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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION
Complaint Resolution Report
Mora Independent School District
Case No. 2324-29
February 9, 2024

This Report requires corrective action. See pages 18-22.

On December 11, 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;

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 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;
- interviews with the Guardian, Advocate, Principal, Case Manager, and Dean of Students and Federal Programs; 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 allowed Student to make progress and receive a free appropriate public education (FAPE), in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC; specifically, whether the District;
 - a. Failed to provide transportation as a related service under the IEP;
 - b. Failed to conduct a Functional Behavior Assessment (FBA) and a Behavior Intervention Plan (BIP) in accordance with Student’s IEP;
 - c. Failed to implement or revise BIP from previous school;
 - d. Failed to provide behavior supports including a 1-1 aide; and
 - e. Failed to provide special education services and support for a full school day.
2. Whether the District failed to follow the required disciplinary rules under IDEA in violation of 34 C.F.R. § 300.530 and 6.31.2.11(F)(2) NMAC; specifically, whether the District;
 - a. Failed to conduct a manifestation determination after 10 days of disciplinary removals;

- b. Failed to provide appropriate special education services during removal;
 - c. Failed to consider least restrictive environment (LRE).
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. Student, who was six years old and in the first grade, attended District School. Student was eligible for services under the category of Other Health Impairment (OHI) because of attention deficit hyperactive disorder (ADHD) and Autism.
2. Student has had a turbulent history and exhibited daily aggressive behavior including kicking, biting, punching, throwing, eloping and inappropriate language with peers and staff.
3. Student transferred from another state school district on August 18, 2021 after Student was placed in the custody of Grandfather.
4. At the time of the transfer, the previous district had completed a functional behavior assessment (FBA) and developed and implemented a behavior intervention plan (BIP).
5. The District implemented the IEP and BIP but did not revise the FBA or BIP until the most recent IEP meeting on December 20, 2023 because the District reported that the FBA and BIP from the previous school were still relevant.
6. When Student arrived at District school, they attended school 2.5 hours every day.
7. A full school day at the District was 7.5 hours.
8. In addition to behavior needs, Student also struggled in reading and math.
9. Student's most recent IEP was developed at a meeting on September 26, 2023 and finalized on October 10, 2023.
10. The IEP team determined academic goals would not be included in the IEP and the focus would be on increasing attendance and self-regulation.
11. Student's IEP provided for full time 1-1 assistance for Student at school.
12. During Student's time at school, Student worked 1-1 with the special education teacher in a classroom. No other students were present while Student was at school.
13. During the 2023-2024 school year, the special education teacher was the only one in the classroom with Student because when Guardian and/or a paraeducator were present, it was too disruptive for Student.
14. The special education classroom was the location of services for Student. At times, especially when Student transferred into District, peers were present. When this was no

longer successful, peers were removed from the classroom and Student was full time with the special education teacher and a 1-1 aide.

15. At some point, multiple adults were too disruptive for Student, the special education teacher worked alone with Student in the special education room.
16. None of these LRE placement changes were made as part of an IEP meeting.
17. In the September 26, 2023 IEP, the LRE justification statement provided that “[Student’s] adaptive/self-help and social/emotional skills impact [Student’s] ability to participate in a full day of school.” This was the only statement in the IEPs or other documentation concerning justification for the shortened school day or plan for reintegrating student.
18. The IEP LRE justification also indicated that “[Student’s] setting is regular Gen. Ed. for two hours, two times weekly with sped teacher inclusion services for 45 mins 2x a week (Tuesday and Thursday).”
19. This was the LRE at Student’s previous school but has never been the LRE at District school.
20. Student’s IEP has always provided for a 1-1 aide. Since special education teacher was working exclusively with Student, she was Student’s 1-1 aide.
21. Student’s special education services on the IEP listed 10.75 hours with 12.75 hours in a typical week and stated the setting was a regular early childhood program less than 10 hours per week.
22. Student’s placement has never been in the general education classroom or provided inclusion on a regular basis since the transfer to District.
23. District believed Student’s chronic absenteeism was the reason why Student’s behaviors were not under control. Student has missed more than 50% of the scheduled school days.
24. During the 2023-2024 school year, Student had missed 49 days out of the 78 total days school was in session. Attendance was also an issue last year.
25. The District did not convene an IEP meeting about the frequent absences but did send a letter to Guardian that if Student was absent for more than 10 consecutive days, Student would be disenrolled.
26. Student returned to school after the letter was received but attendance continued to be an ongoing problem.
27. Guardian reported that Student was often sick with COVID, strep throat and other illnesses. Sometimes due to Guardian’s schedule, Guardian could not transport Student.
28. Although it was difficult to determine triggers for Student’s behavior, when Student was asked to complete non-preferred tasks or had to stop a preferred task, Student would become dysregulated and aggressive.
29. Student was able to function approximately fifteen minutes per day. The remainder of the time, Student would come dysregulated, then would calm down, complete some work, and then become dysregulated again.

