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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION
Complaint Resolution Report
Albuquerque Public Schools
Case No. C2324-28
February 2, 2024

**This Report requires corrective action.
See pages 11-14.**

On December 6, 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 Complainant, Parents, the District Executive Director for Special Education Compliance, and the District Executive Director of Transportation;
- review of records of 24 elementary school special education students;
- review of random sample of special education students across seven In-District schools who require special transportation;
- Called twenty parents of students contained in the sample regarding the provision of special transportation and interviewed twelve parents; 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 Students with related services in the form of special transportation, in violation of 34 C.F.R. § 300.34(c)(16) and 6.31.2.7(B)(7) 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

District Transportation System

1. The School District (“District”) is a large urban district which is responsible for transporting approximately 6,000 special education students to and from their schools.

2. Students' special transportation needs include, but are not limited to, curb-to-curb pick up and drop off, devices for securing a student while riding the bus, or a wheelchair accessible vehicle.
3. To meet the varying needs of their special education students, the District relies on a combination of school-operated buses, private contractor buses, and school-owned sport utility vehicles (SUVs).
4. The District uses a specific form for organizing their special education bus routes. Head/Sponsor Teachers across District schools submit a Transportation Request Form before the end of a school year so that the District Transportation Department has time to prepare bus routes for the following year.
5. The Transportation Request Form collects information such as the location for pick up and drop off, emergency contact, District program, and special transportation considerations (e.g., security device or wheelchair lift).
6. According to the District Executive Director for Transportation, there were approximately 800 Transportation Request Forms that were untimely filed at the beginning of the 2023-2024 school year (as opposed to filing at the end of the 2022-2023 school year).
7. According to the District, it takes 10 to 15 school days to establish a transportation arrangement for a special education student if the student is not assigned a route by the start of the school year (not just due to late form submission but possibly a family move, recent qualification for special education services, or a change in their programming or services).
8. The District also utilizes private contractors who prefer to take on special education bus routes because of higher mileage rates and fewer students per bus.
9. The District Executive Director for Special Education Compliance discussed how the District's Transportation Department does not have a tracking system to ascertain when private contractors start taking on a specific special education route which leads to parents calling the District to report when a bus route has not started yet.
10. For the 2023-2024 school year, a few of these private contractors provided considerably less buses to the District than were agreed upon in their contracts. This shortage resulted in the District having to use other vehicles to cover the necessary routes.

Elementary School

11. One District Elementary School ("Elementary School") encountered a series of special transportation delays at the start of the 2023-2024 school year.
12. The cause of these issues was due to a Head/Sponsor Teacher not submitting the Transportation Request Form until the beginning of the 2023-2024 school year.

13. This was a single point of failure impacting special transportation for 24 students at the Elementary School.
14. Student #1 at the Elementary School is in 4th grade and is eligible for special education under classification of Multiple Disabilities.
15. Student #1 is recommended special for transportation in their IEP due to Student needing curb-to-curb transportation, a security device, and a wheelchair lift vehicle.
16. In the first half of the 2023-2024 school year, Student accrued 17 tardies and 4 absences. The checkered attendance history was due in large part to the lack of appropriate special transportation that could meet Student's disability-related travel needs.
17. The District held an IEP Team meeting on October 17, 2023. At the meeting, District staff discussed how Student #1's special transportation was delayed until September 6, 2023 (the first day of school in the District was August 3, 2023). Staff acknowledged how this delay adversely affected Student #1's attendance.
18. The IEP Team recommended that the District "provide compensatory instruction for minutes missed due to a lack of special transportation as required by [Student #1's] IEP."
19. The prior written notice from this meeting stated that additional information about compensatory education for Student #1 would be provided closer to the end of the 2023-2024 school year.
20. Parent of Student of #1 reported that the District had discussed compensatory education at the IEP Team meeting but that no compensatory education had been provided yet because Parent did not want to "punish" Student #1's teachers with additional work during the regular school year.
21. Student #2 at the Elementary School is in 3rd grade and is eligible for special education under the classification of Autism.
22. Student#2 was recommended for special transportation due to needing curb-to-curb transportation and a security device.
23. The attendance records for Student #2 show approximately 22 tardies during the first half of the 2023-2024 school year.
24. At an IEP meeting on October 11, 2023, the District staff discussed how Student #2 missed 18 hours of school due to the lack of special transportation.
25. Before special transportation was put in place, Parent of Student #2 had to check the student out of school early in order for Parent to arrive at work on time.
26. The District calculated that the 18 hours of missed school at the end of the school day amounted to 64 total minutes of missed reading/ELA instruction because that portion of the day is typically reserved for breaks, chores, and classroom clean up.
27. District staff took proactive steps to provide Student #2 with an additional 65 minutes of reading instruction to compensate for the previously missed services.

28. The prior written notice indicates that the IEP Team, including Parent, agreed with this course of action for addressing Student #2's situation.

