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NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
SPECIAL EDUCATION DIVISION  
Complaint Resolution Report  
Albuquerque Public Schools  
Case No. C2324-09  
November 6, 2023

**This Report does not require corrective action.**

On August 24, 2023, there was a complaint filed with the New Mexico Public Education Department's (NMPED) Special Education Division (SED) under the federal Individuals with Disabilities Education Act (IDEA) and the implementing Federal Regulations and State Rules governing publicly funded special education programs for children with disabilities in New Mexico.<sup>1</sup> The parties agreed to participate in mediation and extend the Complaint Resolution Report (CRR) deadline in order to focus on mediation. The CRR deadline was extended from October 23, 2023 to November 6, 2023. The SED has investigated the complaint and issues this report pursuant to 34 C.F.R. § 300.152 (a)(5) and 6.31.2.13(H)(5)(b) NMAC.

**Conduct of the Complaint Investigation**

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

- review of the complaint and supporting documentation from complainant;

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

- review of the District’s responses to the allegations, together with documentation submitted by the District at the request of the PED's independent complaint investigator;
- review of the District’s compliance with federal IDEA regulations and state NMAC rules;
- interview with the Parent on October 6, 2023;
- interview with General Education Teacher, Executive Director of Evaluation and Related Services, and Education Assistant on October 19, 2023;
- interview with Student’s Grandparent on October 24, 2023; and
- research of applicable legal authority.

### **Limits to the Investigation**

Federal regulations and state rules limit the investigation of state complaints to violations that occurred not more than one year prior to the date the complaint is received. 34 C.F.R. § 300.153(c); 6.31.2.13(H)(2)(d) NMAC. Any educator ethics issues, or any alleged ADA or Section 504 disability discrimination issues, are not within the jurisdiction of this complaint investigation and, as a result, were not investigated. For this reason, the Complaint Investigator did not investigate any issues raised by the Complainant related to the creation and/or implementation of the Student’s 504 plan or any allegations made to the Children, Youth, & Families Department (CYFD) regarding the Student.

### **Issues for Investigation**

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

1. Whether the District properly implemented the Student’s IEP and/or BIP, pursuant to 34 C.F.R. § 300.323, 6.31.2.11(B) NMAC, and 6.31.2.11(F) NMAC;
2. Whether the District properly determined the Student’s placement based on their least restrictive environment, pursuant to 34 C.F.R. §§ 300.114 through 300.116 and 6.31.2.11(C) NMAC; and
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**

1. The Student is currently seven years old and in the second grade for the 2023-24 school year.
2. At the beginning of the 2022-23 school year, when the Student was in the first grade, the Student received academic and behavioral interventions that were carried over from the Student's kindergarten school year.
3. Despite the use of interventions to aid in regulating the Student's behaviors, the Student's behaviors escalated in the months of September and October. As a result, a meeting was held with the Parent and school staff at the beginning of October. At the meeting, the District proposed to evaluate the Student to which the Parent refused. Instead, the team determined additional interventions to utilize with the Student and agreed to conduct a functional behavior assessment (FBA).
4. The FBA was completed on November 1, 2022 and a behavior intervention plan (BIP) was developed based on the findings. The FBA/BIP identified accommodations and interventions to utilize with the Student, including, in part, a daily schedule storyboard, use of social stories, offering of choices, and a token system.
5. Between the implementation of the BIP and February 22, 2023, the Student received three incident referrals for their behaviors.
6. Another meeting was held between the Parent and District staff on February 22, 2023. At that time, the Parent consented to a Section 504 evaluation which consisted of a review of school records. The evaluation determined the Student's "impairment" was dysregulation. As a result, a 504 plan was developed to address the Student's dysregulation in busy environments that impacted their ability to learn, follow directions, and complete assignments timely.
7. The Student's 504 plan included the following accommodations:
  - a. A temporary flexible schedule in which Student attends a partial day at school and receives the remainder of instruction at home in the afternoon;
  - b. A "brain break" area in the classroom; and
  - c. Additional time to complete assignments.
8. On February 23, 2023, the Student's BIP was updated to include the accommodations included in the Student's 504 plan.
9. On February 28, 2023, the District requested the Parent's consent to conduct a special education evaluation. The Parent consented to a special education evaluation on March 20, 2023.
10. The Student was evaluated and a report dated April 25, 2023, detailed the results. As a result of the evaluation, the Student was identified a student with a disability under the primary disability classification of Developmental Delay.

11. An IEP meeting was held on April 25, 2023 to review the results of the MET, determine eligibility, and develop an IEP for the Student. Relevant portions of the IEP include:
  - a. The Student exhibits behaviors that impede their learning or the learning of others.
  - b. The IEP contains five measurable annual goals to support academics and behavior needs.
  - c. Special education and related services are included to aid the Student in reaching their IEP goals.
  - d. The following accommodations were included, in part:
    - i. A “brain break” area in the classroom to enable the Student to have quiet time away from others; and
    - ii. Behavior intervention plan.
12. A prior written notice (PWN) dated April 25, 2023, includes, in part:
  - a. The BIP previously created will continue to be implemented;
  - b. The District rejected placement in a social emotional support classroom. Instead, Student will attend their home school with one-on-one adult support. The IEP Team will reconvene at the end of the school year to revisit the placement discussion.
13. The IEP was first implemented on April 27, 2023, the first day the Student was in attendance following its creation.
14. Between April 27, 2023 and May 8, 2023, the District asserts the Student was permitted to use the “brain break” area in the classroom, as needed. However, the Student often preferred to take a break outside of the classroom instead.
15. On May 9, 2023, a significant behavior incident occurred in which Student was physically aggressive towards other students, vandalized property, and eloped from the classroom. As a result, classroom teachers were directed to secure their doors for the safety of all students, for a period of time. Following the incident, the Student was permitted to remain at school for the remainder of the day. The Parent was informed of the incident shortly after it occurred.
16. The Student did not return to school following the May 9, 2023 incident except to attend a “play day” at the end of the school year.
17. On May 15, 2023, the Parent emailed the District regarding the upcoming IEP meeting. In part, the Parent asked if the IEP meeting was necessary if the Student was not going to attend the same school for the 2023-24 school year. The District indicated that the meeting was necessary because the IEP team needed to review what the next best steps were to meet the Student’s needs. Additionally, the District stated “[t]his information will assist [Student’s] *future school* [emphasis added] to best serve [Student].”
18. An IEP meeting was held on May 23, 2023. It was determined that the Student could no longer be supported at their home school and required the support of a social emotional

