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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Las Cruces Public Schools
Case No. 2324-05
October 13, 2023

This Report requires corrective action. See pages 22 – 24.

On August 14, 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, Teacher, Special Education Administrator and Special Education Director; and
- research of applicable legal authority.

Limits to the Investigation

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

Issues for Investigation

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

1. Whether the District failed to develop and implement an IEP that allowed Student to make educational progress, in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC; specifically, whether the District:
 - a. Failed to provide accommodations and modifications or related services as required by the IEP;
 - b. Provided for opportunities to participate in special and general education, extra-curricular and school sponsored activities with the needed supports;
 - c. Made a certified special education teacher and 1-1 aide available to allow Student to access the curriculum;
 - d. Considered Student's individual needs when determining Student's least restrictive environment for instruction;
 - e. Failed to have necessary equipment and supplies to complete IEP goals;
 - f. Failed to modify assignments as required and provide needed assistance to allow Student to complete work;
 - g. Failed to consider Student's changing mental and physical needs and determine if additional assessments were needed and/or IEP needed to be modified to include additional supports and services;
 - h. Failed to consider if transportation was required to allow Student to participate in activities in furtherance of IEP goals;
 - i. Failed to ensure that providers were aware of health needs and implemented health plan with fidelity;

- j. Provided needed assistive technology with appropriate training and follow-up to ensure that Student was able to benefit from assistive technology, and
 - k. Failed to address Student's academic and functional needs when developing goals and providing services.
2. Whether the District failed to provide Parents of Student with an opportunity to participate in the IEP process in violation of 34 C.F.R. §300.322; 34 C.F.R. § 300.501(b) and 6.31.2.11(b)(2) and 6.31.2.13(c) NMAC, specifically whether the District:
 - a. Considered the Parents's and Student's concerns when determining Student's academic course schedule;
 - b. Allowed Parents' access to educational records;
 - c. Provided information about services for students with disabilities and programs such as sunshine classes; and
 - d. Considered Parents' concerns when developing or modifying goals, supports and services on the IEP;
 3. 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

Background information

1. Student's last three-year reevaluation was completed November 18, 2020. The evaluation included a review of previous evaluations in cognitive functioning, academic achievement, adaptive behavior; a psycho-educational evaluation, observations, response to intervention services, and state and district testing. Student's medical and dental history were also reviewed.
2. Student was a fifteen-year-old tenth grader during the 2022-2023 school year.
3. Student was eligible for special education services under the categories of intellectual disability and speech language impairment.
4. Student also had several health issues including asthma, visual impairment and hyperacusis. These and other conditions were addressed through an individual health plan (IHP).
5. Student needed nursing services for medical conditions.
6. Student had significant deficits in cognitive ability, articulation and language which impacted Student's ability to participate in general education classes.
7. Student also needed a smaller teacher/student ratio and slower paced delivery of materials (often 1-1 instruction) for Student to make progress.

8. At the start of the 2022-2023 school year, the October 18, 2021 IEP was in effect for Student.
9. Student's least restrictive environment was a low incidence developmental self-contained classroom. Student had been in a similar classroom previously. In addition to general education electives, Student participated with peers in lunch, assemblies, field trips, library, computer and extra-curricular activities.
10. Student has participated in general education electives including choir, dance and theater. Student attended and participated in classes and performances.
11. For Student to participate successfully in general education electives, Student needed adult support. Student did not have a full time 1-1 aide but a classroom aide or teacher would accompany Student to electives.
12. Elective requirements were modified for Student. Student would receive a grade for participation and projects or assignments completed with adult assistance that were modified to Student's abilities.
13. Student participated in student government (LCSU), was an officer-director for the Best Buddies program and an ambassador for the Adaptive Cycle program.
14. Parent requested a 1-1 aide for Student throughout the day. The District stated it would collect data to determine the need for a 1-1 aide. Parents were not provided with the data on the 1-1 aide, nor did the IEP team meet to discuss results of data collection.
15. The District has "sunshine" elective classes for special education students in self-contained settings. Some of these classes are being eliminated to encourage inclusion for special education students in the District.
16. At IEP meetings, sunshine classes were proposed for Student. Parents wanted Student in general education electives as much as possible.
17. Parents reported Student could read basic sight words, especially when in large print; test results indicated Student's academic skills were at a primer-kindergarten level with some math skills at a first-grade level.
18. Student's teacher reported Student could not complete first grade math without one-on-one assistance. Student was not able to read a 2nd grade book. Parent reported that Student was capable of learning at a higher academic level than staff expected.
19. Parent believed that Student's goals did not change from year to year, the assigned work in the low incidence classroom was repetitive with Student making minimal progress.
20. Parent wanted Student involved in learning functional skills like cooking and money management. Previously, Parent had paid for groceries or materials because the District budget limited those purchases. However, Parent expressed concern that rather than plan menus or make meals, the students only made cupcakes and each student always completed the same task.

