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**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report**



Albuquerque Public Schools

Case No. C2324-06

October 13, 2023

This Report requires corrective action. See pages 25-27.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on August 15, 2023, 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. §§ 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 Parents of the Student; 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. For this reason, the Complaint Investigator did not investigate the following issues raised by the complainant: any claims related to Section 504 issues.

Issue for Investigation

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

- 1. Whether the School had knowledge that Student is a student with a disability and failed to provide Student the disciplinary protections for children not determined eligible for special education and related services as required by 34 C.F.R. § 300.534 and 6.31.2.11(F)(2) NMAC;**
- 2. Whether the School was aware, or suspected, that Student is a student with a disability and failed to comply with its Child Find obligations under the IDEA following a disciplinary removal of the Student by the School on September 12, 2022, by: ²**

² As of July 1, 2023, the PED has enacted new rules regarding Child Find in the state of New Mexico. However, this complaint investigation involves actions by the parties herein that took place prior to the enactment of the new rules and, therefore, all rights and obligations of the parties shall be governed by the rules in effect during the jurisdictional period of this complaint investigation.

- a. failing to timely conduct an initial special education evaluation of the Student in response to Parents' request for an evaluation, as required by 34 C.F.R. § 300.301 and 6.31.2.10(D)(1)(a) NMAC;
 - b. failing to timely provide the Parents with a copy of the Student's evaluation report, as required by 34 C.F.R. §300.306(a); and 6.31.2.10 NMAC;
 - c. failing to timely convene a meeting of the School's Eligibility Determination Team (EDT) following the completion of the Student's Evaluation, as required by 34 C.F.R. §300.306; and 6.31.2.10(F)(1)(a);
 - d. failing to ensure that a meeting to develop an IEP for the Student was timely conducted following a determination of eligibility for special education and related services, as required by 34 C.F.R. § 300.323(c); and 6.31.2.11(B) NMAC;
 - e. failing to timely provide special education and related services to the Student, as required by 34 C.F.R. §300.323(c); and 6.31.2.11(B) NMAC; and
3. Whether the School'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, who is the subject of this complaint investigation, is currently 15 years of age and, during the time period relevant to this investigation, was in the 9th grade. During the 2022-2023 school year the Student was enrolled in a charter school (the School) which is locally authorized by and under the jurisdiction of the District.
2. School records indicate that the Student was homeschooled beginning in kindergarten through 4th grade.
3. School records indicate that the Student attended Middle School (5th through 8th grades) at a District middle school (the Middle School) beginning with the 2018-2019 school year. During Student's 5th through 8th grade years, the Student attended only morning classes at the Middle School and received the remainder of instruction through homeschool.
4. School records indicate that the Student was diagnosed with ADHD during his 5th grade year by an outside medical provider, for which he was prescribed and takes stimulant medication. A Section 504 Plan was developed for the Student by the Middle School.

5. On April 25, 2022, the Student's Section 504 Committee, including the Parents, at the Middle School, met to review the Student's Section 504 prior eligibility and to develop a new Section 504 Accommodation Plan for the Student prior to beginning high school. The Committee's Report states that the Committee reviewed the medical evaluation/diagnosis provided by Parents, teacher/administrator input and Parent input. The Report further describes how the Student's ADHD substantially limits the learning of the Student by limiting his ability to concentrate and focus. The report also indicates that the Student needs accommodations in order to meet his educational needs as adequately as those of non-disabled peers.
6. On April 25, 2022, a Section 504 Accommodation Plan was developed for the Student. The behaviors related to the Student's impairment were identified as:
 - a. focus and concentration;
 - b. attention deficit;
 - c. difficulties with test taking; and
 - d. difficulty with time management.
7. District records indicate that during the time the Student attended the Middle School, no behavior incident reports regarding the Student were made by Middle School staff, and the Student was not involved in any physical altercations with other peers. School staff from the Middle School report that the Student sometimes drew images of weapons and "scary faces," but the drawings were not accompanied by images of persons being injured or maimed and were not accompanied by verbal or written threats.
8. District records indicate that the enrollment process for the School included an initial parent questionnaire and participation in an interview with School staff. School staff report that in the questionnaire, and during the interview, the Parents did not raise any concerns about any significant behaviors previously exhibited by the Student in school.
9. The Student began attending the School on August 8, 2022.
10. On September 12, 2022, the Student brought a box cutter to school, which was determined by the School to be a weapon and, therefore, a violation of the School's code of student conduct. The Student admitted to bringing the box cutter to school, and it was found in his possession, but he stated that he brought it to work on an art project. The Student received a three-day suspension from School beginning on Tuesday, September 13 through Thursday, September 15, 2022. The anticipated return of Student to the

School was Wednesday, September 21, due to the fact that school was not in session from Friday, September 16 through Tuesday, September 20, 2022.