30. Although alternative placements had been proposed, there had been no decisions on how to increase Student's attendance and decrease negative behaviors.
31. The District reported there were no other options in the geographic vicinity because they were a small rural school district and that they were doing the best they could with the resources available.
32. District reported the shortened day was Guardian's request, but also conceded that Student's significant behaviors (including aggression and inappropriate language towards other students and staff) was another reason.
33. Student received 45 minutes of speech services per week, 75 minutes of social work services and 60 minutes per week of occupational therapy (OT) during the 2.5 hours of school.
34. All related services were provided in the classroom. This year, Student only received 4 speech sessions because of frequent absences.
35. OT services were not initiated until January 2024 because there was no service provider.
36. Student had limited contact with peers. Breakfast was provided to Student in the classroom and Student left school before lunch. All specials were scheduled in the afternoon when Student was not at school.
37. Student wanted to eat hot lunch with peers and make friends.
38. On rare occasions, Student went to the first-grade classroom with the teacher to pick up a book or some other item. Student never participated in first grade activities.
39. Student attended recess after Student completed a non-preferred task. If Student was unable to complete a non-preferred task, then Student would not participate in recess (which was a preferred activity).
40. At an IEP meeting on December 20, 2023, Student's schedule was reduced to 1.5 hours per day. Although there was no rationale for the reduction noted on the IEP, the District indicated that the shortened day was Guardian's request because he was unable to transport Student the approximate 22 miles and get Student and the other children in the home to school before 9 am. Also, Student's medication made Student tired and unable to focus.
41. For approximately four weeks at the start of the 2023-2024 school year, Student received education virtually because there were concerns about reactions to medication. Student fell asleep at school and had other medication concerns. One medication was changed to evenings so Student would not fall asleep at school.
42. According to Guardian, Student's medication issues have been managed but he has not shared the doctor's reports with the District.
43. Guardian reported that he would like Student at school all day but he could not be responsible for transportation of Student.

44. At the December 20, 2023 IEP meeting, speech services were reduced from 45 minutes per week to 30 minutes per week because the speech clinician was not able to keep Student engaged for 45 minutes. Social work services were reduced because Student's attendance was reduced.
45. OT services are provided virtually and District acknowledged they owed Student compensatory OT services.
46. Progress notes on Student's IEP goals from last year indicated that no progress was made because of chronic absenteeism and the IEP goals remained the same.
47. For the 1.5 hours of instruction for Student, a typical day at school was as follows.
 - Student arrived at approximately 9:00 am.
 - Student had breakfast available and had 10-20 minutes of acclimation with Student's choice of a preferred task.
 - Following that, Student had the choice of two non-preferred tasks. These tasks took approximately 8-10 minutes to complete. They were not paper-pencil but may be counting or writing letters in the sand as examples.
 - If Student completed the task, Student received a sticker. Stickers were a positive reward for Student.
 - If Student became dysregulated, the teacher tried to calm Student and get back to the non-preferred task. At times, depending on Student's behavior, the non-preferred task may be modified. This continued until the non-preferred task was completed and Student received sticker.
 - When Student completed a non-preferred task, Student could choose a preferred task to complete.
 - Recess was a preferred task but Student must complete the non-preferred task before Student could attend recess at 10:05.
 - During the 1.5 hours of daily instruction, Student received related services of speech, OT and social work in the classroom.
 - At 10:30 am, Student left for the day.
48. The goal was to have Student complete two non-preferred tasks during the 1.5 hours of school. Student has not consistently completed one non-preferred task during school.
49. Previously, Student attended recess with second and third grade students. That was not successful and Student started attending recess with first grade peers. Student was able to go to recess approximately 50% of the time. When behavior was appropriate and Student completed work, Student could participate in recess. Student had attended recess approximately 25 times this school year and Student successfully participated 2/3 of the time.
50. When Student was unsuccessful, Student was removed or the other students left until Student could be controlled.