21. Student's teacher this year had cooking lab on Friday. The plans were for simple foods with complexity of foods increasing as the students' skills improved. Students were responsible for finding the ingredients, utensils and would take turns with assigned tasks in the cooking lab.
22. Student had participated in choir since junior high. Student dropped out of choir this year because Student was not able to access the curriculum without enlarged music, an accommodation on the IEP.
23. Student participated in dance class as an elective and enjoyed it. However, the aides that assisted Student were not always aware of Student's needs; therefore, at times were unable to provide the needed support in dance.
24. During the 2022-2023 school year and the start of this school year, Student was increasingly frustrated and anxious; other students were loud and often disruptive. The support staff changed and were not always familiar with Student needs.
25. Student was hypersensitive to noise and wore noise-cancelling headphones in the classroom. Student struggled with the excessive noise and disruption in the self-contained classroom.
26. Throughout the 2022-2023 school year, Parents sent emails to staff about Student's medical complaints including stomach, toothache and headache. Parents also reported that Student was anxious, frustrated and often did not want to come to school.
27. A series of emails beginning March 28, 2023 reiterated the concerns with Student's anxiety, health concerns and lack of support; the District proposed a meeting to discuss if additional supports or services were needed, but that meeting was never scheduled.
28. Student was often absent because Student, who had previously loved school, now did not want to come to school. When Student was at school, Student participated with general education peers in multiple classes and activities successfully when needed adult support was available.
29. Parent reported that activities that Student used to enjoy were no longer enjoyable because of Student's sensitivity to noise and anxiety.
30. The certified special education teacher was on administrative leave much of last year and a certified substitute was assigned to the classroom.
31. This year, the class size was reduced from 14 to 9 students in Student's classroom and another full-time teacher was added. When Student was becoming anxious, Student was offered choices to take a walk, go to the library or other area. When Student returned a short time later, anxiety had decreased. This year, the loud disruptive student was removed to another setting when student was disruptive to reduce noise and disruption for the other students.
32. This year, Parents have been pleased and reported that the District was following Student's IEP.

33. The teacher observed that Student chose to go to the cafeteria to eat lunch with general education peers. Also, when a Best Buddies meeting got loud; Student practiced accommodations to reduce anxiety so Student could stay at the meeting.
34. Parent reported that when student government activities such as a veteran's program were planned, Student was not included because no adult support was available or Student was informed too late to make arrangements to attend.
35. Parent opined that frequent changes in support staff and lack of support from the administration limited the options the high school had for including Student in school activities.
36. Student had shown interest in various extra-curricular activities including ROTC and FFA but constraints on Student's abilities and/or adult support limited Student's extra-curricular options. However, Student participated as an officer-director in the Best Buddies group and an ambassador in the Adaptive Cycle program.
37. In Student's theater class, they were working on building a prop with the assistance of adult support. To assist with this project, the librarian found a 2nd grade reading book at an elementary school to assist Student in completing the project. Student was not able to read this book without assistance but was able to use the pictures to assist in completion of the prop.
38. Parent reported Student was so excited because this was the first time that Student had checked out a book or been assisted in obtaining library books to read.
39. Parent was concerned that last year, Student was only watching movies, having "fun" days and coloring worksheets all day at school instead of learning tasks Student would need upon graduation.
40. Parent noted Student had difficulties but the District was not challenging Student; Student was much more capable than what they were providing to Student.
41. Every year, they discussed Student's schedule and proposed more general education classes; but when the schedule was shared with Parent, Student was in Sunshine classes instead of general education classes that Student preferred.
42. When in the special education classroom, Parent would report that Student continued to complete the same work or packets Student had completed earlier or even the previous year. Student complained of boredom at school. Parents were concerned about watching videos instead of working on IEP goals and reported that Student was bored with the curriculum because Student had to complete the same personal information multiple times.
43. The unique learning curriculum was being used in the self-contained classroom. This individual-based curriculum was project or activity oriented rather than relying on textbook.