11. The Parents report that prior to this incident, the Student had not exhibited any similar behavior at school or home.
12. In response to the suspension, the Parents proposed adding a small dose of the Student's ADHD medication at lunchtime to help the Student control his behaviors, and the School agreed to facilitate the Parent's proposal.
13. While serving his three-day suspension, the Student sent texts to several different students, who sent screenshots of these communications to the School's Division Head. These messages were reviewed by the Division Head on September 19, 2022. School Administration interviewed eight students, consulted with the School's mental health team, including two school counselors and a social worker, and then consulted with the District's Senior Director of Staff and Student Supports with the District's Crisis Intervention Team. School and District staff determined the Student's communications to be violent and threatening. The School then contacted the Parents regarding the Student's threatening communications and recommended that the Student immediately receive a mental health evaluation.
14. School records indicate that on September 19, 2022, the student received an additional three-day suspension for the threatening and violent communications he made to other students, to begin on Wednesday, September 21, 2022. The School informed the Parents that the Student would not be able to return to school until the School had confirmation from a mental health provider that indicated he was safe to do so. The Parents responded that they would follow-up with the Student's therapist, and also requested a manifestation determination review (MDR) in connection with the Student's Section 504 Plan.
15. On September 20, 2022, the School sent an email to the Parents indicating the School was willing to schedule a MDR meeting in accordance with the student's Section 504 Plan, but also needed assurances from a mental health provider before scheduling a date for the Student to return to school. The Parent responded that they would follow-up with the Student's therapist and pediatrician.
16. On September 21, 2022, the School and the Parents initially agreed to meet the following day to discuss the situation with the Student, but the Parents later informed the School that they wanted to postpone the meeting until they could arrange for a disability rights

advocate to attend a meeting with them. However, the Parents later did agree to meet on September 22.

17. The documentation indicates that on September 22, 2022, School staff and the Parents did meet to conduct an Informal Threat Assessment Review regarding the two behavior incidents involving the Student. The Threat Assessment Team's written reports indicate that the recommendation was to refer the Student for assessment by an outside mental health expert.
18. On September 23, 2022, School staff emailed to the Parents the Informal Threat Assessment report that had also been provided to the District, and requested a date from the Parents when the team could meet with the Parents and the Student's disability rights advocate to develop a re-entry plan for the Student. The Parents indicated they could respond with a meeting date by September 29, 2022.
19. The Parents also inquired whether the Student would be able to have access to his schoolwork while he was not attending classes. In response, School administration notified the Student's teachers to provide access to all course work for the Student on the School's communication platform or sent directly to the Parents.
20. On September 29, 2022, the Parents sent an email to the School which, among other things, included a written request for an expedited neuropsychological special education evaluation for the Student, not because of academic concerns (Student was receiving all A's and B's), but more so for a strong behavior plan. The Parents requested that the District send a Consent to Evaluate form as soon as possible.
21. On September 30, 2022, the School convened a Section 504 MDR meeting, which included five School staff, both Parents, two disability rights advocates and the Student. The MDR report indicates that the committee reviewed grade reports, Parent input, Administrator input, Student input, and school history/attendance for the Student. After a lengthy discussion regarding the Student's disability (ADHD) and his behaviors which led to the suspensions, the disability advocates invited by the Parents requested that a vote be taken. The five School staff members all agreed that the Student's behaviors were not a manifestation of his disability, and the Parents, disability advocates and the Student all agreed that the Student's behaviors were a manifestation of his disability. School staff report that at the MDR meeting the Parents were offered the opportunity to sign a Consent to Evaluate and a Consent for Functional Behavioral Assessment, but the Parents

indicated they wanted to wait to sign the consents until after the family's Fall Break vacation the following week.

22. The September 30, 2022, MDR report, which was signed by all committee members including the Parents and Student, indicates, in relevant part, as follows:
 - a. It was determined that the Student's conduct in question was, and was not, a manifestation of his disability;
 - b. It was also determined that the Student's conduct in question was, and was not, the direct result of the School's failure to implement the Student's Section 504 plan;
 - c. The MDR Committee's Plan was to "move the [Student] to distance learning program using school online learning program on Edgenuity for the remainder of the semester. All current 504 accommodations will be implemented. Student will not be allowed to be on campus or attend schoolwide events during this time. If the student is required to be on campus he must be accompanied by a parent for the entire visit. Student will continue to follow the schoolwide discipline plan, unless 504 is updated to create a BIP. Team will revisit the implementation of a reentry plan prior to the start of the second semester. School will move forward with request for testing, FBA and BIP."
23. The documentation indicates that on October 3, 2022, the School arranged for the Student to use the Edgenuity program to continue his distance learning, modified to account for the Student's 504 accommodations and to receive support from School staff.
24. On October 4, 2022, the School emailed the Consent to Evaluate and consent for an FBA forms to the Parents.
25. On October 5, 2022, the School notified the Parents that the District had advised the School that a Formal Threat Assessment meeting regarding the Student be held. The meeting was scheduled for October 11, 2022, and would be attended by the School's administrative team, the Parents and facilitated by a representative from a family guidance center.
26. On October 11, 2022, a Formal Threat Assessment meeting was held with School staff, the Parents and parent advocate, and facilitated by a family guidance counselor. The report indicates that School staff believed that the Student was a "High Level Threat, Category 2: High Violence Potential, Not Imminent," and the Parents believe that Student

was a “Medium Level Threat.” It was agreed to by all parties that the Student would continue with distance learning, taking classes through Edgenuity.

