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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION
Complaint Resolution Report
Rio Rancho Public Schools
Case No. C2324-31
March 8, 2024

This Report does not require corrective action.

On January 8, 2024, a complaint was 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 Parent, Special Education Instruction Leader, Special Education Teacher, General Education Teacher, Executive Director of Special Services, and Director of Special Services for Elementary.
- 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. The Complaint Investigator did not investigate any issues related to any time period following the filing of the Complaint.

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 appropriately determine the educational placement of the Student in the Student’s most recent IEP, by failing to ensure that the placement decision was made in conformity with the Least Restrictive Environment (LRE) provisions set forth in the IDEA and state rules, as required by 34 C.F.R. §§ 300.114 through 300.120; and 6.31.2.11 (C) NMAC, by:
 - a. failing to ensure that to the maximum extent appropriate, the Student is educated with children who are nondisabled, and that special classes, separate schooling, or other removal of the Student from the general educational environment occurs only if the nature or severity of the Student’s disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, as required by 34 C.F.R. § 300.114; and 6.31.2.11(C) NMAC;
 - b. failing to ensure that the placement decision for the Student was made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, as required by 34 C.F.R. § 300.116(a); and 6.31.2.11(C) NMAC;

- c. failing to give consideration to any potential harmful effect on the Student or on the quality of services that the Student needs, as required by 34 C.F.R. § 300.116(d); and 6.31.2.11(C) NMAC;
 - d. failing to ensure that the Student was not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum, as required by 34 C.F.R. § 300.116(e); and 6.31.2.11(C) NMAC;
 - e. failing to determine if the Student has a visual disability, which impacts the Student's ability to access education, ability to develop language or communication, social emotional development, and/or overall development prior to determining the Student's placement in the least restrictive environment, in compliance with 34 C.F.R. §§ 300.114 through 300.120 and 6.31.2.11(C) NMAC, as required by 6.31.2.11(L)(4)(d) NMAC.
2. Whether the District predetermined the Student's placement decision by:
 - a. failing to afford the Parents an opportunity to participate in meetings with respect to the educational placement of the Student and the provision of FAPE to the Student, as required by 34 C.F.R. §§ 300.501(b) and (c) and 300.327; and 6.31.2.11(B)(2) NMAC.
 3. Whether the District's actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE), in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

General Findings of Fact

1. The Student is currently nine years of age and resides with the Parents within the jurisdictional boundaries of the District. In the Fall of 2021, the Student transferred to the District from a school district in Florida. The Student is currently in the 2nd grade and attends an elementary school in the District (the School). The Student also attended 1st grade at the School.
2. The Student transferred to the District with an IEP developed by his previous school district in Florida. The district in Florida conducted a special education re-evaluation of the Student in February 2021, and determined that the Student was eligible to receive special education and related services under the eligibility classification of Multiple Disabilities, including Autism, Other Health Impairment (OHI), Deaf and Hard of Hearing (DHH) and Speech Language Impairment (SLI).
3. The documentation from the District and the Parents, and Parental reports, indicate that the Student has been diagnosed with Down syndrome, is non-verbal and currently cannot read. It is reported that the Student may have cognitive deficits which, to date, multiple

evaluators have been unable to accurately identify or quantify because the Student is nonverbal and cannot read.