44. On holidays, or other times, students would watch videos but were also working on other activities related to their IEP goals.
45. Parents reported that pursuant to the IEP, they were to receive daily communication from staff about Student's day at school but this did not always happen.
46. Parents raised concerns about compensatory services owed to Student in occupational therapy and mental health services. At the October 17, 2022 IEP meeting, the District agreed they would review compensatory services and have a plan developed to address concerns by December 31, 2022. No plan was provided nor was an IEP meeting scheduled to discuss the matter.
47. During the 2021-2022 school year, Student received adult support during set up and two days of the fall festival. Student also had adult support during two rehearsals and two music performances.
48. During the 2022-2023 school year, Student had adult support during a rehearsal, music performance and theater.
49. During the 2023-2024 school year, Student had adult support while decorating for homecoming.
50. Student would have had adult support for the homecoming dance but did not attend because Parents were not informed soon enough that adult support would be available.
51. Parent reported that Student has always loved to learn, was curious, excited about new experiences. Last year, Student frequently did not want to attend school because Student was anxious, frustrated and having headaches, stomachaches, or toothaches. These ailments may have been related to the disruption in the classroom.
52. Parent has requested examples of work and how academic progress was monitored. Progress notes were limited to progress being made with no data to support progress. Student was making progress on academic and functional IEP goals.
53. District administration noted that this was a problem and was working to provide Parents of Student's progress on goals including the data.
54. Last year, daily work was rarely provided; this year, teacher is working to add completed work on Synergy so Parents are aware of what Student is accomplishing.
55. In the general education classes, Student was not required to complete all assignments but may complete alternative assignments or projects.

IEP meetings

56. During the October 18, 2021 IEP meeting, Parents requested a 1-1 aide to assist Student throughout the day. The IEP team agreed to collect data on the need for a 1-1 aide. Nothing further has been done on this request.

57. Student had nine goals on the IEP . It was noted that Student needed academic support, speech, occupational therapy (OT), physical therapy (PT), adaptive behavior and mental health services.
58. Examples of a math goal on the October 17, 2022 IEP was for Student to “solve real-world one to two step problems involving calendars, money, elapsed time, charts and measurement.” A reading goal was to "explain the sequence of events by describing what happened first, next and last” after reading a story. A physical therapy goal was to ascend and descend stairs using the handrail as necessary and maintaining fluid momentum. A language goal was to “describe a target item event or individual with a minimum of two details.” These goals as well as the other goals and short-term objectives on the October 17, 2022 IEP were appropriately challenging based on Student’s abilities but also addressed academic and functional needs as outlined on the present levels of academic achievement and functional performance (PLAAFP).
59. Several accommodations and modifications were included on Student’s IEP. These included large print materials, computer with larger screen, FM system, extra adult support for extracurricular activities and participation in general education electives, an IHP, word predictive software and voice to text software.
60. The assistive technology was difficult for Student to use; Student became easily frustrated with the multiple steps needed to access the program. Recently, Student has been receiving training in OT to allow Student to effectively use the assistive technology available.
61. Student indicated that the FM system was not needed, so it was no longer used.
62. Student did not need transportation as a related service but Parents were requesting transportation to allow Student to participate in community and extracurricular activities. Student would also need adult support to be able to participate in those activities. Sometimes students would walk to activities or could use school buses, city buses or accessible buses depending on the needs of the students.
63. The IEP team agreed that Student’s social/interpersonal needs could be enhanced though participation in clubs, groups and other extracurricular activities at school. Although Student was eligible to participate in those outside activities, often adult support was not available to assist Student or Parents were not informed of activities to plan for Student’s attendance with appropriate supports.
64. An IEP meeting was held on July 7, 2022 to change the mental health provider from social work services to a psychologist.
65. Student’s last IEP was October 17, 2022. Student was on an ability program of study for earning a diploma.
66. The IEP team discussed Student’s coursework and there was discussion about Student’s transition goals. When Student started at the high school, there were concerns with

Student's schedule, the Parents requested modifications but approved the final course schedule for the 2022-2023 school year.

67. On the October 17, 2022 IEP, Student received the following services: 45 minutes per week for case management; 240 minutes per week in reading; 240 minutes per week in math; 720 minutes per week in special education instruction in the developmental classroom; 240 minutes per week in electives with adult support; 40 minutes per week of adaptive physical education; 20 minutes per week of occupational therapy; 25 minutes per week of physical therapy; 45 minutes per week in psychological services; 20 minutes per week in nursing services and 60 minutes per week in speech.
68. Student had eight goals on the IEP in the areas of functional, receptive, expressive and pragmatic language, adaptive physical education, reading, writing, math, behavior, transition, and speech.
69. This IEP also provided for extra adult support for extra-curricular activities, as needed, on campus and at community activities.
70. There was a discussion at that IEP meeting about transportation services; the IEP team determined Student was not eligible for transportation as a related service for attending school.
71. Student had an FM system that was not always used. The October 17, 2022 IEP had similar accommodations to the previous including enlarged music for choir, audio recording of the music and electronic enlarging equipment. Student did not always have enlarged music but there were other options to allow Student access to the music program.
72. On May 4, 2023, Parents requested adult support for the Adaptive Cycle Parade but that was not provided.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to develop and implement an IEP that allowed Student to make educational progress, in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC; specifically, whether the District:

- a. Failed to provide accommodations and modifications or related services as required by the IEP;**
- b. Provided for opportunities to participate in special and general education, extra-curricular and school sponsored activities with the needed supports;**
- c. Made a certified special education teacher and 1-1 aide available to allow Student to access the curriculum;**

- d. Considered Student’s individual needs when determining Student’s least restrictive environment for instruction;**
- e. Failed to have necessary equipment and supplies to complete IEP goals;**
- f. Failed to modify assignments as required and provide needed assistance to allow Student to complete work;**
- g. Failed to consider Student’s changing mental and physical needs and determine if additional assessments were needed and/or IEP needed to be modified to include additional supports and services;**
- h. Failed to consider if transportation was required to allow Student to participate in activities in furtherance of IEP goals;**
- i. Failed to ensure that providers were aware of health needs and implemented health plan with fidelity;**
- j. Provided needed assistive technology with appropriate training and follow-up to ensure that Student was able to benefit from assistive technology, and;**
- k. Failed to address Student’s academic and functional needs when developing goals and providing services.**

Special education is “specially designed instruction provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability.” 34 C.F.R. § 300.39(a)(1). This specialized designed instruction is adapting the content, methodology or delivery of instruction to address the unique needs of an individual child. 34 C.F.R. § 300.39(b)(3). These unique needs are more than academic needs but can include social, health and emotional needs. *County of San Diego v. California Special Education Hearing Office*, 95 F3d 1458 (9th Cir. 1996). Behavioral needs are also part of the IEP process and can be addressed in a behavioral intervention plan (BIP). A BIP is usually a component of the IEP to address behaviors that impede the student’s learning and are inconsistent with school expectations. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions*, 81 IDELR 138 (OSERS 2022).

IEPs are to be developed during an IEP meeting. The IEP team must consider the student’s strengths, any concerns of the parents, results of evaluations, and academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a)(1). Parents, as required members of the IEP team, must have adequate information to make informed decisions. 34 C.F.R. § 300.321(a)(1). Every IEP for a student must contain “[a] statement of the child’s present levels of academic achievement and functional performance, including --How the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children).” 34 C.F.R. § 300.320(a)(1). This statement of PLAAFP assists in determining the needs of an individual student to develop annual goals to allow the student to receive FAPE and make progress in the general education curriculum. *Bakersfield City School District*, 51 IDELR 142 (SEA CA 2008). The PLAAFP must be comprehensive and provide baseline data that reflects

all the child's needs, both academic and nonacademic. This also should include relevant background information about needs, strengths, interests and learning styles. 34 C.F.R. § 300.324 (a). The PLAAFP must be individualized to reflect the unique needs and abilities of a particular student. *Letter to New*, 211 IDELR 464 (OSEP 1987).

A child's annual IEP must include measurable annual goals, both academic and functional that meet the child's needs that result from the child's disability and allow the child to participate in and make progress in the general education curriculum. The IEP goals must address all the child's needs that result from the child's disability. 34 C.F.R. § 300.320(a)(2). Annual goals should reflect what is reasonably expected to be accomplished during the annual IEP period. *Letter to Butler*, 213 IDELR 118 (OSERS 1988). The annual goals should be specific to be able to determine progress made and the specific skills needed to achieve progress on goals. 64 Fed. Reg. 12, 471 (1999). When Student is not making progress on their goals, the IEP team needs to meet to modify the goals or determine the need for additional supports and services. 34 C.F.R. § 300.324(b)(ii)(A). An IEP must be implemented with all required components. 34 C.F.R. §300.324(b)(ii)(a). However, only material failures of implementation will result in a denial of FAPE. *See Van Duyn v. Baker School District*. 5J, 481 F3d 770 (9th Cir. 2007).

a. Failed to provide accommodations and modifications or related services as required by the IEP

Student had several accommodations and modifications included in the October 17, 2022 IEP. These included enlarged music, adult support for extra-curricular activities and assistive technology. There have been concerns about the enlarged music but the District provided a magnifier and/or magnifying sheets when the enlarged music was no longer effective. Student used an FM system but this was discontinued because Student did not need it. The IEP was not modified to note that some of these accommodations were not effective or not being used. Student had ongoing difficulty with assistive technology and recently began receiving training and support with the word prediction and speech to text computer programs to allow Student to benefit from the assistive technology. The assistive technology has been a part of Student's 2021 and 2022 IEPs but is has been an ongoing problem with access to the assistive technology. Student's work was modified for general education classes; grades were assigned based, in part, on Student's participation. Accommodations and modifications listed on the IEP must be provided as written unless an addendum is completed changing the accommodations and/or modifications. The District failed to provide the accommodations and modifications listed on the IEP or when those accommodations or modifications were no longer needed, the IEP was not amended to reflect the changing needs of Student.