51. The District's reported plan for increasing Student's instruction time, which was not included in the IEP, was instruction time would increase by one hour after Student had attended school 80% for one month. If regular attendance continued, then another hour of instruction would be added until Student was back at school full time by the end of the 2023-2024 school year.
52. When Student was in attendance, District reported progress was made but when Student was absent then regression reoccurred. The District was unable to provide documentation of progress on reducing behaviors. The District believes that if Student attended every day there would be progress on managing behaviors.
53. At the previous school, Student was transported on a special education bus to and from school.
54. Following Student's transfer into District, the District IEP team determined that Student needed special transportation as a related service.
55. It was determined that Student could not be transported on the regular school bus because of aggressive and other maladaptive behaviors towards students and staff. District reported that Guardian was concerned that Student would harm someone if Student rode the bus.
56. Guardian disagreed and stated that he could not transport Student for the limited time Student was at school; other arrangements would need to be made to transport Student.
57. Student has never ridden the bus while in attendance at District.
58. The only option for transportation provided by the District was Guardian would transport and be reimbursed for mileage.
59. The District has had difficulty finding staff to work with Student. Student has worked with three para educators and all have been injured.
60. It was approximately 22 miles one way from Guardian's home to school.
61. Guardian reported that because of other commitments, it was difficult to transport Student when Student was only at school 1.5 hours.
62. To attend appointments, sometimes two hours away, Guardian took Student with him rather than transport Student to school for the shortened school day.
63. District's disciplinary records indicate that Student had two office referrals, with one resulting in a two-day suspension for aggressive behavior.
64. Although District personnel reported that Student's behaviors was one of the reasons for the shortened school day, there was no documentation provided about how often Student exhibited behaviors or what happened following the maladaptive behaviors. These records were in a binder in the classroom. The incomplete information was reviewed but there were no records from October, 2022 through September, 2023 and data on behaviors as required by the BIP only noted if Student completed a non-preferred task.

65. Guardian reported that even though Student was only attending 2.5 hours per day and later 1.5 hours, Guardian was frequently called to come pick up Student because of behaviors. There was no record of how often that happened.
66. The IEP did not provide documentation about why the need for the shortened school day nor what the plan was to integrate Student back to full time attendance.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to develop and implement an IEP that allowed Student to make progress and receive a free appropriate public education (FAPE), in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC; specifically, whether the District;

- a. Failed to provide transportation as a related service under the IEP;**
- b. Failed to conduct a Functional Behavior Assessment (FBA) and a Behavior Intervention Plan (BIP) in accordance with Student's IEP;**
- c. Failed to implement or revise BIP from previous school;**
- d. Failed to provide behavior supports including a 1-1 aide; and**
- e. Failed to provide special education services and support for a full school day.**

When the IEP team determines that transportation as a related service is required for a student to receive a free appropriate public education (FAPE), it must be provided to the family at no cost. 34 C.F.R. § 300.34(c)(16). The IEP team determines if transportation is needed and how transportation should be provided. *Questions and Answers on Servicing Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009). The need for transportation must be made on a case-by-case basis. 34 C.F.R. §§ 300.320-300.324. Parents cannot be charged fees for a needed related service. Requiring the parent to provide transportation must be mutually agreeable. *Letter to Hamilton*, 25 IDELR 520 (OSEP 1996); 34 C.F.R. § 300.16(b)(14). The IEP should describe the needed transportation services and explain the need for transportation services. 34 C.F.R. § 300.107; 34 C.F.R. § 300.117; *see also* 71 Fed. Reg. 46, 576 (2006).