27. On October 11, 2022, the Parents signed and provided to the School a Parent Request Form providing written consent for a special education evaluation for the Student, and signed and provided to the School the Consent for an FBA for the Student. The Parent also requested that the student be tested for Tourette syndrome.
28. On October 12, 2022, the School notified the Parents that the School would provide a comprehensive special education evaluation in all areas of suspected need including neuropsychological, Autism and Tourette syndrome with the provider requested by the Parents. Both parties agreed in their email communication that the evaluation provided by the outside evaluator would be an “IEE.”
29. On November 1, 2022, a Section 504 Team meeting was held and a 504 Accommodation Plan was developed for the Student. The parents gave signed consent to implement the accommodations on November 30, 2022.
30. On December 5, 2022, the School’s Division Head sent an email to the Parents asking what their plans or wishes were for the Student’s second Semester. The Parents responded that because the Student’s evaluation was not completed in a timely manner, the Parents “have no choice but to leave [the Student] enrolled.”
31. On December 13, 2022, School staff, the parents and the Student met to discuss the Student’s progress and a plan for Semester 2. The parties agreed that the Student would continue with remote learning for Semester 2.
32. The documentation indicates that, beginning on September 29, 2022, the following actions and activities occurred regarding the special education evaluation requested by the Parents and the District’s Child Find activities regarding the Student:
 - a. On September 29, 2022, the Parents first requested a special education evaluation for the Student and a Consent for Evaluation form from the School;
 - b. On October 11, 2022, the Parents returned the signed Consent for Evaluation form to the School;
 - c. On October 13, 2022, the School’s SAT Chair reports that she called the office of the evaluator requested by Parents requesting information regarding the evaluator’s evaluation process;
 - d. On October 18, 2022, the SAT Chair emailed the Student’s teachers to send to the SAT Chair the Student’s present levels;

- e. On October 20, 2022, the SAT Chair requested the School Nurse to complete the hearing/vision help forms for the Student. The vision/hearing screener was completed on November 28, 2022;
- f. On November 22, 2022, the SAT Chair emailed the evaluator's office requesting clarification of the referral process and next steps;
- g. On November 29, 2022, the evaluator's office sent a copy of the purchase order to the School;
- h. On December 1, 2022, the SAT Chair notified the Parents that the Student needed to meet with a Speech Language Pathologist (SLP) to complete a screener as soon as possible, and also provided a parent questionnaire to be shared with the evaluator. (The SLP contacted the Parents to schedule the assessment in early to mid-December or January 9 or 10. The Parents requested to meet after the Winter break. On January 10, 2023, the SLP offered three additional dates in January between the 17th and the 30th. On January 30, 2023, the parents asked for dates in February, which were provided by the SLP. On March 13, 2023, the SLP again reached out to the Parent to offer dates in March and April for the SLP assessment. The Parents responded on March 14 and agreed to have the assessment conducted on March 27, 2023.)
- i. The purchase order for the outside evaluator was completed on December 2, 2022. The SAT Chair reports that she expressed to the evaluator's office staff that the evaluation needed to be completed as soon as possible;
- j. On December 5, 2022, the evaluator's office confirmed that the evaluation for the Student was scheduled with the Parents, and would take place on January 3, 2023;
- k. A comprehensive neuropsychological evaluation of the Student was conducted by the outside evaluator on January 3, 2023. The SAT Chair sent an email to the Parents on March 13, 2023, reporting that the evaluator informed her that it would take 10-12 weeks to complete the evaluation report;
- l. On April 4, 2023, the School and the Parents received a copy of the evaluation report from the evaluator's office. The Parents requested some proposed dates from the School for the Eligibility Determination Team (EDT) and the IEP Team to meet. The School replied on April 11, 2023, that the School's diagnostician and special education director were reviewing the report and would reach out soon to propose a date to meet;

- m. The School's Special Education Director scheduled a meeting with the Parents for a Review of Existing Evaluation Data (REED) on April 18, 2023, and the REED was held on that date. The group reviewed the Student's evaluation report and the SLP evaluation and determined that there were no outstanding assessments.
 - n. On April 18, 2023, following the REED, the Student's EDT met to determine the Student's eligibility for special education and related services. The EDT determined that the Student was eligible to receive special education and related services under the disability classifications of Autism and Other Health Impairment (OHI).
33. On April 20, 2023, the School provided notice to the Parents of an IEP team meeting for the Student scheduled for May 11, 2023.
34. On May 9, 2023, the School prepared and emailed a draft of the Student's IEP to the Parents.
35. On May 11, 2023, the Student's IEP team met to develop an initial IEP for the Student. The Student's May 11, 2023, IEP provides, in relevant part, as follows:
- a. The Student's primary disability is identified as Autism, and the Student's secondary disability is identified as OHI;
 - b. The Student Profile indicates that there are no academic concerns for the Student in the areas of math, reading and writing;
 - c. The Present Levels of Academic Achievement and Functional Performance (PLAAFP) provides as follows:
 - i. the Parents and the Student were in agreement with the goals being proposed;
 - ii. During the IEP team meeting, the Parents and the Student expressed the fact that they did not want Student to return to in-person learning at the School due to a lack of trust and communication, but the Student was excited about returning to in-person learning at another school;
 - d. The IEP does contain Post-Secondary Goals and transition planning;
 - e. The IEP does contain Instructional Accommodations and/or Modifications;
 - f. Annual Goals:
 - i. Academic: the IEP contains one academic goal in the area of Speaking & Listening.
 - ii. Functional:

1. Social/Emotional: the IEP contains three functional goals in this area.
 - g. Special Education and Related Services: the IEP provides for the following special education and related services in the following areas:
 - i. Communication Skills for 600 min./week;
 - ii. Social Work Services for 45 min./week; and
 - iii. Special Ed Services for 30 min./week.
 - h. The starting date for the Student's IEP services was May 11, 2023, and the IEP indicates that Student would attend school in-person;
 - i. The following persons attended the Student's IEP team meeting and participated in the development of Student's IEP: Parents and Student, Parent's Advocate, LEA Representative, Special Education Teacher, Regular Education Teacher, Special Education Charter Liaison, and Social Worker.
36. On May 11, 2023, the School's Special Education Director emailed a copy of the Student's finalized IEP and Prior Written Notice to the Parents.
37. Student's grades for the 2022-2023 school year (9th grade) included only "B's" and "A's"
38. School records indicate that Student's Edgenuity Progress Reports indicate, in relevant part, as follows:
- a. Student completed or tested out of 100% of all quizzes, tests, exams, assignments, labs and projects for each course taken since October 3, 2022;
 - b. Student scores ranged from a low of 77% on Science assignments, with most other scores in the upper 80's to 100% ranges on all metrics in all classes;
 - c. The Student performed very well in all of Student's on-line courses.
39. District and School staff report that during the time the Student was receiving his educational services through distance learning, there were no reports of the Student having any threatening or violent communications with other students at the School.
40. School records indicate that the Parents disenrolled the Student from the School on May 16, 2023.

Discussion and Conclusions of Law

Issue No. 1

Whether the School had knowledge that Student is a student with a disability and failed to provide Student the disciplinary protections for children not determined eligible for special education and related services as required by 34 C.F.R. § 300.534 and 6.31.2.11(F)(2) NMAC.

The IDEA provides that any party may present a complaint with respect to any matter relating to the identification, evaluation, educational placement, or provision of FAPE to a disabled student. 20 U.S.C. § 1415(b)(6).

In 1982, the U.S. Supreme Court held that “the Individuals with Disabilities Education Act establishes a substantive right to a ‘free appropriate public education’ for certain children with disabilities. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176 (1982). *Endrew F. v. Douglas County Sch. Dist.*, 580 U.S. 386 (2017); 69 IDELR 174, 177 (2017). In 2017, the Court in *Endrew F.* further described what a FAPE requires, and the IEP process to provide a FAPE to an eligible student, as follows:

A FAPE, as the Act defines it, includes both “special education” and “related services.” § 1401(9). “Special education” is “specially designed instruction ... to meet the unique needs of a child with a disability”; “related services” are the support services “required to assist a child ... to benefit from” that instruction. §§ 1401(26), (29). A State covered by the IDEA must provide a disabled child with such special education and related services “in conformity with the [child’s] individualized education program,” or IEP. § 1401(9)(D).

The IEP is “the centerpiece of the statute’s education delivery system for disabled children.” *Honig v. Doe*, 484 U.S. 305, 311 (1988). A comprehensive plan prepared by a child’s “IEP Team” (which includes teachers, school officials, and the child’s parents), an IEP must be drafted in compliance with a detailed set of procedures. § 1414(d)(1)(B) (internal quotation marks omitted). These procedures emphasize collaboration among parents and educators and require careful consideration of the child’s individual circumstances. § 1414. The IEP is the means by which special education and related services are “tailored to the unique needs” of a particular child. *Rowley*, 458 U.S., at 181.

The IDEA requires that every IEP include “a statement of the child's present levels of academic achievement and functional performance,” describe “how the child's disability affects the child's involvement and progress in the general education curriculum,” and set out “measurable annual goals, including academic and functional goals,” along with a “description of how the child's progress toward meeting” those goals will be gauged. §§ 1414(d)(1)(A)(i)(I)-(III). The IEP must also describe the “special education and related services ... that will be provided” so that the child may “advance appropriately toward attaining the annual goals” and, when possible, “be involved in and make progress in the general education curriculum.” § 1414(d)(1)(A)(i)(IV).

Andrew F., 69 IDELR, at 177.

The IDEA Federal regulations and State rules provide protections to students who have previously been identified, evaluated and determined eligible for special education services, but also provide protections to certain students who have not been determined eligible for special education services. A student who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in the regulations if the public agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. 34 C.F.R. § 300.534(a). A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred: (1) the parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services; (2) the parent of the child requested an evaluation of the child pursuant to §§300.300 through 300.311; or (3) the teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or other supervisory personnel of the agency. 34 C.F.R. § 300.534(b).

If a public agency does not have knowledge that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors. 34 C.F.R. §300.534(d)(1). However, if a request is made for a special education evaluation of the child during the time period in which the child is subjected to disciplinary measures, the evaluation

must be conducted in an expedited manner. 34 C.F.R. § 300.534(d)(2)(i). The Federal regulations at 34 C.F.R. § 300.534 do not include a specific timeline for conducting the evaluation. The U.S. Department of Education specifically refused an opportunity to revise the IDEA regulations to add a time requirement but did provide some guidance that it must occur in less than the standard 60 days:

We do not believe a specific timeline for an expedited evaluation or an eligibility determination should be included in these regulations. What may be required to conduct an evaluation will vary widely depending on the nature and extent of a child's suspected disability and the amount of additional information that would be necessary to make an eligibility determination. However, 34 CFR §300.534(d)(2)(i), consistent with section 615(k)(5)(D)(ii) of the Act, specifies that the evaluation in these instances be "expedited," which means that an evaluation should be conducted in a shorter period of time than a typical evaluation conducted pursuant to section 614 of the Act, which must be conducted within 60 days of receiving parental consent for the evaluation. (See section 614(a)(1)(C)(i)(I) of the Act).