As to Issue #1a, the District is cited and Corrective Action is required.

b. Provided for opportunities to participate in special and general education, extra-curricular and school sponsored activities with the needed supports

Student's IEP provided for extra support in extracurriculars and in general education. Student did not have a 1-1 aide to assist throughout the day, however, Student had adult assistance in general education electives. For some non-school, community-based activities such as the adaptive cycle parade, Student did not have adult supports even though it was requested. This was not an extracurricular or school sponsored activity. At other times like the harvest festival, Student had adult support available to allow participation. Student was eligible to participate in groups and clubs at school but Student's lack of participation in all activities of interest was not proximately due to a lack of adult support but may have been because of Student's abilities. For example, Student's inability to complete grade level work and/or physical limitations because of medical needs and adaptive physical education would have made participation in ROTC difficult if not impossible. The homecoming dance was another extracurricular activity that Student wanted to attend but the information that adult support was available was provided too late for Student to participate in the dance. The District provided opportunities for Student to participate in special and general education and other activities and provided needed support for Student's participation. Because of Student's needs and abilities, not all activities were appropriate for Student's participation.

As to Issue #1b, the District is not cited.

c. Made a certified special education teacher and 1-1 aide available to allow Student to access the curriculum

The teacher in the developmental classroom was a certified special education teacher. However, the teacher went on administrative leave during much of the 2022-2023 school year. A certified substitute teacher replaced the certified teacher. Student had adult support in electives in the general education program but the Student did not have a 1-1 aide. At the October 18, 2021 IEP meeting, the issue of a 1-1 aide was proposed and data was to be collected to determine the need for a 1-1 aide. This matter was not addressed at the October 17, 2022 IEP meeting and Parents have not been provided with the data concerning the 1-1 aide. The IEP team has never determined the need for a fulltime 1-1 aide. The plan is to address that issue at the upcoming IEP meeting but that matter should have been addressed at the October 17, 2022 IEP meeting by collecting data and determining whether an aide was necessary for Student to access their curriculum

As to Issue #1c, the District is cited and Corrective Action is required.

d. Considered Student's individual needs when determining Student's least restrictive environment for instruction

Student's LRE on both the 2021 and 2022 IEPs was a self-contained developmental classroom. Student did participate with nondisabled peers throughout the day including electives such as choir and theater. Student academic skills were at the primer or kindergarten level, except for math where Student had some first-grade skills. Student's teacher this year stated that Student was unable to read a second-grade level reading book and needed one to one assistance to complete math assignments. Student needed a smaller class with extra support and instruction to be successful. Student participated in general education electives and was active in social interactions with peers but assignments were modified commensurate with Student's abilities. Student's disabilities and needs prevented placement full time in the general education classes or even a resource room. Student's abilities in all academic and functional areas prevented Student from being successful in a less restrictive environment. The self-contained classroom allowed Student the structure and support needed to access the curriculum and make educational progress. Although Parent disagreed with this recommendation, the IEP team considered Student's abilities and needs and determined that Student's placement in a self-contained classroom was appropriate.

As to Issue #1d, the District is not cited.

e. Failed to have necessary equipment and supplies to complete IEP goals

Student's October 18, 2021 and October 17, 2022 IEPs provided for an electronic enlarger, large print material and enlarged music among other items. During the 2022-2023 school year, Parent had raised concerns that Student was in choir but did not have enlarged music to access and participate in choir. Student had access to a magnifier and enlarger so Student would have access and be able to participate in choir. Assistive technology was provided to Student; Student has been receiving training on use of the assistive technology. Parents were told there were limited funds available to work on completing functional skills such as cooking and money management, however, Student participated in a cooking lab once a week. Student had the necessary equipment and supplies to complete IEP goals.

As to Issue #1e, the District is not cited.

f. Failed to modify assignments as required and provide needed assistance to allow Student to complete work

Student in the self-contained classroom had a modified curriculum that addressed Student's needs and abilities. In the electives that Student participated in, Student's required work was

adapted to her abilities while still allowing her to participate. Except for the text to speech software where Student would get frustrated and quit because Student was overwhelmed, Student did receive needed assistance. The OT is working with Student on how to effectively use assistive technology. Student's general education assignments were modified; Student would be given a grade for participation or work completed. Recently, Student was assisted in obtaining library materials to complete assignments.

As to Issue #1f, the District is not cited.