support classroom. The IEP was amended to account for the Student's change of placement for the 2023-24 school year.

19. The Parent provided a recording of the May 23, 2023 IEP meeting. The recording included, in part, a discussion between the IEP Team members regarding the appropriate placement for the Student. District staff and the Parent did not agree what placement was appropriate for the Student.
20. The Student did not attend the school the District proposed to send the Student because Student's family initially elected to homeschool Student at the start of the 2023-2024 school year.
21. The period of homeschooling lasted two weeks and then Student was enrolled again in the District where they attend a school that is different from the school the District previously recommended.
22. The Student is in a social emotional classroom at their new school and is doing well according to the Parent.

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

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

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

The IDEA is a federal law that makes available a free appropriate public education (FAPE) to eligible children with disabilities. 34 C.F.R. § 300.1.

In order to be a "child with a disability," a child must be evaluated in accordance with 34 C.F.R. §§ 300.304 through 300.311, determined to have at least one of the thirteen identified disabilities, and require special education and related services. 34 C.F.R. § 300.8.

The Parent alleges in their complaint that the District did not properly implement the Student's IEP and/or BIP. Most of the Parent's grievances with the implementation of the BIP were regarding accommodations put in place prior to Student's eligibility determination. Any instances in which the Student's BIP was not properly implemented prior to Student's eligibility determination on April 25, 2023 are not subject to the protections of the IDEA and, thus, are not discussed here.

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

The Parent alleges the Student's IEP/BIP were not properly implemented in regards to the "brain break" accommodation. Since the implementation of the IEP dated April 25, 2023, the Student attended less than ten school days. There is no indication that the Student was denied the use of the "brain break" area at any time that they were in attendance. The record in this case supports a finding that the District properly implemented Student's IEP and BIP.

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

**Issue No. 2**

**Whether the District properly determined the Student's placement based on their least restrictive environment, pursuant to 34 C.F.R. §§ 300.114 through 300.116 and 6.31.2.11(C) NMAC.**

Students with disabilities must be educated in the regular classroom with their nondisabled peers to the maximum extent appropriate. 34 C.F.R. § 300.114 and 6.31.2.11(C)(2) NMAC. In determining placement, the placement decision must be (1) made by a group of persons, including parents and (2) in conformity with the LRE provisions. 34 C.F.R. § 300.116. Placement must be determined annually, be based on the student's IEP, and be as close as possible to the child's home. *Id. at* § 300.116(b). Although the IDEA creates a preference for educating students in their neighborhood school, students may need to be placed elsewhere if the neighborhood school is not properly suited to meet their educational needs. *H.D. v. Central Bucks Sch. Dist.*, 59 IDELR 275 (E.D. Pa. 2012).

Predetermination occurs when, prior to an IEP meeting, district members of the IEP team unilaterally make decisions regarding the student's identification, evaluation, placement, and/or FAPE. To avoid a finding of predetermination, a District must enter an IEP team meeting with an open mind and must meaningfully consider the parent's input. *H.B. v. Las Virgenes Unified Sch. Dist.*, 52 IDELR 163 (C.D. Cal. 2008), *aff'd*, 54 IDELR 73 (9th Cir. 2010, *unpublished*) (holding that the superintendent's announcement at the start of an IEP meeting that the team would discuss the student's transition to public school showed that the district predetermined the student's placement).

Here, the May 15, 2023 email in which the District states the information gleaned from the upcoming IEP meeting would assist the Student's "future school" in servicing the Student is an indication the District predetermined the Student's placement. However, while the language in the email is concerning, because the IEP Team participated in a placement discussion and the Parent was provided the opportunity to give their input, there is no finding of predetermination.

*See Deal is Nack v. Orange City Sch. Dist.*, 46 IDELR 32, (6th Cir. 2006) (finding that as long as school officials are willing to listen to parents and allow parents the opportunity to make objections and suggestions, coming into an IEP meeting with a pre-formed opinion is not predetermination). *See also H.B. v. Las Virgenes Unified School District*, 48 IDELR 31 (9th Cir. 2007).

There is no evidence that the placement decision was not made pursuant to the IDEA regulations. While the Parent did not want the Student's placement to change for the 2023-24 school year, the placement decision was based on the Student's disability-related learning needs.

**As to Issue No. 2, the District is not 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.**

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

1. Has the district complied with the procedures set forth in the IDEA?
2. Is the IEP reasonably calculated to enable the child to receive an educational benefit?

If the two-part test is satisfied, FAPE was provided. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (1982).

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

As stated above, there is no procedural error or any evidence that the IEP is not reasonably calculated to enable the Student to receive an educational benefit.

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

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:

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Complaint Investigator

Reviewed by:

*/s/ Miguel Lozano*

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