4. The District's Eligibility Determination Team (EDT) met on September 14, 2021 and October 6, 2021, to review the February 2021, evaluation and determine eligibility for the Student for special education services. The EDT determined that the Student met the eligibility criteria as a student with Multiple Disabilities including OHI, Autism and DHH. The Student's IEP team met to develop an IEP for the Student on October 6, 19, 23 and 25, and completed the IEP on January 21, 2022.
5. The January 21, 2022, PWN states that at the first meeting of the IEP team on September 14, 2021, the IEP team accepted the Parent's proposal to conduct a Functional Behavior Assessment (FBA) to be completed within four weeks. Once completed, the IEP team would meet to determine whether a Behavior Intervention Plan (BIP) was appropriate for the Student. At the October 19, 2021, IEP team meeting the IEP team reviewed the completed FBA and agreed that additional information was needed to determine the need for a BIP and its appropriate content, if needed. The IEP team agreed not to draft a BIP at that time. It was noted that there were accommodations in place to address behavioral needs. However, at the January 21, 2022, IEP team meeting the team determined that it would be appropriate to develop a BIP in addition to the current accommodations in place. The Parent reports that the Student's IEP team did develop a BIP for the Student dated April 18, 2022.
6. The Student's January 21, 2022, IEP provides for 60 minutes per week each of special education services in the areas of Speech/Language, ELA and Math in the Special Education Setting. The District reports that it originally proposed 120 minutes per week each of ELA and Math special education services which the Parents objected to. The District reports that "based on parent input and information from the Student's prior district," the District agreed to provide 60 minutes per week each of ELA and Math special education services.
7. The January 21, 2022, PWN states that the District and the Parents agreed to conduct additional evaluations in the areas of academic, SLP, cognitive and adaptive. The PWN also states that Progress Monitoring would provide the IEP team with additional information to determine future programming for the Student.
8. District records indicate that there were 20 participants at the January 21, 2022, IEP team meeting, including both Parents and their attorney. The documentation clearly indicates that the Parents were very involved in the IEP development process and made many proposals regarding services and programming that were accepted by the IEP team.
9. District records indicate that on March 16, 2022, the Student's IEP team agreed to amend the Student's January 21, 2022, IEP without a meeting to correct clerical errors and provide clarifications requested by the Parents. The Prior Written Notice attached to the

Student's March 16, 2022, amended IEP captures the actions of the Student's IEP team, including the amendments.

10. The March 16, 2022, IEP and PWN show that Covid-19 safety protocols, specifically including masking and 6-foot distancing, were very significant factors in the provisions of the Student's IEP. For example, on October 25, 2021, the IEP team agreed that the Student would be temporarily placed in a cross categorical (small group) classroom with masking goals. However, when the IEP was finalized on January 21, 2022, the IEP provides that the Student would be in the Regular Classroom for 80% or more of the school day.
11. On March 17, 2022, the Parents signed consent for the District to implement the Student's January 21, 2022, IEP.
12. On April 7, 2022, the Parents signed consent for the District to conduct a re-evaluation of the Student. The evaluations were conducted in late April and early May, 2022, with a Report date of May 27, 2022. The Re-Evaluation Multi-Disciplinary Report indicates that the Student was referred for cognitive and adaptive behavior testing to determine if an additional eligibility of Intellectual Disability was appropriate for him.
13. The May 27, 2022, Report provides, in relevant part, as follows:
 - a. Speech/Language Assessments: "[The Student] obtained an auditory comprehension standard score of 50, [Standard Error of Measurement] range of 50 to 55.2, and a percentile rank of 1. This places his understanding of language in the significantly below-average range."
 - b. Cognitive Assessments:
 - i. Developmental: "Overall, [the Student] is demonstrating delayed skills across developmental domains at this time according to parent and teacher ratings."
 - ii. Nonverbal Intelligence: The Student did not respond to the test appropriately so no scores were recorded.
 - iii. Scale of Intelligence: The Student did not respond to the test appropriately so no scores were recorded.
 - c. Adaptive Behavior Assessments: "All of the scores from the Domain-Level Teacher form are in the moderate to severe range of Intellectual Disability. . . All of the scores from the Domain-Level Parent/Caregiver Form are in the mild to moderate range of Intellectual Disability. It was indicated that the delay in the development of skills can be contributed to the Student's current eligibilities of DHH and/or Autism.
 - d. The Report states that the "assessment and evaluation does not appear to demonstrate the child meets the requirements of the intellectual disability definition."