- g. Failed to consider Student's changing mental and physical needs and determine if additional assessments were needed and/or IEP needed to be modified to include additional supports and services**

Parents repeatedly reported that Student was having more health symptoms, was anxious, frustrated and not wanting to come to school. There were also reports that Student was frustrated because of the noise and disruptions in the classroom that exacerbated Student's anxiety. The District reported that it would convene a meeting to discuss Parents' concerns but no meeting was scheduled. This year, there have been changes in the classroom to address Student's mental and physical needs.

As to Issue #1g, the District is cited and Corrective Action is required.

- h. Failed to consider if transportation was required to allow Student to participate in activities in furtherance of IEP goals**

At both the 2021 and 2022 IEP meetings, the IEP team determined that Student did not need transportation to allow Student to access the curriculum. Transportation to extracurricular activities is usually the responsibility of the parents and students were transported to community-based activities as needed. There was no evidence that Student's unique needs required transportation to extracurricular activities.

As to Issue #1h, the District is not cited.

- i. Failed to ensure that providers were aware of health needs and implemented health plan with fidelity**

Student was on an individual health plan and had multiple medical needs. Student received psychological services weekly. When Student reported health concerns such as stomachache or headache, Student was taken to nursing services. There was nothing to indicate that Student's medical needs were not being met. Teaching staff were aware of Student's medical needs but it was not clear that all aides and support staff were aware of Student's medical needs.

As to Issue #1i, the District is cited and Corrective Action is required.

- j. Provided needed assistive technology with appropriate training and follow-up to ensure that Student was able to benefit from assistive technology**

Student had assistive technology services including an FM system which Student reported was no longer needed in choir. That service was still on Student's IEP. Student also used word prediction and speech to text software for reading and writing; the assistive technology overwhelmed Student and Student would give up. Student is now receiving additional training in OT. The District planned to recommend an assistive technology assessment at the upcoming IEP meeting. The assistive technology was either not used or Student was not able to access it because of lack of training or assistance.

As to Issue #1j, the District is cited and Corrective Action is required.

- k. Failed to address Student's academic and functional needs when developing goals and providing services**

The IEP team at both the 2021 and 2022 IEP meetings considered Student's academic and functional needs. Student's academic abilities, as measured by testing, were in the primer to kindergarten level and the goals reflected Student's levels while continuing to challenge Student. Many of Student's academic goals reflected functional needs. Examples of a math goal was for Student to "solve real-world one to two step problems involving calendars, money, elapsed time, charts and measurement." A reading goal was to "explain the sequence of events by describing what happened first, next and last" after reading a story. A physical therapy goal was to ascend and descend stairs using the handrail as necessary and maintaining fluid momentum. A language goal was to "describe a target item event or individual with a minimum of two details." These goals as well as the other goals and short-term objectives on the October 17, 2022 IEP were appropriately challenging based on Student's abilities but also addressed academic and functional needs as outlined on the present levels of academic achievement and functional performance (PLAAFP).

As to Issue #1k, the District is not cited.

As to Issue #1a, 1c, 1g, 1i and 1j, the District is cited and Corrective Action is required.

As to Issue #1b, 1d, 1e, 1f, 1h and 1k, the District is not cited.

Issue No.2

Whether the District failed to provide Parents of Student with an opportunity to participate in the IEP process in violation of 34 C.F.R. §300.322; 34 C.F.R. § 300.501(b) and 6.31.2.11(b)(2) and 6.31.2.13(c) NMAC, specifically whether the District:

- a. Considered the Parents's and Student's concerns when determining Student's academic course schedule;**
- b. Allowed Parents' access to educational records;**
- c. Provided information about services for students with disabilities and programs such as sunshine classes; and**
- d. Considered Parents' concerns when developing or modifying goals, supports and services on the IEP.**

Parents are mandatory members of the IEP team. 34 C.F.R. § 300.321(a)(1). Districts must provide parents with meaningful parental participation in any decisions involving the identification, evaluation and educational placement of the student and provision of FAPE. 34 C.F.R. § 300.501(b). The district must send the parents periodic reports of the student's progress toward his IEP goals following the schedule set forth in the student's IEP. 34 C.F.R. § 300.320(a)(3)(ii). Meaningful parental participation includes consideration of parent's concerns and, if appropriate, incorporating those concerns in documents. *Deal v. Hamilton County Board of Education*, 42 IDELR 109 (6th Cir. 2004), *cert denied*, 546 U.S. 936 (2005), *on remand* (E.D. TN 2006), *aff'd* 49 IDELR 123 (6th Cir 2008). The 11th Circuit Court of Appeals in *R.L v. Miami-Dade County School Board* held that parental participation required the District to come to meetings with an open mind and be receptive and responsive to parent's concerns. *R.L. v. Miami-Dade County School Board*, 63 IDELR 182 (11th Cir. 2014). Although parents are equal members of the IEP team, decisions are not made by voting but by consensus. 34 C.F.R. § 300.503(a). When consensus cannot be obtained, the district must provide the Parents with a prior written notice (PWN) outlining proposals and refusals. *Letter to Richards*, 55 IDELR 107 (OSEP 2010). Staff that work with students must have the necessary skills and knowledge and appropriate certification. 20 U.S.C. § 6611 (c)(4)(B)(i).