High School

29. Student #3 is in 11th grade at another District high school and eligible for special education under the classification of Multiple Disabilities.
30. The special transportation needs of Student #3 included curb-to-curb transportation, security device, and wheelchair accessible vehicle.
31. Similar to students at the Elementary School, Student #3 experienced a delay in receiving special transportation due to issue with the submission of their Transportation Request Form.
32. When Student #3's teacher submitted the form, the document indicated that Student attended an Intensive Global Support ("IGS") without specifying whether it was a Level 1 or Level 2 IGS program.
33. When the District Transportation Department received the form, they assigned Student #3 to the closest IGS program (Level 1) at their neighborhood high school.
34. On August 21, 2023, Student #3's teacher became aware of the erroneous bus assignment and clarified that Student #3 attended an IGS Level 2 program at a non-neighborhood high school.
35. The form was resubmitted and District staff and Parent negotiated transportation arrangements until it was agreed upon that Student #3 would be transported by the District in the mornings (with Parent picking up in the afternoons).
36. Special Transportation for Student #3 began on October 30, 2023.
37. At an IEP Team meeting on September 25, 2023, District staff conceded that Student #3 missed 7 days of school due to the delay in transportation associated with original submission of the Transportation Request Form.
38. The IEP Team agreed at this meeting to provide Student #3 with 49 hours of compensatory education to remedy the missed instruction.
39. Parent of Student #3 stated that student had yet to receive their compensatory services.

Student Survey

40. As part of the investigation, the District provided contact information for parents of special education students at seven, randomly selected District schools.
41. The universe of students included those students at the sample schools that were recommended for special transportation in their IEPs.
42. The responses from parents of these students varied.

43. Two students at an elementary school were not receiving special transportation. One parent stated the District did not explain why their child was not receiving special transportation. The other parent described how their child had transferred to the elementary school over the winter break and the District had yet to arrange for special transportation.
44. Another parent of a student at a District middle school reported that she refrained from having her child use District transportation due to prior safety concerns such as staff not using the security device and child sliding onto the bus floor while in transit.
45. In the case of a high school student, the parent explained how special transportation was delayed until November 2023 because there was a shortage of bus drivers. Parent stated that their child missed some school due to the delay in transportation.
46. The vast majority of other respondents in the survey said that their child's special transportation was properly arranged at the beginning of the school year.

Contingency Plan

47. The District has employed what they call a "contingency plan" to address disruptions in special transportation during the 2023-2024 school year.
48. The District Executive Director for Special Education Compliance stated that during every IEP review meeting this year, District staff are required to discuss the provision of transportation and ask parents whether their child has experienced any disruption in transportation.
49. If the student missed school due to a failure of the District to provide special transportation, then the IEP Team will consider whether compensatory education is appropriate to remedy the missed educational opportunities.
50. Under the contingency plan, schools may wait to determine the amount of compensatory education until the end of year to ascertain whether teachers have incorporated additional instruction throughout the school year to make up for missed school days due to transportation delays.
51. Separately, the District plans to retrain special education staff on timely submission of the Transportation Request Form before the end of the 2023-2024 school year.
52. Each school in the district will also be required to develop a roster for tracking the students who require special transportation with their pending transportation requests.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to provide Students with related services in the form of special transportation, in violation of 34 C.F.R. § 300.34(c)(16) and 6.31.2.7(B)(7) NMAC.

Special transportation is the means by which a special education student travels to and from school as well as specialized equipment (adaptive buses, lift, and ramps) that is required for transporting a child with a disability. 34 C.F.R. § 300.34(c)(16). IEP teams may decide that either the student's unique needs or inability to access their special education program necessitates a recommendation for special transportation in the IEP. IEPs, including special transportation services, must be implemented as soon as possible after they are developed. 34 C.F.R. § 300.323(c)(2). 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).

Here, Students #1, #2, and #3 all experienced substantial delays in receiving special transportation recommended in their IEPs. Student #1 did not receive their mandated transportation until over a month after the 2023-2024 school year began. Student #2 recorded over 20 tardies and missed 18 hours of school due a lack of transportation at the beginning of the school year. Student #3 experienced a delay in transportation lasting multiple months and missed several days of school because of it. The reasons for these delays were due to untimely or incorrect submission of the District's Transportation Request Form. While steps were taken to overcome the obstacles stemming from the misfiled forms (e.g., convening IEP meetings, communicating directly with parents about transportation), the extent of these transportation delays are considerable and directly impacted the Students' receipt of special education programming and services. Therefore, the evidence in this case supports a finding that the District materially failed to implement the IEPs of Students #1, #2, and #3 by substantially delaying the provision of special transportation.

In addition to the aforementioned students, the survey conducted in this investigation shows that some similarly situated students in the District have encountered transportation delays. While the reasons for the transportation delays and their educational impact among the survey students were not factually established, there are a confluence of factors during the 2023-2024 school year which have contributed to the lack of transportation. Those factors are: (1) untimely submission of transportation request forms at the start of the school year which places an unnecessary burden on the District Transportation Department to craft special education routes

without the benefit of using the summer break for planning; (2) lack of accountability from private contractors to faithfully perform their obligations such as starting a special education route or providing the number of buses/drivers as agreed upon; and (3) a shortage of bus drivers.

