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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Cobre Consolidated School District
Case No. C2223-50
July 28, 2023

This Report requires corrective action. See pages 11 – 12.

On May 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.¹ The SED has investigated the complaint and issues this report pursuant to 34 C.F.R. § 300.152 (a)(5) and 6.31.2.13(H)(5)(b) NMAC.

Conduct of the Complaint Investigation

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

- review of the complaint and supporting documentation from complainant;
- review of the District's responses to the allegations, together with documentation submitted by the District at the request of the PED's independent complaint investigator;

¹ The state-level complaint procedures are set forth in the federal regulations at 34 C.F.R. §§ 300.151 to 153 and in the state rules at Subsection H of 6.31.2.13 NMAC.

- review of the District’s compliance with federal IDEA regulations and state NMAC rules;
- interviews with the Parent, Grandparent, Educational Diagnostician, Speech Language Pathologist, and Special Education Teacher; and
- research of applicable legal authority.

Limits to the Investigation

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

Issues for Investigation

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

1. Whether the District failed to implement Student’s Individualized Education Program (IEP), in violation of 34 C.F.R. §§ 300.320–300.328 and 6.31.2.11(B) NMAC;
2. Whether the District failed to conduct progress monitoring of Student’s annual IEP goals and provide progress reports to Parent, in violation of 34 C.F.R. § 300.320(a)(3) and 6.31.2.11(B) NMAC;
3. Whether the District failed to evaluate Student in all areas of suspected disability by not conducting an occupational therapy evaluation, in violation of 34 C.F.R. § 300.304(c)(4) and 6.31.2.10(G)(1) NMAC;
4. Whether the District failed to maintain the confidentiality of Student’s educational records, in violation of 34 C.F.R. §§ 99.2 & 300.610 and 6.31.2.13(L)(1) NMAC; and
5. Whether the District’s actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE), in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

General Findings of Fact

2022-2023 IEP

1. Student is in the second grade and is eligible for special education under the classification of Speech or Language Impairment.
2. The Student's identified areas of need included articulation, receptive language, and expressive language.
3. An annual IEP meeting was held on August 19, 2022. At this meeting the Parent expressed concerns about Student having missed speech therapy sessions and a lack of academic progress. Parent also pointed out that District staff did not have copies of progress reports, speech service logs, and present levels of performance to discuss Student's current educational progress and how best to address their current disability-related learning needs.
4. The District proposed to postpone the remainder of the meeting to gather additional information about Student's academic progress from the 2021-2022 school year before proceeding with finalizing the IEP.
5. Another IEP meeting was held on September 6, 2022. At this meeting the IEP team recommended an IEP that provided Student with 120 minutes of speech therapy per month and 60 minutes of academic inclusion support per week.
6. IEP goals included a communication goal aimed at increasing Student's articulation/grammar skills and an academic support goal that was designed to improve in-class engagement.
7. At this meeting, the IEP team agreed to provide Student with compensatory speech services for missed sessions during the 2021-2022 school year. Additionally, the IEP team recommended that the speech therapist provide parent with weekly updates about Student's progress in speech therapy. The plan was to provide those updates in a notebook that would be shared between the Speech Therapist and Parent.
8. Parent raised concerns about their child's handwriting and organization skills. In response, the IEP team proposed conducting an occupational therapy evaluation of Student to assess their fine motor and visual motor skills. The District did not conduct an occupational therapy evaluation of Student which the District conceded in their response to the complaint.
9. Parent and Grandparent also inquired about conducting a full comprehensive evaluation of Student due to concerns that Student may be displaying signs of a learning disability. Grandparent stated that District declined to conduct a multidisciplinary evaluation because it was too early for a reevaluation and this testing would be completed in another couple years.

10. Lastly, IEP team recommended that teachers monitor Student's text fluency and Special Education Teacher stay abreast of Student's progress in math.