Behaviors that inhibit a child's learning or that of others should be addressed on the IEP or through a BIP developed by the IEP team. Negative behaviors are not a justification for shortening a school day. *Alleghany County (NC) Schools*, 69 IDELR 193 (OCR 2016). When an interstate transfer of a special education student occurs, the District may adopt and implement the IEP and BIP and provide comparable services or conduct an evaluation and develop and implement a new IEP. 34 C.F.R. § 300.323(f). Comparable services refer to similar or equitable services. 71 Fed. Reg. 46,681 (2006). The BIP must describe the behavior and positive

interventions and supports and other strategies designed to reinforce positive behaviors and reduce negative behaviors that interfere with learning. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 53 IDELR 268 (OSERS 2009). The IEP team must determine the need for interventions, supports and strategies. 71 Fed. Reg. 46, 683 (2006). Excessive absences should be addressed as behavior issues or through a BIP. *Huron School District*, 68 IDELR 178 (SEA SD, 2016); *District of Columbia Public Schools*, 120 LRP 179 (SEA DC, 2019).

Shortening a student's school day should be a rare occurrence and for a limited period. *In re: Student with a Disability*, 121 LRP 1039 (SEA WI 2021). The IEP team must determine that the shortened school day is necessary for student to receive FAPE. *Christopher M. v. Corpus Christi Independent School District*, 933 F2d 990, 17 IDELR 990 (5th Cir. 1991). Convenience is not sufficient to shorten a school day. *Osseo Area School Independent School District No. 279 v. AJT*, 81 IDELR 256 (MI 2000). The IEP team must document on the IEP the services and supports needed to justify the shortened day. Aggression, lack of academic stamina and resistance to non-preferred tasks are insufficient reasons to shorten a student's school day. *In re: Student with a Disability*, 82 IDELR 44 (SEA WI 2022). The IEP documentation must include all steps and placement options that the District considered and/or implemented before shortening the school day. The IEP must also include a plan for returning the student to a full school day of attendance. 34 C.F.R. § 300.116. While parents/guardians have input in development of the IEP, it is ultimately the responsibility of the IEP team to develop an IEP that provides Student a FAPE. 34 C.F.R. § 300.116.

a. Failed to provide transportation as a related service under the IEP

The IEP team determined at the annual IEP meeting that Student needed transportation as a related service to receive a FAPE. The District provided bus service but because of Student's aggressive behaviors towards other students and staff, the District determined they could not transport Student on the bus. At Student's previous school, Student was transported on a shuttle bus with a 1-1 aide. The District informed Guardian that Guardian would need to transport Student and receive mileage reimbursement if Student attended school. The District opined that this was Guardian's suggestion but Guardian disagreed and said he believed he had no choice but to transport Student. Guardian stated because of his schedule and other obligations, it was difficult to travel 22 miles one way to get Student to school every day for only 1.5 hours of school. The District did not consider any other options to get Student to school. Since Student needed transportation as a related service to get to and from school and Guardian was not in agreement with providing that transportation, it was the responsibility of the District to develop and implement a plan to get Student to and from school. Providing transportation might address the

District's concern with poor attendance because Guardian indicated that Student missed school at times because he could not get Student to school and meet his obligations.

