents detailed above, there is a finding that the Social Worker provided some kind of social work-related support to the Student. Thus, the service minutes documented for the “real-time support” are permissible to be counted towards the weekly service minutes required.

All information gathered supports that the Student received 475 minutes of the 480 minutes of social work services required. Thus, the District is in substantial compliance with the required service minutes and there is no implementation failure, in this regard.

### *C. Positive Behavioral Interventions and Supports*

All IEPs and BIPs implemented between August 2022 and January 2023 included a number of positive behavioral interventions and supports. Specifically, when the Student is struggling with their behavior, staff are to define expectations, provide frequent cues to redirect the Student, have a private discussion with the Student about their behavior in the hallway, contact the social worker, etc. In addition, the Student’s BIPs indicates a number of steps to be taken when the Student engages in undesired behaviors (e.g., after the first offense, staff are to explain the expectations and allow the Student two minutes to make a good choice, etc.). The BIP indicates the support from the social worker, case manager, and/or SEIL is not to be sought until the third offense. After the third offense, administration should be contacted.

A review of the Student record shows very little of the positive behavioral interventions and supports being utilized prior to a disciplinary referral. Most referrals fail to indicate what positive behavioral interventions and supports were utilized, if any. Some referrals indicate the Student was redirected or asked to refrain from the undesired behavior but no other interventions and supports were mentioned. Additionally, a narrative provided by the teacher who was involved in the January 17, 2023 incident states no positive behavioral interventions or supports were utilized before the teacher revoked internet access to the Student’s Chromebook. Instead, the

teacher “confirmed” the Student was watching an unrelated video, revoked internet access, and then wrote a referral.

The Student’s behavior difficulties are well documented in their file. The purpose of positive behavioral interventions and supports and behavior plans is to aid a student in managing inappropriate or unacceptable behaviors. There is little indication that the Student’s interventions and supports and behavior plans are actually utilized to manage their behavior, resulting in numerous disciplinary referrals and removals.

The failure of the District to utilize the positive behavior interventions and supports and BIP, as was required in the Student’s 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.

No concerns were identified with the District’s IEP development process. Thus, only the second prong will be discussed below.

Throughout the school year, there have been multiple IEP meetings to address the Student’s behavior. Despite the multiple meetings, no changes were made to the Student’s positive behavioral interventions and supports or BIP after the FBA was conducted on September 30, 2022, nor after the IEP meeting on October 13, 2022, following an additional three behavior incidents.

More concerning is that following the MDR, when the MDR committee and IEP Team determined certain behaviors were a manifestation of the Student’s disability, no relevant changes were

made to the Student's positive behavioral interventions and supports or BIP. At that point in time, the Student had received nine referrals and had been subjected to ten removals. Clearly, the positive behavior interventions and supports and/or BIP were not effective in the ways the IEP Team had anticipated, yet no changes were made to help support the Student.

The District did not appropriately respond to the increasing number of referrals or following the MDR committee's determination regarding the Student's behavior. For this reason, the District failed to develop an IEP that was reasonably calculated to enable the Student to receive an educational benefit, in violation of 34 C.F.R. § 300.320, 34 C.F.R. § 300.324, and 6.31.2.11(B) NMAC.

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

**Issue No. 3**

**Whether the District conducted timely manifestation determination reviews, pursuant to 34 C.F.R. § 300.530(e).**

School districts are required to conduct an MDR within ten school days of a disciplinary change of placement. 34 C.F.R. § 300.530(e). An MDR determines whether the student's behavior that resulted in discipline (1) was "caused by, or had a direct and substantial relationship to" the student's disability, or (2) was a result of the district's failure to implement the student's IEP. *Id.* § 300.530(e)(1).

If the IEP team determines a student's conduct was a manifestation of their disability, the IEP team must either: (1) conduct an FBA, unless the district conducted an FBA before the behavior occurred, and implement a BIP or (2) if a BIP was already developed, review the BIP and modify it to address the behavior, as necessary. *Id.* § 300.530(f)(1).

A change in placement occurs if the student has been subjected to a series of removals that constitute a pattern because (1) the removals total more than ten school days; (2) the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in a removal; and (3) additional factors such as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another. 34 C.F.R. § 300.536(a).

The Student was subjected to a disciplinary removal ten different times between September 22, 2022 and November 22, 2022. The Parent asserts there were two additional days that the Student was subjected to a disciplinary removal – October 17, 2022 and October 18, 2022. A review of the record shows no disciplinary removal on either of those days. Thus, as of November 22, 2022,

the Student had not been subjected to more than ten removals. The MDR conducted on November 28, 2022 was voluntary, even if the District did not realize it at the time. As no MDR was required, there was no violation of 34 C.F.R. § 300.530(e), at that time.