71 Fed. Reg. 46,728 (2006). Moreover, the IDEA does not have a stay put provision during the pendency of an expedited evaluation. Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services. 34 C.F.R. § 300.534(d)(2)(ii).

School personnel may remove a student with a disability who violates a code of student conduct from the student's current placement to an appropriate interim alternative educational setting (IAES), another setting, or suspension, for not more than 10 consecutive school days (to the same extent those alternatives are applied to students without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct, (as long as those removals do not constitute a change of placement because of disciplinary removal as set forth in 34 CFR § 300.536). 34 C.F.R. § 300.530(b)(1); and 6.31.2.11(F)(2) NMAC. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question

was caused by, or had a direct and substantial relationship to, the child's disability, or if the conduct in question was the direct result of the LEA's failure to implement the IEP. 34 C.F.R. § 300.530(e)(1); and 6.31.2.11(F)(2) NMAC. Parents do have the right to invite additional participants to the MDR, but they do not have the right to veto a district's choice of team members or the MDR team's determination that the child's misconduct is unrelated to his disability. *Fitzgerald v. Fairfax County Sch. Bd.*, 556 F.Supp.2d 543 (E.D. Va. 2008).

On September 12, 2022, School administration conducted an investigation of allegations that the Student was in possession of a weapon at school and determined that the Student violated a code of student conduct by bringing a box cutter knife to school. At the time in question, the Student had not been identified, evaluated and determined eligible to receive special education and related services under an IEP. Therefore, it is concluded that the Student was not entitled to the disciplinary protections set forth in 34 C.F.R. § 300.530, afforded to a student with a disability who had previously been determined eligible to receive special education services. The question now becomes whether the Student was entitled to the protections for children not determined eligible for special education and related services set forth in 34 C.F.R. § 300.534.

With respect to Issue No. 1, the initial inquiry is whether the District had knowledge that the Student was a student with a disability prior to the Student's behavior incidents that began on September 12, 2022, and resulted in disciplinary removals of Student from the School. School and District staff have consistently stated that they were not aware that the Student was a student with a disability who was eligible to receive IDEA special education services. The Student's school record does not include any behavior incident reports for the previous four years the Student attended a District school. Moreover, the Student's previous, and current, teachers and school administrators have reported that they did not have knowledge that Student was a student with a disability. Prior to September 12, 2022, there is no evidence that the Parent expressed concern in writing to supervisory or administrative personnel of the School or District, or a teacher of the Student, that the Student was in need of special education and related services, or that the Parent requested a special education evaluation of the Student. There is no record or report that the teacher of the Student, or other School personnel, expressed specific concerns about a pattern of behavior demonstrated by the Student directly to the District's director of special education or other supervisory personnel of the District. Therefore, it is concluded that the District did not have knowledge that the Student was a student with a disability before the behavior incident on September 12, 2022, that precipitated the disciplinary

action against the Student. It is further concluded that due to the District's lack of knowledge that the Student was a child with a disability prior to taking disciplinary measures against the Student, the Student was subject to the disciplinary procedures applicable to other non-disabled students at the School who engage in comparable behavior.

These conclusions are further supported by the fact that on September 30, 2022, at the request of the Parents, the School did conduct a Section 504 MDR of the Student's behavior incident, which was slightly over 10 school days after the Student's disciplinary removal. There is no question that the District was fully aware that the Student was receiving accommodations under a Section 504 Plan due to a previous diagnosis of ADHD. However, the fact that the Student has been diagnosed with ADHD does not necessarily mean that bringing a box cutter knife to school was a manifestation of the Student's disability, ADHD. *In re: Student with a Disability*, 121 LRP 38430 (SEA KS 10/25/21) (finding that a student's possession of a weapon at school was not a manifestation of his disability, ADHD.). The behaviors of Student that were being addressed by his Section 504 Plan dealt with focus and concentration, attention deficit, difficulties with test taking, and difficulty with time management, none of which appear to have a nexus to bringing a weapon to school. In any event, the Student's Section 504 MDR team determined that the Student's behavior was not a manifestation of his disability despite the tie "vote" that was taken at the MDR meeting. As noted above, parents do not have the right to veto the MDR team's determination that the child's misconduct is unrelated to his disability. Finally, it should be noted that the documentation indicates that the Student's Section 504 team, including the Parents and the Student, agreed at the MDR meeting that the Student would not return to in-person learning at the School, but would continue with his distance-learning program provided by the School. It does not appear that the School required the Student to continue with distance-learning as a consequence for his previous disciplinary removal. However, up to the time of the MDR meeting on September 30, 2022, the documentation does indicate that the Student was not being allowed to attend school in-person.

Therefore, it is concluded that the School did not have knowledge that Student is a student with a disability and did not fail to provide Student the disciplinary protections for children not determined eligible for special education and related services as required by 34 C.F.R. §300.534.