As to Issue #1a, the District is cited and Corrective Action is required.

b. Failed to conduct a Functional Behavior Assessment (FBA) and a Behavior Intervention Plan (BIP) in accordance with Student's IEP

Student was an interstate transfer student during the 2022-2023 school year. At the time of the transfer, Student had an FBA and BIP completed at the previous school. The District accepted the IEP and BIP from the previous school and provided comparable services. The District reported that the FBA and BIP were accurate with respect to Student's behaviors and needs and did not need to be revised upon Student's enrollment. The District provided comparable services of 2.5 hours on instruction per day. At the December 23, 2023 IEP meeting, the FBA and BIP were revised.

As to Issue #1b, the District is not cited.

c. Failed to implement or revise BIP from previous school

When a BIP is not working, the IEP team should meet to update or revise the FBA and BIP. Last year, Student received 2.5 hours of instruction per day. Since December 20, 2023, Student received 1.5 hours of instruction daily. Student's academic goals were removed from the September 26, 2023 IEP to focus on Student's behaviors. There was no progress made on goals and the goals were repeated in the 2023-2024 IEP. The FBA indicated that Student had skill deficits and needed to be taught those skills. Student was aggressive towards other students and staff and used inappropriate language. Student was resistant to completing non-preferred tasks and worked 1-1 with a teacher in a classroom with no other students or staff. Student struggled with completing one non-preferred task without dysregulation. When Student was not making progress, the IEP team needed to meet to consider what other supports and services were needed.

The District stated that when Student was at school, Student was making progress on behaviors. There were more issues with this Student than just poor attendance. Student's instruction time was reduced rather than increased and progress was not occurring. The frequent absences should have triggered the need for an IEP meeting to determine why Student was missing so much school and what could be done to address the absences. The District sent a letter stating Student was at risk of disenrollment. There was no IEP meeting to discuss how to increase attendance.

As to Issue #1c, the District is cited and Corrective Action is required.

d. Failed to provide behavior supports including a 1-1 aide

Student's IEP required a full time 1-1 aide to work with Student. Student was served in a classroom exclusively by the special education teacher with no other students present. At all times, Student was with the classroom teacher or rarely, when Student would receive OT services in another room, a 1-1 aide would accompany Student. Student's instruction time was reduced from 2.5 hours to 1.5 hours of school a day on December 20, 2023.

The FBA determined that Student had skill deficits that needed to be taught, however, the focus on the BIP was to ensure Student attended school and completed two non-preferred tasks. Student was rewarded for completion of non-preferred tasks but it was unclear how the school was teaching Student the skills necessary to learn self-regulation. The social work goal was to address self-regulation but social work service time was decreased rather than increased. The District failed to provide the appropriate behavior supports to allow Student to make progress.

As to Issue #1d, the District is cited and Corrective Action is required.

e. Failed to provide special education services and support for a full school day.

During the investigation, there were many explanations provided why this Student did not attend school all day. The District reported it was Guardian's suggestion for the shortened day. Student had difficulty focusing and completing non-preferred work. Student was able to self-regulate only 15 minutes of the 1.5 hours of instruction. The IEP, however, was silent about the justification for the shortened day last year. At the December 20, 2023 IEP meeting, there was no explanation why instructional time was decreased to 1.5 hours.

The District continually stressed that Student's absences were the reason for lack of progress, yet they did not increase the time to see if more time would improve Student's behaviors. Instead, the IEP team decreased Student's instruction time, in part, because Student was struggling most of the time Student was at school. There was no indication of what other supports and services were considered or attempted to prevent the shortened day. Other placements were brought up but there was no follow-through with those placements. There was no plan to increase Student's time at school except to say that if Student was in attendance most days in any given month, then District would increase the time at school by one hour so that by the end of the year, Student would be at school all day.

The District reported that when Student attended, progress was made. The District should have convened an IEP meeting to address attendance and increased Student's time at school. There

was no justification for the shortened day or that it related to the individual needs of Student. This was a violation of IDEA.

As to Issue #1 e, the District is cited and Corrective Action is required.

As to Issue #1, the District is cited as to Issue 1a, 1c, 1d, and 1e. The District is not cited as to Issue #1b.