2022-2023 School Year

11. Parent worked for the District as a cafeteria worker. At the start of their employment for the 2022-2023 school year, Parent reported that he was discouraged by the District to make any issue out of Student's special education provided by the District.
12. During the first half of the 2022-2023 school year, there was an initial speech therapist who worked with Student and regularly exchanged a notebook with Parent.
13. The notebook served as a conduit for providing Parent with weekly updates on how Student was progressing in their speech and communication skills.
14. In the classroom, Special Education Teacher worked with Student on ensuring they were engaged in the classroom to access their lessons, assignments, and intra-school transitions. Special Education Teacher reported that these services enabled Student to be organized when in school. This service was provided pursuant to the IEP service schedule as academic support inclusion.
15. At the end of the first half of the 2022-2023 school year, the speech therapist working with Student left the District.
16. While the District worked to replace this vacancy, Student did not receive speech therapy services during the month of January 2023.
17. By the end of the month, the District secured a new speech therapist who provided make-up speech therapy services to Student during the months of February and March 2023.
18. Speech Therapist continued working with Student for the remainder of the 2022-2023 school year and Student received all speech therapy services they were owed that year.
19. Progress monitoring of Student's goals was carried out by the Speech Therapist and Special Education Teacher.
20. Progress notes from the Speech Therapist show that Student had progressed to the point of achieving the goal of improving their articulation. Special Education teacher monitored Student's academic support goal with benchmark testing and ongoing monitoring of Student while in class. Student's testing scores show a gradual, grade-level improvement in reading and math skills throughout the 2022-2023 school year.
21. Parent stated that they did not receive IEP goals progress reports. The District acknowledged that they did not provide Parent with progress reports in the 2022-2023 school year.
22. Special Education Teacher denies observing that Student was displaying any signs of having a learning disability and stated that Student did not have any issues with accessing their academic curriculum or grasping new concepts.

23. Parent claimed that former Special Education Director disclosed to other District staff about how Parent behaved during the August 19, 2022 IEP meeting. District denies any personally identifiable information about Student was shared with unauthorized District staff. Special Education Teacher said that any discussions based on the confidential information in Student's educational records took place in private with other teachers working with Student.
24. Student obtained high marks in their 2022-2023 report card. Grades were A's in all classes except a C in Elementary Math.
25. The benchmark testing Student underwent this past year also shows improvement in reading and math. Student's end-of-year scores show them maintaining grade-level reading skills and going from below grade level to achieving grade level in their math skills.
26. Parent explained they did not raise serious concerns about Student's special education until May 2023 because at that time he was no longer employed with the District and now felt at liberty to directly address those issues.
27. Parent first called the District about Student having missed speech therapy services and the District asked the Parent for time to look into his concerns. Parent proceeded to file a state complaint following these communications with the District.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to implement Student's Individualized Education Program (IEP), in violation of 34 C.F.R. §§ 300.320–300.328 and 6.31.2.11(B) NMAC.

At the start of each school year, a local educational agency must have an IEP in effect for each special education student. 34 C.F.R. § 300.323(a). Once an IEP is developed, the special education and related services outlined in the document must be made available to the student. 34 C.F.R. § 300.323(c)(2). A material failure to implement an IEP occurs when there is more than a minor discrepancy between the services a school provides to a child with a disability and the services required by the IEP. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). The proportion of services required in an IEP compared to the services provided is a crucial measure for purposes of determining whether there has been a material failure to implement it. *Turner v. D.C.*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013). Any missed services that were later provided to a student do not constitute a material nonconformity with an IEP. *C.B. ex rel. Baquerizo v. Garden Grove Unified Sch. Dist.*, 655 F. Supp. 2d 1088, 1095 (C.D. Cal. 2009), *as amended* (Dec. 10, 2009), *aff'd*, 635 F.3d 1155 (9th Cir. 2011).

Here, the IEP called for Student to receive 120 minutes of speech therapy per month and 60 minutes of academic inclusion support every week. During the month of January 2023, a failure to implement the IEP did occur because no speech therapy services were provided to Student. However, the gap in speech therapy services was not a material failure to implement services because those services were later provided once the District obtained a licensed professional who was qualified to deliver speech therapy services to Student during the second half of the 2022-2023 school year. The District also provided academic inclusion support services via the Special Education Teacher and there were no inconsistencies in the provision of such services. While the weekly speech progress updates (contained in a notebook exchanged between Parent and Speech Therapist) were not offered in the second semester, the absence of this periodic, related service reporting does not outweigh the proportion of IEP services that were given to Student. Taken together, this evidence supports a finding that the District properly implemented the IEP because all speech therapy services were eventually delivered and academic inclusion support was made available throughout the year.

As to Issue No. 1, the District is not cited.

Issue No. 2

Whether the District failed to conduct progress monitoring of Student's annual IEP goals and provide progress reports to Parent, in violation of 34 C.F.R. § 300.320(a)(3) and 6.31.2.11(B) NMAC.

