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NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
SPECIAL EDUCATION DIVISION  
Complaint Resolution Report  
Belén Consolidated Schools  
Case No. C2324-23  
January 2, 2024

**This Report requires corrective action. See pages 7-10.**

On November 3, 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.<sup>1</sup> 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;

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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 compliance with federal IDEA regulations and state NMAC rules;
- interviews with the Complainant, Advocate, and District Special Education Director; and
- research of applicable legal authority.

### **Limits to the Investigation**

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

### **Issues for Investigation**

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

1. Whether the District failed to provide Student with speech therapy as a related service, in violation of 34 C.F.R. § 300.34(c)(15) and 6.31.2.7(B)(20) 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 in 8<sup>th</sup> Grade at the District's middle school and is eligible for special education under the classifications of Other Health Impairment and Specific Learning Disability (Dyslexia).
2. Student's IEPs for the 2022-2023 and 2023-2024 school years called for speech therapy services in the amount 180 minutes per month (45 minutes per week).
3. At the start of the 2022-2023 school year, the District was unable to secure a Speech Language Pathologist to provide speech therapy to students at the middle school. This resulted in Student not receiving speech therapy services for the first semester of the 2022-2023 school year.

4. In late January 2023, the District was able to contract with an outside Speech Language Pathologist (hereinafter “Therapist”) to provide speech therapy for the remainder of the school year.
5. The Therapist provided speech therapy to Student primarily through teletherapy with an educational assistant present for in-person support. Once a month, the Therapist visited the middle school and provided in-person therapy sessions.
6. Due to the constraints on speech therapy at the beginning of the school year, the District had the Therapist push-in to Student’s classes to provide additional speech therapy services.
7. For the remainder of the 2022-2023 school year, Student received 2,270 minutes of compensatory speech therapy services.
8. The Speech Language Services report prepared by the Therapist on May 25, 2023, showed that Student made moderate progress on the short-term objectives of their expressive and receptive language goals.
9. The Therapist contracted with the District decided not to return for the 2023-2024 school year which created another Speech Language Pathologist vacancy at the District middle school.
10. As a result, Student has not received speech therapy services during the current school year.
11. An IEP team meeting was held on October 20, 2023. At the meeting, the District acknowledged that Student was missing speech therapy services due to the lack of available providers.
12. The Prior Written Notice from this meeting states that the District is monitoring the amount of time Student has not received speech therapy in order to provide compensatory services once a therapist is obtained.
13. Complainant expressed concern that Student’s reading skills are significantly below grade level and this may impact their ability to understand curriculum materials in the classroom. Student has a propensity to shut down if they do not comprehend the concepts presented during a lesson.
14. Similarly, Complainant reported that Student’s writing skills are deficit because they write in such small letters that their writing samples are largely illegible.
15. Advocate described a lack of programming at the District to address Student’s dyslexia-related learning needs.
16. The District Special Education Director stated that the District is open to getting staff trained to deliver structured reading interventions.
17. Director explained that the District is actively pursuing to fill the job vacancy for a speech therapist at Student’s middle school. If a therapist is not hired for the middle school in the second semester of the 2023-2024 school year, then the District plans to provide

Student with compensatory speech therapy services from another District speech therapist (e.g., who is otherwise stationed at the District's high school and elementary schools) during the Summer 2024 school break.

18. Student's is earning average grades so far this year except they are currently failing in their English class.
19. Student's English teacher wrote in the first quarter report card that Student is not participating in class and has offered to tutor Student.
20. Student has accrued some absences in their classes this year but many of them were excused by the District.

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

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

#### **Whether the District failed to provide Student with speech therapy as a related service, in violation of 34 C.F.R. § 300.34(c)(15) and 6.31.2.7(B)(20) NMAC.**

A material failure to implement an IEP occurs when there is more than a minor discrepancy between the services a school provides to a child with a disability and the services required by the IEP. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). The failure to provide any specialized instruction within an educational setting constitutes a material failure to implement an IEP. *Turner v. D.C.*, 952 F. Supp. 2d 31, 40–42 (D.D.C. 2013). Similarly, not providing a substantial amount of speech therapy services can support a finding that a District materially failed to implement an IEP. *El Paso Indep. Sch. Dist. v. F. A.*, 2010 WL 11506526, at \*6 (W.D. Tex. Feb. 12, 2010), *report and recommendation adopted*, *El Paso Indep. Sch. Dist. v. F.A.*, 2010 WL 11506518 (W.D. Tex. Apr. 15, 2010).

Here, the Student has received no speech therapy services during the first half of the 2023-2024 school year. The frequency of speech therapy in Student's IEP amounts to 1620 minutes of therapy per school year (45 minutes per week multiplied by 36 weeks of school in session). Therefore, Student has missed approximately 810 minutes of speech therapy during the 2023-2024 school year. This gap in services is a substantial amount and constitutes a material failure to implement Student's IEP because the failure to provide any speech therapy is a significant setback for addressing Student's disability-related language learning needs. For these reasons, the evidence supports a finding that the District failed to provide Student with speech therapy services.

**As to Issue No. 1, the District is cited and Corrective Action is required.**

**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.**

A student eligible for special education is entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. School districts are obligated to provide FAPE for each student eligible in their district. 6.31.2.9(A), 6.31.2.11(I)(2) NMAC. If an IDEA procedural violation occurs, that violation will constitute a denial of FAPE only if it: (1) resulted in a substantive harm to the child or their parents; (2) deprived an eligible student of an IEP; or (3) resulted in the loss of an educational opportunity. *Boutelle v. Bd. of Educ. of Las Cruces Pub. Sch.*, No. CV 17-1232 GJF/SMV, 2019 WL 2061086, at \*7 (D.N.M. May 9, 2019). The substantive legal standard for determining whether a District has offered a student FAPE is whether an IEP is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017).