Issue No. 2

Whether the District failed to follow the required disciplinary rules under IDEA in violation of 34 C.F.R. § 300.530 and 6.31.2.11(F)(2) NMAC; specifically, whether the District;

- a. Failed to conduct a manifestation determination after 10 days of disciplinary removals;**
- b. Failed to provide appropriate special education services during removal;**
- c. Failed to consider least restrictive environment (LRE).**

When a student is removed from school for behavior reasons, it is considered a disciplinary removal and can trigger the District's responsibility to conduct a manifestation determination review (MDR). The classification of the removal from the school is not the deciding factor; shortening the school day for a student as a repeated, daily exclusion from school (e.g., parents are asked to pick up early or student leaves school early because of behaviors) qualifies as disciplinary removals that count toward the ten days. *School District of Flint*, 66 IDELR 192 (SEA MI 2015); *Letter to Mason*, 72 IDELR 192 (July 27, 2018); *see also* 34 C.F.R. § 300.530(a)(2). Whether removals constitute a pattern of behavior depends on the length of the removal, the total amount of time and the proximity of the removals. 34 C.F.R. § 300.536(a)(2). IDEA mandates that to the maximum extent appropriate, students are educated with their peers. 34 C.F.R. § 300.114(a). The LRE for a student should be a fundamental part of any placement decision. 34 C.F.R. § 300.116.

a. Failed to conduct a manifestation determination after 10 days of disciplinary removals;

Student received instruction for 2.5 hours per day during the 2022-2023 school year and 1.5 hours per day after December 20, 2023. Records indicated Student had two disciplinary removals, one warranting a two-day suspension. Those were the only disciplinary removals and, therefore, the District opined the Student has not been removed for 10 days, so a manifestation determination review (MDR) was not required.

The District reported Student was aggressive and used inappropriate language daily but no records were provided of the frequency of the dysregulation or the District's response to

behaviors. Student's IEP stated that "[Student's] setting is regular Gen. Ed. for two hours, two times weekly with sped teacher inclusion services for 45 mins 2x a week (Tuesday and Thursday)." This has not been Student's placement since arrival at District in 2021. Student was changed from placement in a special education classroom with a special education teacher, a 1-1 aide and peers to the recent placement of Student and the special education teacher in the special education classroom. These placement changes were not made through the IEP team. It was reported that Student was denied recess because Student was unable to complete a non-preferred task and some of the time was removed from recess because of aggressive behaviors. Guardian reported that Guardian was called to school early to take Student home but there was no record of how often this occurred.

The lack of documentation made it impossible to determine if the shortened day or other removals were disciplinary removals that would count toward the ten days requiring an MDR. The District's classification is not the deciding factor, it is the impact on the Student and whether the reduction in instruction time was because of disciplinary reasons or was based on the individual needs of the Student. Given the facts found on this record, it is not clear whether the decision to further shorten day Students day was a disciplinary removal for MDR purposes.

Nevertheless, there were sufficient triggers including the shortened day, frequency of absences, elimination of academic goals, lack of progress and continued negative behaviors that should have indicated the need for an IEP meeting to determine if additional services and supports were warranted or an alternative placement was needed. The failure to convene a timely IEP meeting was a violation of IDEA.

As to Issue #2a, the District is cited and Corrective Action is required.

b. Failed to provide appropriate special education services during removal;

The District provided the special education services that were listed on Student's IEP during the 1.5 hours that Student attended school since December 20, 2023. Student's school day was shortened both in 2022-2023 and 2023-2024. Student was not making progress on behavior goals; academic goals were removed because the focus was to improve Student's behaviors. The District's assertions that the reason for the poor progress was because Student was absent more than half of the school days was not an explanation or justification for the lack of services and supports for this Student. Chronic absenteeism was one trigger for the IEP team to meet and determine if additional services and supports were needed. The District did not meet this Student's needs after the decision to shorten Students day further.

As to Issue #2b, the District is cited and Corrective Action is required.

c. Failed to consider least restrictive environment (LRE).