As to Issue No. 1, the District is not cited and Corrective Action is not required.

It should be noted that the Parents made a request for an evaluation of the Student on September 29, 2022, during the time period in which the Student was subjected to disciplinary measures, which means that the Student's evaluation was required to be conducted in an expedited manner. 34 C.F.R. § 300.534(d)(2)(i). In view of the fact that this issue is identified in Issue No. 2(a), it will be discussed, and conclusions made, below.

Issue No. 2

Whether the School was aware, or suspected, that Student is a student with a disability and failed to comply with its Child Find obligations under the IDEA following a disciplinary removal of the Student by the School on September 12, 2022, by:

- a. failing to timely conduct an initial special education evaluation of the Student in response to Parents' request for an evaluation, as required by 34 C.F.R. § 300.301 and 6.31.2.10(D)(1)(a) NMAC;
- b. failing to timely provide the Parents with a copy of the Student's evaluation report, as required by 34 C.F.R. § 300.306(a); and 6.31.2.10(F)(1)(b) NMAC;
- c. failing to timely convene a meeting of the School's Eligibility Determination Team (EDT) following the completion of the Student's Evaluation, as required by 34 C.F.R. § 300.306; and 6.31.2.10(F)(1)(a);
- d. failing to ensure that a meeting to develop an IEP for the Student was timely conducted following a determination of eligibility for special education and related services, as required by 34 C.F.R. § 300.323(c); and 6.31.2.11(B) NMAC;
- e. failing to timely provide special education and related services to the Student, as required by 34 C.F.R. § 300.323(c); and 6.31.2.11(B) NMAC.

Students with disabilities who are eligible under the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. § 300.1(a); 6.31.2.7(B)(20) NMAC. The IDEA and its implementing regulations, and state rules, use the term "Child Find" to describe the affirmative and continuing obligation of school districts to identify, locate and evaluate all children with disabilities residing within the district's jurisdictional boundaries who are in need of special education and related services. 34 C.F.R. § 300.111; 6.31.2.10(A) NMAC. The requirements of Child Find apply to, among others, students who are suspected of being students

with a disability and who are in need of special education and related services, even though they are advancing from grade to grade. 34 C.F.R. §§ 300.101(a), 300.111(c)(1); 6.31.2.10(A) NMAC.

The obligation to evaluate arises when there is a reason to suspect a disability and a reason to suspect that the disability is adversely affecting a child's educational performance so that the child needs special education services. The threshold for "suspicion" is relatively low. The key is not whether the child is actually qualified, but whether the child should be referred for an evaluation. *Department of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Hawaii 2001); *School Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 942 (E.D. Va. 2010). In an opinion from the Ninth Circuit, which is persuasive, if not precedential authority, the court held that a disability is suspected when the district is put on notice that symptoms of disability are displayed by the child. See *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9th Cir. 2016). Notice may come in the form of expressed parental concerns about a child's symptoms, expressed opinions by informed professionals, or less formal indicators, like the behaviors in and out of the classroom. *Id.* at 1121. A school's ineffective use of interventions and lack of a positive response to interventions may also trigger the child find obligation. *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.2d 781, 793-94 (5th Cir. 2020).

The Federal regulations and state rules provide that a request for an initial evaluation may be made by either the parents or by school staff. 34 C.F.R. § 300.301(b); 6.31.2.10(D)(1)(b) NMAC. Upon receipt of a request for an evaluation, the district must respond within a reasonable timeframe. The response may not be delayed due to the district's Response to Intervention process. 6.31.2.10(D)(1)(c)(iv) NMAC. See *Letter to Ferrara*, 60 IDELR 46 (OSEP 2012). Neither the federal regulations nor the state rules require that the referral, or parental request, for a special education evaluation be in writing. 34 C.F.R. § 300.301(b); 6.31.2.10(D)(1)(b) NMAC.

Once the District is aware, or has reason to suspect, that a student is a student with an IDEA disability and may need special education, it must take steps to ensure that the student receives a full and individual evaluation. 34 C.F.R. § 300.301(a); 6.31.2.10(C)(1)(a) NMAC. The district must complete the initial evaluation within 60 calendar days of receiving parental consent. 34 C.F.R. § 300.301(c); 6.31.2.10(D)(1)(c)(i) NMAC. There are two exceptions to the 60-day evaluation timeline: (1) if the parent of a child repeatedly fails or refuses to produce the child for the evaluation, or (2) if the child enrolls in a school of another public agency after the initiation of the evaluation and prior to a determination as to whether the child is a child with a disability. 34

C.F.R. § 300.301(d); 6.31.2.10(D)(1)(d) NMAC. There are certainly circumstances when the failure to timely conduct an evaluation can be the fault of the parents and not the district. However, the Federal regulations and state rules require prompt and timely actions by public agencies following a referral for a special education evaluation, except in the two above-mentioned exceptions.

