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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION
Complaint Resolution Report
Albuquerque Public Schools
Case No. 2324-22
December 18, 2023

This Report does not require corrective action.

On October 19, 2023, there was a complaint filed with the New Mexico Public Education Department's (NMPED) Office of Special Education (OSE) 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 OSE 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 Complainants, Principal and Special Education Teacher; and
- research of applicable legal authority.

Limits to the Investigation

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

Issues for Investigation

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

1. Whether the District failed to develop and implement an IEP that addressed all of Student’s educational needs including appropriate adult supervision to allow Student to participate in the educational program and make educational progress, in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC; and
2. 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. Student is a seven-year-old first grade student who started school in the District during the 2023-2024 school year.
2. Complainants, Student’s grandparents, have raised Student since Student was sixteen months old.
3. Student is a quadriplegic and has cerebral palsy.
4. Previously, Student had attended a private kindergarten program and received speech-language therapy services under an individual services plan (ISP).

5. Student had a reevaluation in March of 2023 when Student was determined eligible for special education services under the category of orthopedic impairment and speech-language impairment.
6. Grandparent contacted the school in July to discuss Student transferring to District and Student's needs. The registration for Student was completed on August 4, 2023.
7. The first day of school for the 2023-2024 school year was August 3, 2023.
8. An IEP meeting was held on August 10, 2023 after Student started at the District. The Grandmother attended the meeting and Grandfather provided input.
9. Student's placement at District was an inclusion general education classroom with a cross-categorical teacher.
10. Student received services in math, reading and written language, occupational therapy, physical therapy, speech language therapy and health services.
11. Student navigated the school campus but might need assistance on stairs.
12. Student accessed most playground equipment independently without adult assistance.
13. Student had assistive technology supports through a speech generating device at school.
14. On September 19, 2023, Student was in math class and complained of a sore ear.
15. A classmate escorted Student to the nurse's office and then returned to the classroom.
16. Student left the nurse's office unaccompanied to return to the classroom.
17. Student took a wrong turn and went out the exterior door which locked behind Student.
18. For approximately four to five minutes, Student went to multiple doors to try and get into the building before a staff member saw Student and assisted in bringing Student to the classroom.
19. Student was not injured or harmed while out of the building.
20. The special education teacher was not informed that Student left the building. Student was gone from the classroom for approximately 10-15 minutes.
21. Grandparents were notified by the Principal of the incident later that day. Later, Grandparents came to the school to view the video with the Principal.
22. A previously scheduled IEP meeting was held on September 21, 2023. The IEP meeting had been planned following the August 10, 2023 IEP meeting to review Student's progress. However, the focus of the IEP meeting quickly shifted to the incident on September 19, 2023.
23. On the special factors portion of the IEP, the following statement was included: "[Student] requires adult supervision during all times of the day, including transitions, structured and unstructured times and before and after school. There was an incident on September 19, 2023 where Student got lost on the way back to the playground from the nurses office and ended up leaving the school campus and was locked out. [Student] was found in the school parking lot. Parent is also requesting one-to-one supervision when [Student] is at recess."

24. The PWN from that meeting noted that the IEP team agreed to 1-1 supervision during recess and field trips.
25. The IEP team also agreed to 240 minutes weekly of medical-safety support to assist Student to move in and around school.
26. Principal was not in attendance at the September 21, 2023 IEP meeting. Principal was contacted during the meeting about 1-1 supervision of Student.
27. Principal responded to Teacher that there was no data to support a 1-1 aide but the School could provide medical-safety support.
28. That same day, Principal prepared a plan which was provided to Grandparents the names of the supervising staff. Three adults would be supervising at every recess; one adult, that would change daily, would monitor Student.
29. During the afternoon recess, the teacher was supervising because there were only 29 first grade students on the playground.
30. Grandparents reported the Principal told them there was no data to support that Student needed an exclusive 1-1 aide and there were insufficient staff available.
31. Grandparents indicated in an email that Student would not return until Student had 1-1 aide for Student.
32. Principal disputed Grandparents' statements; she stated she worked with Grandparents to address concerns and explained the difference between a 1-1 aide for Student and 1-1 adult supervision. There was no demonstrated need for a 1-1 aide for Student, but the plan provided for adult supervision during recess to monitor Student.
33. After the September 19, 2023 incident, a video was prepared outlining what to do if a student became locked out of the building. All students saw the video during Friday announcements.
34. In addition to the recess supervision plan, Student would be accompanied to and from therapies. Student would be accompanied by an adult when Student needed the bathroom or to move about the school.
35. Student did not return to school after the incident on September 19, 2023 and was disenrolled on October 2, 2023.
36. Beginning October 12, 2023, Student enrolled in a District charter school and Student continued to be enrolled there.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to develop and implement an IEP that addressed all of Student's educational needs including appropriate adult supervision to allow Student to participate in the educational program and make educational progress, in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC;

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*, 93 F.3d 1458 (9th Cir. 1996).

IEPs are 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). As a Student's needs change, the IEP team should convene and modify the IEP as appropriate to address changing needs. 34 C.F.R. § 300.324. 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, 502 F.3d 811, 822 (9th Cir. 2007).

Grandparents were concerned about the incident on September 19, 2023 when Student inadvertently left the building and was alone in the parking lot for four to five minutes. Grandparents were informed about the incident that same day by the Principal. The incident was also addressed at the previously scheduled IEP meeting on September 21, 2023. Grandparents wanted an exclusive 1-1 aide with Student whenever Student left the classroom to prevent future incidents like the September 19, 2023 incident. The IEP team agreed to provide 1-1 adult support during recess and field trips. The team also agreed that an adult would accompany Student when Student was out of the classroom or during toileting. The 1-1 support was not an exclusive 1-1 aide for Student but one adult would monitor Student during recess. Grandparents were concerned about Student's ongoing safety and disenrolled Student and transferred to a District charter school. The school never had an opportunity to implement the supervision plan for Student because Student did not return to school after the September 19, 2023 incident and was disenrolled on October 2, 2023. The IEP team developed an appropriate

plan to address Grandparents' concerns but never had the opportunity to implement the plan. The District did not err.

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

Issue No. 2

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." *Endrew F. v. Douglas County School District. RE-1*, 137 S. Ct. 988 (2017). The Court in *J.L. v. Mercer Island School District*, 592 F.3d 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).

The IEP team developed an IEP that was reasonably calculated to allow Student to make progress. After the incident on September 19, 2023, the IEP team met two days later and developed a plan to ensure Student's safety at school. The effectiveness of the plan and its implementation could not be determined because Student never returned to school and was disenrolled from the school on October 2, 2023. There was no substantive denial of FAPE.

There were no procedural errors on this record. Grandparents were informed of the September 19, 2023 incident the day it happened. The Principal shared the video with Grandparents and discussed options with them. The IEP team met two days later at a previously scheduled IEP meeting and developed a plan to address Student's safety and Grandparents' concerns. The Principal shared the final plan with Grandparents and the training for all students was completed. Since Student never returned to school, no further implementation of the Student's plan was completed. The Student was not deprived of educational benefit or educational opportunity.

The Grandparents were informed and participated in the IEP meeting when the plan was developed. There were no procedural violations.

As to Issue No. 2, 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:

/s/ Michele Bennett

Michele K. Bennett, Esq.

Complaint Investigator

Reviewed by:

/s/ Miguel Lozano

Miguel Lozano, Esq.

Chief Counsel, Office of Special Education

Reviewed and approved by:

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Margaret Cage

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Director, Office of Special Education