The implementing regulations of IDEA call for a description of when periodic reports will be provided to parents explaining how a student with a disability is advancing towards achievement of their annual IEP goals. 34 C.F.R. § 300.320(a)(3). Regular progress monitoring is critical to a substantively appropriate IEP. *T.M. on behalf of T.M. v. Quakertown Cmty. Sch. Dist.*, 251 F. Supp. 3d 792, 800 (E.D. Pa. 2017).

In this case, the District was conducting progress monitoring but did not provide Parent with copies of progress reports. The Speech Therapist maintained progress notes while they worked with Student during the second half of the school year. Special Education Teacher used benchmark testing and observation to track Student's academic inclusion support goal. However, both the District and Parent provided evidence that no progress reports were produced to apprise Parent of Student's progress towards achieving their IEP goals. Therefore, the record in this case demonstrates that the District conducted some forms of progress monitoring but failed to provide Parent with copies of Student's progress reports.

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

Issue No. 3

Whether the District failed to evaluate Student in all areas of suspected disability by not conducting an occupational therapy evaluation, in violation of 34 C.F.R. § 300.304(c)(4) and 6.31.2.10(G)(1) NMAC.

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

The evidence in the record is very clear. At the IEP meetings on August 19 and September 6, 2022, the IEP team recommended conducting an occupational therapy evaluation of student. This proposal was made after the Parent voiced concerns about Student's handwriting and organization. When Parent raised these issues, the IEP team determined that there was reason to suspect disability-related motor deficits which led to a recommendation for an occupational therapy evaluation. The fact that the District did not take any further action in effectuating the additional evaluation constitutes a failure to evaluate in all areas of suspected disability.

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

Issue No. 4

Whether the District failed to maintain the confidentiality of Student's educational records, in violation of 34 C.F.R. §§ 99.2 & 300.610 and 6.31.2.13(L)(1) NMAC.

The Family Educational Rights and Privacy Act ("FERPA") sets forth legal requirements for protecting the privacy of parents and students. 34 C.F.R. § 99.2. In conjunction, IDEA regulations require the confidentiality of students' personally identifiable information be maintained by school districts. 34 C.F.R. § 300.610; 6.31.2.13(L) NMAC. Personally identifiable information may include a student's name, parent's name, family address, personal identifier, or other information that would allow a reasonable person to identify the student. 34 C.F.R. § 99.3.

The record does not support a finding that the District improperly disclosed Student's confidential educational information. Parent described that District staff described talking about how he acted during his child's prior IEP meetings. Yet the District denies the allegations and the

Special Education Teacher explained how staff would take steps to ensure any discussion about student information takes place among authorized teachers/providers in a private environment within the school setting. There is a lack of concrete evidence to substantiate any claim that the District unlawfully disclosed confidential information in Student's educational records.

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

Issue No. 5

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

A student eligible for special education is entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. A state-supported educational program that accepts a child with a disability at the request of a parent or upon the request or order of a noneducational public authority, and without inviting the public agency that has primary responsibility for serving the child to participate in the IEP process, assumes all responsibility for ensuring the provision of FAPE. 6.31.2.11(J)(2) NMAC. If an IDEA procedural violation occurs, that violation will constitute a denial of FAPE only if it: (1) resulted in a substantive harm to the child or their parents; (2) deprived an eligible student of an IEP; or (3) resulted in the loss of an educational opportunity. *Boutelle v. Bd. of Educ. of Las Cruces Pub. Sch.*, No. CV 17-1232 GJF/SMV, 2019 WL 2061086, at *7 (D.N.M. May 9, 2019). The substantive legal standard for determining whether a District has offered a student FAPE is whether an IEP is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017).

The two main procedural violations that the District committed were not providing Parent with progress reports and not conducting an occupational therapy evaluation of Student. Parent may have been kept more informed about Student's progress had Parent received periodic progress reports during the 2022-2023 school year. Yet there is no substantive harm to the Parent because Parent chose to have limited communication with the District until May 2023. In other words, any adverse impact on parental participation in the IEP process was jointly caused by both parties. Neither did the lack of an occupational therapy evaluation constitute a procedural FAPE violation. Student's education was not harmed by the lack of this evaluation, Student had an IEP in place this past school year, and the failure to conduct an occupational therapy evaluation did not directly result in a loss of educational opportunity. Accordingly, the cumulative procedural violations do not constitute a denial of FAPE.