Upon completing the administration of tests and other evaluation materials, a group of qualified professionals and the parent of the child shall determine whether the child is a child with a disability. The determination shall be made in compliance with all applicable requirements of 34 CFR Sec. 300.306 and these or other department rules and standards. 6.31.2.10(F)(1)(a) NMAC. The district must ensure that a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services. 34 C.F.R. § 300.323(c)(1); 6.31.2.11(B)(1) NMAC. The district shall provide a copy of the evaluation report and the documentation of determination of eligibility to the parents. 34 C.F.R. § 300.306(a)(2); 6.31.2.10(F)(1)(b) NMAC. Moreover, the district must ensure that as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. 34 C.F.R. § 300.323(c)(2); 6.31.2.11(B)(1) NMAC.

The facts set forth above make it clear that the actions of the School, the Parents and the Parents' requested outside evaluator all contributed to the very lengthy amount of time it took to conduct the evaluation, complete the evaluation report, and hold an EDT review and an IEP team meeting for the Student. The School argues that the delay was caused by the Parents' repeated failure to produce the Student for evaluation, specifically for the SLP assessment, and that the scheduling and completion of the evaluation and evaluation report took almost 4 months by the outside evaluator chosen by the Parents. While this is no doubt true, and is also unreasonable under the circumstances, the fact remains that the District was under no obligation to use the Parent's requested evaluator. This evaluation was clearly an initial special education evaluation of the Student, and not an independent educational evaluation (IEE). The fact that both parties called it an IEE does not make it an IEE under the regulations and rules. Therefore, it is concluded that the School was ultimately in control of, and responsible for, the timely conduct of the Student's initial special education evaluation. The School was free to conduct the initial evaluation using the School's and the District's own evaluators and diagnostician. The Parents would have been entitled to an IEE only if they disagreed with an evaluation conducted by the District, and only

after the completion of the District's evaluation. 6.31.2.10(I)(1) NMAC. Therefore, it is concluded that the District failed to timely conduct an initial special education evaluation of the Student in response to Parents' request for an evaluation.

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

With respect to the District's actions following the completion of the Student's evaluation and evaluation report, the facts support a finding that the District was not in violation of the procedural requirements for timely providing a copy of the evaluation report to the Parents, timely conducting the eligibility determination, and timely development of the Student's IEP. The District and the Parents received a copy of the evaluation report on April 4, 2023, which was well in advance of the EDT meeting which took place on April 18, 2023. The Student's IEP team met on May 11, 2023, and developed an IEP for the Student, which was less than 30 days following the determination of eligibility.

Therefore, it is concluded that the District did not fail to timely provide the Parents with a copy of the Student's evaluation report.

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

It is further concluded that the District did not fail to timely convene a meeting of the School's Eligibility Determination Team (EDT) following the completion of the Student's Evaluation.

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

It is further concluded that the District did not fail to ensure that a meeting to develop an IEP for the Student was timely conducted following a determination of eligibility for special education and related services.

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

With respect to whether the District timely provided special education and related services to the Student, there are compelling arguments on both sides of this issue. From the perspective of whether the District failed to timely provide special education and related services to the Student in conformity with the Student's IEP, which was developed on May 11, 2023, the District did not fail to implement the IEP. The Parents and Student informed the School at the IEP team meeting that the Student would not be attending the School for the following school year. On May 16,

2023, the Parents disenrolled the Student from the School, effectively preventing the School from implementing the May 11, 2023, IEP. However, the competing, and more persuasive, argument as to this issue is that if the District had conducted an initial evaluation and evaluated the Student within less than 60 days following the Parents' written consent for an evaluation, the Student would have been entitled to receive his special education services as early as January, 2023, rather than May, 2023. Therefore, it is concluded that the District failed to timely provide special education and related services to the Student.

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

Issue No. 3

Whether the School'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.

An allegation of a denial of FAPE to a disabled student can be based on either substantive grounds or procedural violations of the IDEA. 20 U.S.C. § 1415(f)(3)(E). *Hendrick Hudson Central School Dist v. Rowley*, 458 US 176; 102 S Ct 3034; 73 L Ed 2d 690 (1982); *Sytsema v. Academy School District No. 20*, 538 F.3d 1306 (10th Cir. 2008). "The IDEA also sought to maximize parental involvement in educational decisions affecting their disabled child by granting parents a number of procedural rights. For example, parents are entitled to: (1) examine all records relating to their child, 20 U.S.C. § 1415(b)(1); (2) participate in the IEP preparation process, *Id.*; (3) obtain an independent evaluation of their child, *Id.*; (4) receive notice before an amendment to an IEP is either proposed or refused, §1415(b)(3); (5) take membership in any group that makes decisions about the educational placement of their child, §1414(f); and (6) receive formal notice of their rights under the IDEA, §1415(d)(1)." *Ellenberg ex rel. S.E. v. New Mexico Military Institute*, 478 F.3d 1262 (10th Cir. 2007). The IDEA's "procedural guarantees are not mere procedural hoops through which Congress wanted state and local educational agencies to jump. Rather, the formality of the Act's procedures is itself a safeguard against arbitrary or erroneous decision making." *Daniel R.R. v. State Bd. Of Edc.*, 874 F.2d 1036, 1041 (5th Cir. 1989) (internal quotation marks omitted).