According to the September 26, 2023 IEP, Student's placement setting was "regular Gen. Ed for two hours, two times weekly with sped teacher inclusion services for 45 mins 2x a week. (Tuesday and Thursday)." That has never been Student's LRE at District. When Student first started at District, Student had some access to peers in the special education classroom during the 2.5 hours of instruction per day. Since December 20, 2023, Student received 1.5 hours of instruction daily. When at school, Student was in a classroom with only the special education teacher, and no peers. Except for recess, no other students were with Student during those 1.5 hours of instruction. Social work, speech and OT services were provided in that classroom. Recently, Student started attending recess when they completed non-preferred tasks. Student participated with peers at recess approximately 25 times, half the time Student was at school. At least two-thirds of those times, Student was able to participate with peers at recess. The other times, either Student would be removed or the peers would leave. Student was not with peers for lunch or breakfast and rarely, on two reported occasions, Student went into the first-grade classroom but did not participate in activities with peers. Specials (special subjects) were all in the afternoon when Student was not present at school. LRE requires Student to be educated with peers to the maximum extent possible. Student's behaviors might be concerning, but isolating Student in a classroom with only a teacher for the vast majority of Student's shortened day was not providing opportunities for Student to be with peers and practice appropriate behaviors. This is especially problematic because District did not have a plan to transition Student back to a full day or less restrictive environment other than to wait for student to begin attending school regularly.

As to Issue #2c, the District is cited and Corrective Action is required.

As to Issue #2a, 2b and 2c, the District is 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.

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-I, 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 developed by the District was not reasonably calculated to allow the child to make progress. Student had significant needs and behaviors that impacted Student's learning and the learning of peers. Shortening the school day and limiting access to peers were not allowing Student to make progress. Attendance was an issue that needed to be addressed by the IEP team. The District was optimistic that when Student attended regularly then educational progress would occur, but poor attendance did not explain or justify the District's actions in shortening the school day and isolating Student. Recently the FBA and BIP were updated but the daily schedule provided did not explain how Student was taught the skills needed to allow Student to return to school full time and participate with peers in the classroom. Student was rewarded for completing non-preferred tasks that were not academic or paper-pencil. Student was not asked to work on any academic goals during 1.5 hours of daily instruction. Student was provided limited opportunities to interact with peers much less learn how to interact with peers. This evidence supports a finding that there was a substantive denial of FAPE.

There were also procedural errors that rose to the denial of FAPE. Guardian participated in the IEP meetings but transportation services provided by Guardian were mandated by the District if Student was to attend school. Guardian reported Student wanted to have lunch with peers and be at school all day. Options to address these concerns were not considered during the IEP meetings. The shortened day and lack of access to peers deprived Student of educational benefits and resulted in the loss of many hours of educational opportunity. These procedural errors, taken together, amounted to a denial of FAPE.

As to Issue #3, the District is cited and Corrective Action is required.

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC	<p>The District failed to develop and implement an IEP that allowed Student to make progress and receive a free appropriate public education (FAPE) specifically, the District,</p> <p>Failed to provide transportation as a related service under the IEP;</p> <p>Failed to implement or revise BIP from previous school;</p> <p>Failed to implement or revise BIP from previous school;</p> <p>Failed to provide behavior supports including a 1-1 aide;</p> <p>Failed to provide special education services and support for a full school day.</p>
34 C.F.R. § 300.530 and 6.31.2.11(F)(2) NMAC	<p>The District failed to follow the required disciplinary rules under IDEA specifically, the District;</p> <p>Failed to conduct a manifestation determination after 10 days of disciplinary removals;</p> <p>Failed to provide appropriate special education services during removal;</p> <p>Failed to consider least restrictive environment (LRE).</p>
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 23, 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 7, 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 OSE Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan (CAP).	February 23, 2024	Written Assurance	February 23, 2024
2.	The District Special Education Director and the school principal shall meet 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 Special Education Director shall be responsible for arranging this meeting with OSE.	March 1, 2024	Notes from meeting	March 8, 2024
3.	The District shall complete a comprehensive evaluation of student to include at least a psychological evaluation and functional behavior assessment.	March 15, 2024	Evaluation and FBA reports	March 29, 2024
4.	As soon as possible after the completion of the evaluations and functional behavior assessment for Student, the District shall convene a Facilitated IEP (FIEP) meeting. The FIEP meeting shall address: <ul style="list-style-type: none"> Determination of Student's Least restrictive environment (LRE); 	15 Days after the evaluation and FBA reports are completed.	1. Invitation to IEP meetings, 2. IEPs, 3. Prior Written Notices, and 4. Agenda for IEP team meetings	15 days after the IEP meeting is held