14. On September 12, 2022, the Student's IEP team met to review the Student's IEP. The September 12, 2022, IEP provides, in relevant part, as follows:
- a. The Student's primary eligibility was identified as Multiple Disabilities in the areas of Autism Spectrum Disorder and OHI.
 - i. The Student no longer qualified as a student with DHH eligibility due to several recent hearing tests that indicated that the Student's hearing was in the normal range in both ears.
 - b. Annual Goals:
 - i. Reading: updated benchmark and two objectives;
 - ii. Math: three objectives;
 - iii. Communication: three objectives;
 - iv. DHH Expanded Core Curriculum: two objectives;
 - v. Fine Motor/Self-Regulation Skills: two objectives;
 - vi. PT/APE/Motor Skills: two objectives;
 - vii. Life Skills: three objectives.
 - c. Instructional Accommodations were agreed to in the areas of ELA, Math, Related Arts, Science and Social Studies.
 - d. Schedule of Services:
 - i. Special Education & Related Services:
 1. ELA services for 175 minutes/week in the Special Education Setting;
 2. Math services for 175 minutes/week in the Special Education Setting;
 3. Speech-Language, Small Group, individual and/or Group, for 60 minutes/week in the Special Education Setting;
 4. APE, individual and/or group, for 30 minutes/week in the Special Education Setting;
 5. PT, individual and/or group, for 30 minutes/week in the Special Education Setting;
 6. OT, individual and/or group, for 30 minutes/week in the General Education Setting;
 7. DHH Direct Services for 30 minutes/week in the General Education Setting;
 8. Adult Assistance for 1090 minutes/week in the General Education Setting; and
 9. Social Work, individual and/or group, for 30 minutes/week in the General Education Setting.
 - ii. Supplementary Aids and Services:

1. Access to AT device and/or low-tech picture communication symbols, Daily, across all settings;
 2. Adult Assistance, Daily, across all settings; and
 3. Audiologist, 1x/semester, across all settings.
- iii. Supports for School Personnel:
1. DHH Consult to Staff, 2x/week as needed;
 2. AT consultation 1x/month;
 3. Adult Assistance across all settings;
 4. SLP and AT consultation for teachers and paraprofessional support staff regarding Student's use and generalization of the AAC device, 1x/month;
 5. Training for teachers and paraprofessional staff on the use and programming of AAC system device, 1x/month;
 6. Training to enhance safety and supervision of the Student in the positive behavior support system for behavior challenges, 1x/month;
 7. Cross-training of paraprofessional and/or plan of implementation when teacher and/or paraprofessional may be absent , 1x/year; and
 8. ASL training for staff, 1x/month/as needed.
- e. Least Restrictive Environment (LRE):
- i. Impact Statement: "[The Student] is a student with multiple disabilities . . . and has significant language delays as well. These disabilities manifest themselves in a number of ways in both his academic and functional performance. His multiple disabilities interfere with his ability to understand and follow directions, interfere with the acquisition of new content, and his ability to recognize and respond to social cues and boundaries. His limited vocabulary in the classroom impacts his understanding of grade level concepts and reading comprehension. His difficulties with fine motor skills impact his ability to independently perform self-help tasks in the school setting and perform written tasks."
 - ii. Continuum of Alternative Placements:
 1. The Student cannot be served 100% in the general education setting because that setting alone does not provide sufficient academic, functional, and/or behavioral supports for the Student.
 2. Combination of general education and special education settings. "In order to receive small group instruction in an academic area(s) that breaks classroom assignments down into smaller steps, allows

for frequent review of materials, and builds in individualized organizational strategies for work completion, [the Student] will receive specially designed instruction in a special education setting for a portion of the school day.”

3. The placement in general education setting is reduced or limited. “The nature or severity of the disability of the student is such that education in the general education setting with the use of supplementary aids and services, including special education teacher support through consultation or co-teaching, cannot be achieved satisfactorily.”

- iii. Consideration of any potential harmful effect on the Student: “As an IEP team, we recognize that the benefits of receiving specialized instruction outweigh the potential, harmful effects of decreased access to general education peers.”

15. The PWN provided by the District to the Parents regarding the Student’s September 12, 2022, IEP provides, in relevant part, as follows:

- a. The PWN states that the Parents participated in developing, and accepted, the Student’s annual goals;
- b. The Schedule of Services proposed by the District was discussed and accepted by the Parents. The IEP team agreed that the Student needed to receive 175 minutes each per week of ELA and Math special education services in the special education setting. The service minutes provided for ELA and Math were almost triple those provided for in the January 21, 2021, IEP.
- c. The District’s and the Parents’ proposed LRE for the Student was “to serve [the Student] in some combination of general education and special education settings with special education and related services.” The stated reason for this proposal was that the Student “needs a combination of large and small group instruction. The small group instruction is needed to reinforce concepts taught in the large group and provide [the Student] with opportunities to ask questions and get immediate feedback.” This proposal was accepted by the IEP team, including the Parents.