However, proving a procedural violation is only a first step to obtaining relief. In *Sytsema*, the court held that an "IEP's failure to clear all of the Act's procedural hurdles does not necessarily

entitle a student to relief for past failures by the school district.” *Sytsema*, 50 IDELR at 216; quoting *Garcia v. Bd. Of Educ. Of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1125-26 & n.4 (10th Cir. 2008) (“[O]ur precedent hold[s] that procedural failures under IDEA amount to substantive failures only where the procedural inadequacy results in an effective denial of a FAPE.”); quoting *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996) (holding that a procedural failure did not entitle a student to relief because that deficiency did not result in the denial of a FAPE). Congress provided in the 2004 amendments to the IDEA that to find a denial of FAPE based on a procedural violation, the procedural violation must have: (1) impeded the student’s right to a FAPE, (2) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or (3) caused a deprivation of educational benefits. 34 C.F.R. § 300.513(a)(2).

The IEP process provides that the parents and school personnel are partners in decision-making; the IEP team must consider the parents’ concerns and information they provide regarding their child. 64 Fed. Reg. 12473 (Mar. 12, 1999). The IDEA’s requirement that parents participate in the IEP process ensures that the best interests of the child will be protected and acknowledges that parents have a unique perspective on their child’s needs, since they generally observe their child in a variety of situations. *Amanda J. ex rel. Annette J. v. Clark County School Dist.*, 267 F.3d 877, 891. A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. *Fuhrmann v. East Hanover Board of Education*, 993 F. 2d 1031,1036 (3rd Cir. 1993). Stated another way, a parent has meaningfully participated in the development of an IEP when he/she is informed of his/her child’s problems, attends the IEP meeting, expresses his/her disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. *N.L. v. Knox County Schools*, 315 F.3d 688, 693 (6th Cir. 2003); *Fuhrmann*, supra, 993 F.2d at 1036.

It has been concluded above that the Student’s evaluation and evaluation report were not completed in a timely manner by the District, and certainly not in an expedited manner. This constitutes a procedural violation of the IDEA. However, in order to rise to the level of a substantive violation it must be determined whether the District’s procedural violation impeded the Student’s right to a FAPE, significantly impeded the Parents’ opportunity to participate in the IEP process, or caused a deprivation of educational benefit to the Student. The facts indicate that the Parents were invited to, and participated in, all of the meetings scheduled by the School to identify, evaluate, determine eligibility for, and develop an IEP for, the Student. The facts also

establish that the Student was not deprived of any educational benefit due to the School's untimely evaluation process. However, it is concluded that the significant delay in evaluating the Student did impede the Student's right to a FAPE, thus constituting a substantive violation of the IDEA. It is further concluded that the failure to timely evaluate the Student also caused a delay in making special education and related services available to the student, which is also a substantive violation of the IDEA.

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

In determining whether the corrective action in this matter should include compensatory education, there are several mitigating factors against such corrective action. First, a significant amount of the delay in completing the evaluation and evaluation report for the Student can be attributed to the evaluator chosen by the Parents and the Parents' own scheduling conflicts. Second, following the MDR in September, 2022, School staff, the Parents and the Student all agreed that the Student would attend school through a distance-learning format. This choice was reaffirmed by the Parents and the Student in December, 2022, prior to the beginning of the second semester. Finally, School and Parent records clearly indicate that the Student completed all of his coursework earning all A's and B's and did not have a reoccurrence of any behavior incidents, during the school year prior to the development of the Student's IEP. Therefore, it is concluded that an award of compensatory education is not needed by the Student, and would not be appropriate, as corrective action for the District's violations set forth above. (*See, e.g., D.G. by B.G. v. Flour Bluff Indep. Sch. Dist.*, 112 LRP 28408 (5th Cir. 06/01/12, unpublished), in which the Fifth Circuit held that a Texas district's failure to evaluate a high school student's need for IDEA services did not in itself entitle the student to compensatory education. The Court concluded that a district cannot be liable for a child find violation unless the student has a need for special education. The court held that the student with ADHD did not need specialized instruction during his ninth-grade year, and he was not entitled to relief for a Texas district's failure to evaluate. The key question is whether the School has reason to believe the student needs specialized instruction. In this case the fact that the student performed well academically for years after his ADHD diagnosis indicated that he did not need special education to receive FAPE.

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. § 300.301 and 6.31.2.10(D) NMAC.	The District failed to timely conduct an initial special education evaluation of the Student in response to Parents' request for an evaluation.
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) to the Student.

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 January 31, 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 Department</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 Charter 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 and School plan to take to ensure that the violations are corrected and do not recur. The District Special Education Director shall be	October 27, 2023	Notes from meeting prepared by District	November 3, 2023

	responsible for arranging this meeting with SED.			
3.	<p>The District is required to provide training to Charter School staff including the MLSS and special education personnel assigned to the School regarding the Charter School's Child Find obligations, specifically including:</p> <p>(1) the manner in which District staff become aware, or suspect, that a student is a student with a disability who needs an evaluation;</p> <p>(2) the Federal and state requirements for responding to a parental request or school referral for a special education evaluation, including the timing of such response and the documentation required;</p> <p>(3) the circumstances under which an expedited special education evaluation is required, and the timing for such an evaluation;</p> <p>(4) the differences between an initial special education evaluation and an independent educational evaluation (IEE), the circumstances under which each is required, and the timing requirements for each.</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>

	The training shall be provided by a person with expertise in special education and who is approved by NMPED. The trainer may be an employee of the District, but not of the Charter School.			
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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/ Wallace Calder

Wallace J. Calder, Esq.

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