- a. Considered the Parents' and Student's concerns when determining academic course schedule**

Parents' and Student's concerns were addressed at the IEP meetings. Many of the accommodations and modifications provided to Student were at the request of the Parent. Parent wanted Student to participate more in general education, but the IEP team discussed this and determined that the low incidence classroom was more appropriate because of Student's below grade level academic skills. Sunshine classes were proposed but rejected by Parents and Student to allow Student to participate with peers and be challenged in areas of high interest. During the discussion on Student's future career plans, consideration was given for how to best

prepare Student for the future while addressing Student's areas of interest. Student participated in general education classes in areas of particular interest. Parent reported that the final schedule differed from the proposed schedule, but changes were made to the schedule when Parent reported that to administration.

As to Issue #2a, the District is not cited.

b. Allowed Parents' access to educational records

There was no evidence on this record that Parents were denied access to educational records pertaining to their Student. When records were requested, the District has provided them to Parents. The District noted that in the future, academic and functional progress notes will include data.

As to Issue #2b, the District is not cited.

c. Provided information about services for students with disabilities and programs such as sunshine classes

The PWNs from both the 2021 and 2022 IEPs referenced Sunshine classes as options for Student but the parents rejected those proposals. It is not clear what other programs Parents were referring to because Student participated in extracurricular activities and electives programs with peers.

As to Issue #2c, the District is not cited.

d. Considered Parents' concerns when developing or modifying goals, supports and services on the IEP

The PWNs from the two IEP meetings indicated that Parents concerns were discussed and addressed during the IEP meetings. For example, District proposed sunshine classes and Parents rejected. Transportation was proposed and rejected. A 1-1 aide was proposed, data was to be collected and reviewed at a subsequent IEP meeting. There has been no follow up for Student's need for a 1-1 aide. Parents actively participated in IEP meetings and most of their concerns were considered. However, the District stated they would collect data on the need for a 1-1 aide but that was never followed up with the IEP team. Parents requested compensatory education. A plan was to be developed by December 31, 2022 but a plan has not been provided to Parents. For these reasons, the IEP team failed to consider and address as appropriate all of the Parents' concerns.

As to Issue #2d, the District is cited. Corrective Action is required.

As to Issue #2a, 2b and 2c, the District is not cited.

As to Issue #2d, the District is cited.

Issue No.3

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.

Students who are eligible for special education services are entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. A District is obligated to provide a FAPE to students within their jurisdiction who have been determined eligible for special education services. 34 C.F.R. § 300.17. The determination of whether there has been a denial of FAPE requires consideration of two components: substantive and procedural. The question one must answer to determine the substantive standard is whether the IEP was "reasonably calculated to allow the child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas County School District. RE-I*, 137 S. Ct. 988 (2017). The Court in *J.L. v. Mercer Island School District*, 592 F3d 938, 951 (9th Cir. 2010), held that a procedural violation may be a denial of FAPE when it resulted in the loss of an educational opportunity, infringed on parents' opportunity to participate in the development of the IEP or deprived the student of an educational benefit. All circumstances surrounding the implementation of the IEP must be considered to determine whether there was a denial of FAPE. *A.P. v. Woodstock Board of Education*, 370 F. Appx. 202 (2d Cir. 2010).

There were multiple procedural errors in this matter. Student was not receiving all of the accommodations and modifications that were on Student's IEP. Although the District proposed a meeting to discuss increase in mental health needs, no meeting was held. The District failed to ensure that all staff were familiar with Student's medical needs to provide appropriate support. Not all Parents' concerns were addressed by the IEP team, the 1-1 aide and compensatory services were to be addressed at a future date but that has still not happened. Student does not consistently use assistive technology that is included as an accommodation on the IEP. Student reported the FM system was not needed and the speech to text and word prediction software was too difficult for Student to use effectively. The IEP team did not make a plan to determine if additional or alternative assistive technology services were needed for Student to access the curriculum. However, the errors do not rise to the level of a denial of FAPE. Student had educational opportunities with peers in various clubs and classes. Parents were provided meaningful parental participation; Student was not deprived of an educational opportunity or benefit. Student made progress, albeit slow progress on IEP goals.