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED</u> <u>OSE</u>	<u>Document Due Date</u>
	<ul style="list-style-type: none"> • Plan to address students issues attending school including the attendance log described in Step 5; • Alternative Special transportation services for Student which shall not be limited to transportation by Guardian; • Transition plan to Integrate Student back into full-day, in-person instruction in Student's LRE which shall not be contingent on Student's regular attendance; • Determination and documentation of the present levels of academic performance and appropriate measurable goals for each area of need where special education and related services are provided. • Additional needs identified through the comprehensive evaluation and update FBA; • Revision of Student's BIP; and • Periodic progress reporting plan to ensure the effectiveness of IEP and BIP and the next steps if progress is not observed. 			

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED</u> <u>OSE</u>	<u>Document Due Date</u>
	<p>The Facilitator shall be independent of the District and shall be selected from the PED list of approved facilitators. The Facilitator shall be paid for by the District.</p> <p>The FIEP meetings shall be held on a date and time that is convenient for the parent. The parent will be provided with a copy of the IEPs and PWNs at the conclusion of the FIEP meetings.</p> <p>The District Special Education Director shall participate in the IEP meeting. The District shall also ensure that the IEP team includes, but is not limited to, parents, special education teacher, general education teacher, and any related services providers.</p>			
5.	<p>In order to ensure that the District is monitoring the integration of Student back into full-time, in-person instruction, the District shall maintain a daily attendance log for Student which includes dates of attendance, excused and unexcused absences, dates of refusal to attend, any informal removals from school (both voluntary or involuntary), any formal discipline including in-school and out-of-school suspensions, or expulsion.</p> <p>The daily log shall also provide descriptions of the reasons for any</p>		Daily Attendance Logs	Provided monthly beginning March 1, 2024 until December 31, 2024.

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED</u> <u>OSE</u>	<u>Document Due Date</u>
	<p>informal or formal removal of Student from school.</p> <p>The District shall utilize this log to determine progress toward integration and shall seek possible revisions to Student's IEP and/or BIP if Student's regular attendance does not improve or diminishes. PED, in its review of these daily attendance logs, may require additional action based on Student's diminished attendance or persistent removal from school.</p> <p>If Student maintains regular attendance for an extended period as determined by PED, the District may request that this requirement be terminated or modified prior to December 31, 2024.</p>			
6.	<p>The District shall arrange to provide training to District staff (including special education teachers, special education administrators, and related service personnel), on the following special education topics:</p> <ul style="list-style-type: none"> • Addressing behavioral issues with positive behavioral supports and implementation of FBAs and development of BIPs and • Transportation as a related service; • Least restrictive environment; • Shortened school days; • Development and implementation of IEP; 	April 30, 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>March 25, 2024</p> <p>April 1, 2024</p> <p>May 6, 2024</p>

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED</u> <u>OSE</u>	<u>Document Due Date</u>
	<ul style="list-style-type: none"> • Addressing attendance as part of a Student’s IEP; • Revision of IEP when progress is not being made; and • Procedural safeguards related to disciplinary removals, including informal removals. <p>The training shall be provided by a person with expertise in special education who was not involved in responding to this complaint and who is approved by NMPED.</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/ 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:

DocuSigned by:
Margaret Cage

Margaret Cage, Ed.D.

Director, Office of Special Education