16. The documentation does not include any indication that the Parents have objected to the implementation of the Student’s September 12, 2022, IEP.

17. The documentation indicates that the Student received Extended School Year (ESY) services in the summer of 2023.

18. The Parents report that the Student’s 1st grade year (2022-2023) went very well and the Student “had an amazing first grade team.”

19. On August 2, 2023, the Parents met with the Student's General Education (GE) and Special Education (SE) teachers and report that they were pleased with several important accommodations that were already in place in the Student's classroom.
20. The Student began the current school year on August 3, 2023.
21. The Student's schedule for August – December 2023, indicates that the Student received one hour of related services (OT, SW, SLP, APE/PT, and SE) in the morning, 35 minutes of special education Math services just after noon, and adult assistance in the general education class for the rest of the Student's school day.
22. In early August, the Parent met with the Student's Special Education Instructional Leader (SEIL) and they agreed to schedule the annual review of the Student's IEP for September 8, 2023.
23. On August 23, 2023, the Parent reports that she met with the SEIL and the Student's SE teacher and discussed IEP goals for the Student's upcoming IEP team meeting. For ELA, the Parents proposed including a phonics goal and the District indicated that a core vocabulary goal for the Student was more appropriate. For Math they discussed including a counting with 1:1 correspondence goal. The Parent reports that the SEIL brought up the issue of small group instruction for the Student for ELA and Math. The Parent responded that research shows that students with disabilities have better educational outcomes when they are educated with non-disabled peers. The Parent reports that she stated that the Parents "prioritize an inclusive education for [the Student]."
24. The documentation, including the School's communication log, indicate that during the first three weeks of school the Student appeared to be adjusting to his schedule and did not appear to have significant reported behavior issues. During the last week of August and the first week of September, there were more reported incidents of off task behavior and focus issues as well as toilet training issues.
25. In early September 2023, the Parent and the SEIL exchanged several emails in which they discussed the issue of whether the Student should be on the New Mexico Alternate Assessment path rather than Common Core standard path. The Parent indicated that they were not ready to move the Student to Alternate Assessments yet.
26. The District provided a draft of the Student's IEP to the Parent at her request, and the Parent provided feedback and indicated that a phonics goal would be important for the Student and provided a sample reading goal.
27. During the week of September 5, the School reported daily incidents of dysregulation, refusal and maladaptive behavior by the Student.
28. On September 8, 2023, the Student's IEP team met for the annual review of the Student's IEP. The Student's September 8, 2023, IEP provides, in relevant part, as follows:
 - a. Eligibility: the Student's primary eligibility is: Multiple Disabilities.
 - b. Strengths/Concerns:

- i. Parents: The Student knows letter sounds and may be reading some. Parent Concerns that were noted include:
 - 1. Communication: it is difficult to know what the Student is thinking and what he knows;
 - 2. Reading: the Student will likely require more direct, explicit instruction than his typical peers;
 - 3. Math; and
 - 4. toilet training, self-feeding, dressing and hygiene.
 - ii. General Education: The Student continues to struggle with staying focused on the task at hand and completing anything independently, including using the restroom. Social interaction and communication with his peers in the classroom is difficult. Testing is difficult.
 - 1. Reading assessments: scores placed the Student at 1% or Level 1;
 - 2. Math assessments: scores placed the student at 1% for Level 1.
 - iii. Special Education: The Student works and learns best in a 1:1 learning environment and requires the use of a first/then token board to complete any and all tasks.
 - iv. SLP: The Student uses his communication device to make comments, answer questions or ask questions 10% or less of the time throughout his day, or 0-2 words within a 30-minute session.
 - v. Social Work: The Student needs support with increasing his ability to initiate and maintain engagement during social interactions.
 - vi. PT/APE: The Student needs adult assistance and guidance to move around the school campus and with gross motor activities.
 - vii. OT: The Student requires “moderate-max cueing/encouragement to complete and participate in tasks, improving with repetition.”
 - viii. CTVI: The Student has a visual diagnosis of Cortical Visual Impairment which causes difficulty visually identifying the most important features of the objects he is viewing. It was recommended that the Certified Teacher of the Visually Impaired (CTVI) conduct a Functional Visual Evaluation (FVE) and Learning Media Assessment (LMA) (combined FVELMA) to determine his visual needs within the academic setting.
- c. Present Levels of Academic Achievement:
- i. Reading: The Student has been receiving 175 minutes of special education reading instruction. The Student has been working on “identifying lowercase letters, letter sounds (initial sound of CVC words), and identifying 1st grade Dolch sight words. Based on classroom observation, when provided a field of 2 in a digital format, [the Student] is able to