The absence of any speech therapy services has resulted in the loss of an educational opportunity for the Student. Student has expressive and receptive language needs which impact their learning. Speech therapy is meant to address these areas of need. Without the actual delivery of speech therapy services, Student was denied a chance to consistently work on their language deficits. Therefore, the District's failure to provide speech therapy services to Student during the first half of the 2023-2024 school year amounts to procedural denial of FAPE because it deprived Student of an educational language opportunity.

There is no substantive denial of FAPE as it relates to speech therapy. The volume and nature of speech therapy services called for in the IEP appears reasonably calculated to improve Student's language skills.

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

**Summary of Citations**

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. § 300.34(c)(15) and 6.31.2.7(B)(20) NMAC.	The District failed to provide Student with speech therapy as a related service.
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 free appropriate public education (FAPE).

**Required Actions and Deadlines**

**By January 12, 2024**, the District's Special Education Director must assure the OSE in writing that the District will implement the provisions of this Corrective Action Plan (CAP). The OSE 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](mailto: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 OSE 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 OSE.

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 OSE will notify the parties of any extension granted.

**Please carefully read the entire CAP before beginning implementation. One or more steps may require action(s) in overlapping timeframes. All corrective action must be completed no later than October 18, 2024 and reported to the OSE no later than October 25, 2024.** All documentation submitted to the OSE to demonstrate compliance with the CAP must be clearly labeled to indicate the state complaint case number and step number.

**Corrective Action Plan**

<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED OSE</u></b>	<b><u>Document Due Date</u></b>
<b>1.</b>	As described above, the District will submit a written assurance to the PED Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan (CAP).	<b>January 12, 2024</b>	Written Assurance Letter/Email	<b>January 12, 2024</b>
<b>2.</b>	The District Special Education Director and the school principal shall meet virtually with the PED SED Education Administrator assigned to the District and the PED SED CAP Monitor to review the Complaint Resolution Report, the Corrective Action Plan, and any other measures that the District plans to take to ensure that the violations are corrected and do not recur. The District Director has the discretion to include other District or school administrators or personnel in this meeting. The District Director shall be responsible for arranging this meeting with SED.	<b>January 19, 2024</b>	Notes from meeting prepared by the District	<b>January 19, 2024</b>

<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED OSE</u></b>	<b><u>Document Due Date</u></b>
<b>3.</b>	<p>The District shall provide the following compensatory education to Student:</p> <ul style="list-style-type: none"> <li>• 810 minutes of speech therapy services.</li> </ul> <p>The District is required to retain a private speech language pathologist to provide these services unless and until the District is able to employ a speech language pathologist to provide these services.</p> <p>The schedule for compensatory services should be developed in collaboration with the parent and documented in PWN(s) after the schedule is completed. These compensatory services are above and beyond the regular services required by Student’s IEP.</p>	<b>May 29, 2024</b>	<p>Documentation of delivery/provision of compensatory education services, including logs of services and progress reports</p> <p>Prior Written Notice containing plan for compensatory services</p>	<p><b>Monthly from the date of this report until the compensatory education hours are completed</b></p> <p><b>January 31, 2024</b></p>
<b>4.</b>	<p>The District shall develop a plan for recruitment and retention of a permanent Speech Language Pathologist at Belen Middle School.</p>	<b>January 31, 2024</b>	<p>Copy of hiring/retention plan.</p>	<b>January 31, 2024</b>
<b>5.</b>	<p>District shall offer and provide compensatory speech language therapy services to all students of Belen Middle School who missed services during the 2023-2024 school year.</p>	<b>October 18, 2024</b>	<p>Compensatory Education Tracker/Log</p>	<b>Monthly until all compensatory education has been provided.</b>



<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED OSE</u></b>	<b><u>Document Due Date</u></b>
	<p>The District shall internally review these students’ IEPs to determine the amount of needed compensatory speech language therapy resulting from the District’s failure to provide services during the Fall semester of the 2023-2024 school year. The District shall develop plans for providing compensatory speech language therapy services to the individual students. The plans will be documented in a Prior Written Notice (“PWN”) for each student and sent to parents.</p> <p>District shall maintain a tracker that includes the total compensatory hours owed to each student, whether those hours were accepted by the student’s parents, and the provision of compensatory education hours provided to each student.</p> <p>If a parent declines compensatory education, the District shall get a confirmation in writing and provide the written confirmation to PED.</p> <p>District shall complete all compensatory education hours by July 31, 2024. These compensatory services are above and beyond the regular services required by</p>	<p><b>February 16, 2024</b></p>	<p>Prior Written Notices containing plans for compensatory services.</p> <p>Written Confirmation of parent’s decision to decline compensatory speech therapy services.</p>	<p><b>February 23, 2024</b></p> <p><b>Forward when all parents’ decisions have been received and documented.</b></p>

<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED OSE</u></b>	<b><u>Document Due Date</u></b>
	<p>Student’s IEP. The schedule for compensatory services should be developed in collaboration with the parents and can include provisions for services in the summer months.</p> <p>If the District, due to staffing or other limitations, is unable to provide the compensatory services as required by this CAP, the District is required to contract with a private provider to ensure those services are provided.</p>			

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

Investigated by:

*/s/ Michael Gadomski*

Michael W. Gadomski, 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, Special Education Division