The 2022-2023 IEP offered the Student FAPE. The speech therapy and academic inclusion support services were designed to address Student's disability-related communication deficits

within a classroom setting. Grades show Student excelling in all courses except average marks in mathematics. Benchmark testing established that Student was making steady, grade-level progress in developing their reading and math skills. Special Education Teacher provided comments about Student being actively engaged in their schoolwork and adjusting well when presented with new concepts to learn. For these reasons, the IEP was substantively adequate to provide the Student FAPE.

As to Issue No. 5, the District is not cited.

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. § 300.320(a)(3) and 6.31.2.11(B) NMAC.	The District failed to provide progress reports to Parent.
34 C.F.R. § 300.304(c)(4) and 6.31.2.10(G)(1) NMAC.	The District failed to evaluate Student in all areas of suspected disability by not conducting an occupational therapy evaluation.

Required Actions and Deadlines

By August 7, 2023, the District’s Special Education Director must assure the SED in writing that the District will implement the provisions of this Corrective Action Plan (CAP). The SED requests that the District submit all documentation of the completed corrective actions to the individual below, who is assigned to monitor the District’s progress with the Corrective Action Plan and to be its point of contact about this complaint from here forward:

Dr. Elizabeth Cassel
 Corrective Action Plan Monitor
 Special Education Division
 New Mexico Public Education Department
 300 Don Gaspar Avenue
 Santa Fe, NM 87501
 Telephone: (505) 490-3918
Elizabeth.Cassel@ped.nm.gov

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

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

Please carefully read the entire CAP before beginning implementation. One or more steps may require action(s) in overlapping timeframes. All corrective action must be completed no later than January 26, 2024 and reported to the SED no later than February 9, 2024. All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the state complaint case number and step number.

Corrective Action Plan

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
1.	As described above, the District will submit a written assurance to the PED SED Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan (CAP).	August 7, 2023	Written Assurance Letter/Email	August 7, 2023
2.	The District Special Education Director and the school principal shall meet virtually with the PED SED Education Administrator assigned to the District and the PED SED CAP Monitor to review the Complaint Resolution Report, the Corrective Action Plan, and any other measures that the District plans to take to ensure that the violations are corrected and do not recur. The District Director has the discretion to include other District or school administrators or personnel in this meeting. The District Director shall be responsible for arranging this meeting with SED.	August 14, 2023	Notes from meeting prepared by the District.	August 18, 2023
3.	The District will conduct an occupational therapy evaluation of the Student including testing of fine and visual motor skills. The District shall promptly seek parental consent prior to conducting the evaluation. If the	Within 30 days of receiving parental consent.	Signed parental consent form or written record of Parent refusing to provide consent. Evaluation Report if an evaluation is conducted.	Within 7 days of receiving written decision on consent. Within 15 days of completing

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED</u> <u>SED</u>	<u>Document Due Date</u>
	<p>Parent refuses to provide consent for the evaluation, then the District will provide a written record of the refusal.</p> <p>Any occupational therapy evaluation of Student that was conducted after June 15, 2023 will satisfy this CAP requirement.</p>			<p>evaluation report.</p>
4.	<p>If an evaluation is conducted, the District shall convene an IEP meeting to review the Student’s evaluation and consider any necessary revisions or additional services in the IEP.</p>	<p>Within 15 days of completing the evaluation report.</p>	<p>Prior Written Notice and Revised IEP</p>	<p>Within 15 days of completing IEP meeting.</p>
5.	<p>The District shall provide quarterly progress reports (or more frequently if determined by the IEP team) to the Parent for all IEP goals.</p> <p>District shall provide copies of all progress reports to NMPED on a quarterly basis (or more frequently if determined by the IEP team) until the end of the first semester of the 2023-2024 school year.</p> <p>If progress reporting is not provided to Parent on at least a quarterly basis, NMPED may extend the duration of this requirement.</p>	<p>Within 15 days of the end of each quarter</p>	<p>Copies of quarterly (or more frequent) progress reports</p>	<p>Within 15 days of the end of each quarter.</p>

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

Investigated by:

/s/

Michael W. Gadomski, Esq.
Complaint Investigator

Reviewed and approved by:

/s/

Miguel Lozano, Esq.
Interim Director, Special Education Division