That said, this investigation has found that a majority of special education students reviewed in this investigation did receive special transportation according to their IEPs. Some limited instances of administrative errors are to be expected due to the vast number of special education students served as well as various circumstances throughout the school year which may cause a special bus route to change. The District has put in place safeguards to address any delays that arise and continue to improve their procedures for gathering transportation requests. Furthermore, the use of a local school-based roster for administrators to actively track special transportation needs among the student body will help reduce the overall amount of potential transportation delays across the District.

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(l)(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 District's failure to materially implement the IEPs of Student #1, #2, and #3 was a procedural violation that denied these students FAPE. The transportation delays these students experienced resulted in the loss of an educational opportunity to attend school itself. By not having the means to regularly attend school at the beginning of the 2023-2024 school year, Students 1–3 were deprived of the specialized instruction and services they would have otherwise received.

In contrast, the facts established in this investigation show that while administrative oversights may cause some initial transportation delays, this issue does not rise to the level of systematic denial of FAPE for District students needing special transportation. The evidence shows that most

special education students requiring special transportation did receive transportation at the start of the 2023-2024 school year.

However, missed services resulting in denials of FAPE are not excused by administrative oversights and must be remedied. The determination of whether FAPE was denied to any similarly situated special education students who were subjected to transportation delays is left to the IEP teams to decide through the use of the IEP process. The District is advised to consider the length of the transportation delay, the availability of special education services during the delay, and steps taken to finalize transportation arrangements. Those considerations (among others) will help guide the District’s local IEP Teams in deciding whether a specific student is owed compensatory education.

As for 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)(16) and 6.31.2.7(B)(7) NMAC	The District failed to provide Students with related services in the form of special transportation.
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 February 9, 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
 Office of Special Education
 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 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 December 31, 2024 and reported to the OSE no later than January 14, 2025. 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

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED OSE</u>	<u>Document Due Date</u>
1.	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).	February 9, 2024	Written Assurance Letter/Email	February 9, 2024
2.	The District Special Education Director and Transportation Director shall meet virtually with the PED OSE Education Administrator assigned to the District and the PED OSE 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 OSE.	February 23, 2024	Notes from meeting prepared by the District	March 1, 2024
3.	The District shall complete all previously agreed upon compensatory education for Students #1 and #3. The District shall provide PED-approved logs of all compensatory education.	July 31, 2024	Copies of PED-approved compensatory services logs	August 9, 2024

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED OSE</u>	<u>Document Due Date</u>
4.	<p>The District shall internally review the files of all special education students who individually had at least 5 absences (in aggregate) related to transportation delays during the 2023-2024 school year. The District shall determine the amount of compensatory education, if any, owed to these students due to the District’s possible failure to provide consistent special transportation. The District shall develop plans for providing compensatory services to the individual students and, when necessary, convene an IEP team meeting to develop a plan for the provision of compensatory education. The plans will be documented in a Prior Written Notice (“PWN”) for each student and sent to parents.</p> <p>The District shall maintain a PED-approved tracker that includes the total compensatory hours owed and provided to each student based on missed services as well as student need, whether those hours were accepted by the student’s parents, and the provision of compensatory education hours provided to each student.</p>	March 29, 2024	<p>Prior Written Notices containing plans for compensatory services.</p> <p>PED-approved compensatory education tracking log</p>	<p>April 5, 2024</p> <p>Submitted monthly until the completion of all compensatory education.</p>

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED OSE</u>	<u>Document Due Date</u>
	<p>If a parent declines compensatory education, the District shall get a confirmation in writing and provide the written confirmation to PED.</p> <p>The District shall complete all compensatory education hours by December 31, 2024. These compensatory services are above and beyond the regular services required by students' IEPs. The schedules 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>		Written confirmation of parent's decision to decline compensatory services.	Forward when all parents' decisions have been received and documented.
5.	The District shall provide a written plan or procedure to identify and address special transportation assignment issues/deficiencies both prior to and at the start of each school year.	April 15, 2023	Written plan or procedure	April 15, 2023
6.	The District shall provide the spreadsheets (referenced on Page 14 of the District Response dated December 22, 2023) containing the rosters of students in each District school who are recommended for	June 14, 2024	Copies of all spreadsheets/rosters.	June 21, 2024.

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED OSE</u>	<u>Document Due Date</u>
	special transportation and whose parents request this service for the 2024-2025 school year.			
7.	<p>The District shall arrange training for all special education staff to be provided by a person appointed by the District.</p> <p>The training shall address the following topics:</p> <ol style="list-style-type: none"> 1) How to fill out a Transportation Request Form; 2) The deadline for submitting Transportation Request Forms; and 3) As appropriate, the plan or procedure identified in Step 5 for identifying and addressing special transportation assignment issues both prior to and at the start of each school year. 	April 30, 2024	<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>March 29, 2024</p> <p>May 3, 2024</p>

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

Investigated by:

/s/ Michael Gadomski

Michael W. Gadomski, Esq.

Complaint Investigator, Office of Special Education

Reviewed by:

/s/Miguel Lozano

Miguel Lozano, Esq.

Chief Counsel, Office of Special Education

Reviewed and approved by:

DocuSigned by:
Margaret Cage

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Margaret Cage, Ed.D.

Director, Office of Special Education