identify uppercase letters with 80% accuracy, and he is able to identify lowercase letters with 60% accuracy. [The Student] is able to match letters (same to same, uppercase to uppercase, and lowercase to lowercase), with maximum prompting (5+ prompts). Additionally, according to classroom observation, when provided a field of 2 and a picture, in a digital format, [the Student] is able to accurately identify the beginning sound of a CVC word with 50% accuracy. When provided with maximum prompting (5+ prompts) and support, [the Student] is able to match the letters on sight word flashcards (matching same to same), but he has not shown the ability to identify or recognize the same sight words when provided a field of 2. Next steps for [the Student] in the area of Reading include core vocabulary word recognition and spelling of core vocabulary words.”

- ii. Math: The Student has been receiving 175 minutes of special education Math services. The Student has been working on “one-to-one correspondence to 20, identifying numbers 1-20, and adding within 20. Per his progress report notes from the end of the 2022-23 school year, [the Student] is able to identify numbers 1-11 from a field of 3 with 80% accuracy, and he is able to identify numbers 12-16 from a field of 2, with 70% accuracy. [The Student] is continuing to work on 1:1 correspondence, as well as adding, but he currently requires maximum support (5+ prompts). Based on classroom observation, [the Student] is currently able to match numbers (same to same) with moderate prompting (3-4 prompts). He is also able to sort objects based on color and shape with moderate prompting (3-4 prompts). [The Student] prefers to complete his learning activities in a digital format, but for Math, [the Student] has demonstrated the need to use tactile manipulatives while counting instead of counting items on the screen. Next steps for [the Student] in the area of Math include continuing to work on 1:1 correspondence through addition and subtraction with the use of counters, as well as continued instruction in the area of number identification of numbers 1-20.
- d. Annual Goals:
- i. Motor Skills: two objectives;
 - ii. Reading: new goal was changed from the previous goal of understanding letter sound correlation and spoken words, to reading and spelling 25 core vocabulary words, with two objectives;
 - iii. Math: the goal was changed from the previous goal of adding within 20, to adding and subtracting within 20, with three objectives;
 - iv. Functional/Social Communication: new goal with three objectives;

- v. Social/Life Skills: new goal with two objectives; and
- vi. Fine Motor/Self-Regulation Skills: similar goal with two objectives.
- e. Instructional Accommodations were updated and significantly increased in the areas of ELA, Math, Related Arts, Science and Social Studies.
- f. The Alternate Assessment box was not checked.
- g. Schedule of Services:
 - i. Special Education & Related Services:
 1. ELA services for 175 minutes/week in the SE Setting;
 2. Math services for 175 minutes/week in the SE Setting;
 3. Special Education Inclusion Services for 1120 minutes/week in the GE setting;
 4. Speech-Language, Small Group, individual and/or Group, for 60 minutes/week in the SE Setting;
 5. APE, Small Group individual and/or group, for 30 minutes/week in the SE Setting;
 6. Social Work, Small Group, individual and/or group setting for 30 minutes/week in the GE setting;
 7. PT, Small Group, individual and/or group, for 30 minutes/week in the SE Setting;
 8. OT, Small Group, individual and/or group, for 30 minutes/week in the GE Setting;
 - ii. Supplementary Aids and Services:
 1. Access to AT device and/or low-tech picture communication symbols, Daily, across all settings;
 2. Adult Assistance, Daily, across all settings; and
 - iii. Supports for School Personnel:
 1. Consultation for AT device implementation, programming, maintenance, training for teachers and paraprofessional support staff, 1x/month;
 2. SLP consult to staff, 15 minutes/week;
 3. DHH Consult to Staff, 30 minutes/week;
 4. CTSVI consultation to staff, 20 minutes/month; and
 5. AT consultation, 1x/year, as needed.
- h. Least Restrictive Environment (LRE):
 - i. Impact Statement: “[The Student’s] exceptionality interferes with developing an understanding of concepts and grade-level content, interferes with the acquisition of new skills/content, interferes with the

ability to initiate and maintain appropriate social interactions with peers and/or adults, and it negatively impacts oral expression.”