On January 18, 2023, the Student was subjected to their eleventh disciplinary removal of the school year. At this point in time, the first prong to determine if a series of removals constitutes a pattern was met. The analysis regarding whether an MDR was required continues to the second prong – whether the student’s behavior was substantially similar in previous incidents.

The eleven disciplinary removals were in response to only seven different incidents. Of the seven incidents, the following behaviors were noted:

- Four incidents, resulting in eight disciplinary removals, were due to some kind of behavior disruption. The most commonly seen “disruption” was the Student sleeping in class, impermissible use of their phone or computer, and/or not completing their work. However, these behaviors were only noted in three of the four behavior disruption-incidents.
- Two incidents, resulting in two disciplinary removals, were due to being tardy or ditching class.
- The final incident, resulting in the eleventh disciplinary removal, was due to inappropriate use of a device, defiance, and disrespect.

The most prominent behavior in all of the incidents was disruptiveness. However, the Student’s behaviors were not substantially similar in all the behavior disruption-incidents. Moreover, only eight disciplinary removals were related to a behavior disruption. As the Student’s behavior was not substantially similar in all incidents that resulted in the eleven disciplinary removals, the second prong is not met and the District was not required to conduct an MDR and there is no violation of 34 C.F.R. § 300.530(e).

It is important to note, while the District had no statutory obligation to complete an MDR when it did, the District voluntarily did so and found that “behavior disruptions, insubordination of school officials, and disrespect to school officials” were all a manifestation of the Student’s disability. Despite these findings, the District suspended the Student for an additional two days for the same kind of conduct (i.e., insubordination of school officials and disrespect to school officials), in January 2023.

The District is not prohibited from removing a student with a disability who violates a code of conduct for ten days, regardless if the conduct is related to their disability. However, the District should be aware that Student is approaching the ten-day threshold of disciplinary removals, such that Student’s future conduct constitutes a pattern of behavior. If that threshold is met, the

District will be required to conduct another MDR. If the MDR determines the conduct discussed in the MDR is a manifestation of their disability, including behavior disruptions, insubordination of school officials, and disrespect to school officials, the District is not permitted to remove the Student for that conduct. Instead, the District must conduct an FBA, if necessary, and revise the BIP accordingly as required by 34 C.F.R. 300.530(f).

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

**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).

Here, the District failed to implement the IEP when it did not utilize the positive behavioral interventions and supports and/or BIP prior to discipline referrals being made. While an IEP need not be perfectly implemented, there is little evidence that the interventions and supports were utilized in the majority of the behavior incidents resulting in a referral.

Additionally, pursuant to the discussion under Issue No. 2, the Student's IEP was not reasonably calculated to enable the Student to receive an educational benefit. Thus, the Student has been 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. § 300.323 and 6.31.2.11(B) NMAC	The District failed to implement the Student’s IEP accordingly.
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. § 300.101 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 May 5, 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  
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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 July 31, 2023 and reported to the SED no later than August 7, 2023.** All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the state complaint case number and step number.

**Corrective Action Plan**

<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED SED</u></b>	<b><u>Document Due Date</u></b>
<b>1.</b>	As described above, the District will submit a written assurance to the PED Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan (CAP).	<b>May 5, 2023</b>	Written Assurance Letter/Email	<b>May 5, 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>May 12, 2023</b>	Notes from meeting prepared by District	<b>May 19, 2023</b>



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3.	The District Special Education Director will meet with Student’s special education teachers, related service providers, principal, and general education teachers 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>May 19, 2023</b>	Notes from meeting prepared by District	<b>May 26, 2023</b>
4.	<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. The trainer may be an employee of the District.</p> <p>The training shall address the following special education topics:</p> <ul style="list-style-type: none"> <li>(1) Requirements to implement an IEP as written;</li> <li>(2) Implementation of positive behavior interventions and supports; and</li> <li>(3) Requirements to review and revise an IEP to address lack of expected progress, the student’s anticipated needs, or other matters, including requirements after an MDR meeting that determines a student’s conduct is a manifestation of their disability.</li> </ul>	<b>July 31, 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>May 31, 2023</b></p> <p><b>July 3, 2023</b></p> <p><b>August 7, 2023</b></p>

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5.	The District shall convene an IEP meeting for the Student. The IEP meeting shall address: <ul style="list-style-type: none"> <li>• Appropriate positive behavioral interventions and supports; and</li> <li>• The Student’s BIP.</li> </ul>	<b>May 31, 2023</b>	1. Invitation to IEP meetings, 2. IEP and BIP 3. Prior Written Notices, and 4. Agenda for IEP team meetings	<b>15 days after the FIEP meeting is held</b>

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


Investigated by:

*/s/ Emily Adams*  
 Emily Adams, Esq.  
 Complaint Investigator

Reviewed by:

*/s/*  
 Miguel Lozano, Esq.  
 Chief Counsel, Special Education Division

Reviewed and approved by:

  
 Deborah Dominguez-Clark  
 Director, Special Education Division