There was no substantive denial of FAPE on this record. The District repeatedly proposed Student should participate in Sunshine classes. However, Parents objected and Student was in theater, dance and choir with adult support. Student was in student government, and in a leadership role in Best Buddies and Adaptive Cycle. The academic goals for Student were very similar from year to year but Student was making limited progress on academic goals. Student's test scores indicated the primer or kindergarten level in most academic areas except for math where Student scored at first grade for some skills. Parents were concerned that Student was not being challenged and repeating the same tasks or not doing any work but participating in fun activities all day. When Parents requested data to support Student's progress on academic goals; this was not always available. While Parents may believe Student was capable of more than the District was providing; test results, progress notes and IEP indicated that Student's IEPs were reasonably calculated to allow Student to make educational progress in light of Student's circumstances. The circumstances in this case are that Student's disabilities may have prevented Student from participating and being successful full time in a general education classroom. Parents were pleased with the changes this year for Student and that the IEP was being followed.

As to Issue #3, the District is not cited.

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC	<p>The District failed to develop and implement an IEP that allowed Student to make educational progress, specifically, the District:</p> <p>Failed to provide accommodations and modifications or related services as required by the IEP;</p> <p>Failed to make a certified special education teacher and 1-1 aide available to allow Student to access the curriculum;</p> <p>Failed to consider Student’s changing mental and physical needs and determine if additional assessments were needed and/or IEP needed to be modified to include additional supports and services;</p> <p>Failed to ensure that providers were aware of health needs and implemented health plan with fidelity;</p> <p>Failed to provide needed assistive technology with appropriate training and follow-up to ensure that Student was able to benefit from assistive technology.</p>
34 C.F.R. §300.322; 34 C.F.R. § 300.501(b) and 6.31.2.11(b)(2) and 6.31.2.13(c) NMAC	<p>The District failed to provide Parents of Student with an opportunity to participate in the IEP process, specifically whether the District:</p> <p>Failed to consider Parents’ concerns when developing or modifying goals, supports and services on the IEP</p>

Required Actions and Deadlines

By October 20, 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 October 13, 2024 and reported to the SED no later than October 27, 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).	October 20, 2023	Written Assurance Letter/Email	October 20, 2023
2.	The District Special Education Director and the school principal shall meet with the PED SED Education Administrator assigned to the District and the PED SED CAP Monitor to review the Complaint Resolution Report, the Corrective Action Plan, and any other measures that the District plans to take to ensure that the violations are corrected and do not recur. The District Special Education Director shall be responsible for arranging this meeting with SED.	October 27, 2023	Notes from meeting prepared by District	November 3, 2023
3.	The District Special Education Director will meet with Student's special education 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.	November 3, 2023	Notes of meeting prepared by District	November 10, 2023
4.	Conduct a Facilitated IEP to develop a plan to address student's needs including: <ul style="list-style-type: none"> Developing a plan to ensure Student receives accommodations and modifications; 	November 17, 2023	1. Invitation to facilitated IEP meetings, 2. IEPs, 3. Prior Written Notices, and	December 1, 2023

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
	<ul style="list-style-type: none"> • Needed adult support in school and extracurricular activities including the need for 1-1 assistance; • Training on assistive technology to ensure it is effective; • Goals that address Student’s academic, functional and social needs; and • Needed supports and services to address all of student’s needs. <p>The Facilitator shall be independent of the District and shall be selected from the PED list of approved facilitators. The Facilitator shall be paid for by the District.</p> <p>The FIEP meeting shall be held on a date and time that is convenient for the parent. The parent will be provided with a copy of the IEP and PWN at the conclusion of the FIEP meeting.</p> <p>The District shall also ensure that the IEP team includes, but is not limited to, parents, special education teacher, general education teacher, and any related services providers.</p>		4. Agenda for facilitated IEP team meetings	

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>
5.	<p>The District shall arrange to provide training to District staff (including special education teachers, special education administrators, and related service personnel), on the following special education topics:</p> <ul style="list-style-type: none"> • the proper use of assistive technology; • ensuring accommodations and modifications are effective and implemented with fidelity; • developing an IEP that addresses all student’s needs; and • addressing Students’ nonacademic needs or needs related to extracurricular activities. <p>The training shall be provided by a person with expertise in special education who was not involved in responding to this complaint and who is approved by NMPED.</p>	January 31, 2024	<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>December 1, 2023</p> <p>December 8, 2023</p> <p>February 9, 2024</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/ Michelle K. Bennett

Michelet K. Bennett

Complaint Investigator

Reviewed by:

/s/ Miguel Lozano

Miguel Lozano, Esq.

Chief Counsel, Special Education Division

Reviewed and approved by:

DocuSigned by:
Margaret Cage

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Margaret Cage, Ed.D.

Director, Office of Special Education