- ii. Continuum of Alternative Placements:
 1. The Student cannot be served 100% in the general education setting: Due to the Student’s below-average writing, reading and math skills, his academic needs cannot be met in the general education setting alone;
 2. Combination of general education and special education settings. “Due to [the Student’s] significant processing deficits, [the Student] needs small group instruction that breaks classroom assignments down into smaller steps, allows for frequent review of materials, and builds in individualized organizational strategies for work completion. [The Student] will receive specially designed instruction in a special education setting for a portion of the school day.”
 3. The placement in the general education setting is reduced or limited. “The grade-level standards for the [Student’s] assigned grade level exceed his present level of educational performance; therefore, the [Student] requires a structured, specialized environment to close the gap as the [Student] would not benefit satisfactorily from instruction within the general education setting.”
 - iii. Consideration of any potential harmful effect on the Student: “The IEP team, including parents, agree that the benefits in selecting the above LRE outweigh the potential harmful effects on the [Student] or on the quality of services that the [Student] needs.”
 - i. The IEP states that the following individuals attended the Student’s September 8, 2023, IEP team meeting: the Student, both Parents, District Representative, Special Education Teacher, General Education Teacher, Evaluation Representative, SLP, Related Services Provider, SSW, APE, PT, AT, DHH, CTVI, and a second AT, for a total of 16 individuals.
29. The PWN provided by the District to the Parents regarding the Student’s September 8, 2023, IEP provides, in relevant part, as follows:
- a. The Parents proposed that the team focus on developing the Student’s independence and reducing his prompt/adult dependence, which was accepted by the IEP team.
 - b. The IEP team agreed with the District’s proposal to conduct a FVALMA of the Student.

- c. The team discussed the District's proposed ELA goal/objectives. The Parent proposed that the goal/objectives focus on explicit phonics instruction, which was rejected by the District because "[the] time of 175 minutes/week limits the amount of skills that can be explicitly taught in the SE setting." The team eventually agreed that phonics can be embedded into the objectives and the team updated the District proposed goal and accepted it. The Parents agreed that they do not want to overwhelm the Student with too many rules which could happen with a structured, fast-paced phonics program. The parents will look into private tutoring to focus on phonemic awareness, outside of the school.
 - d. The Parents agreed with the Math goal proposed by the District.
 - e. The District proposed having the Student participate in the Alternate Assessment. The Parents wanted to have further discussion about the Alternate Assessment and the team agreed to meet in the spring to discuss this topic again.
 - f. The District proposed adding more special education support in the small group setting for the Student. The Parents indicated that they "would like [the Student] to continue receiving SE support in the GE setting for a majority of his day. They stated that if a more restrictive setting is going to be considered, they would like to ensure that all strategies have been implemented and that growth has not been seen." The IEP team rejected the District's proposal for more SE support at that time.
 - g. The Parents accepted the District's proposed schedule of services, as set forth in the September 8, 2023, IEP.
 - h. The Parents agreed to waive the 5 school day waiting period of prior written notice before implementing the IEP so the District implemented the IEP on September 8, 2023.
30. During September 2023, the documentation indicates that the Student continued to have instances of difficulty staying on task, completing tasks, work refusal and frustrated behavior, such as tearing a book during Social Work, fighting his aides to change him, striking out at staff with increasing frequency and difficulty with transitions. However, the Student's teacher also informed the Parent that the communication log from the school does not fully capture his day, and that the Student has good days and lots of positive interactions across his day.
31. The Parent reports that based on documentation of continued escalation of physical aggression by the Student, the Parents sent an email to the SEIL and the Student's teacher on September 18, 2023, requesting an FBA. The District agreed to conduct an FBA.
32. On September 26, 2023, the Parent signed consent for the FBA.
33. On October 6, 2023, the Parent signed and returned a consent for the Student's FVALMA that the IEP team had previously agreed to conduct.

34. On October 25, 2023, the Student had the first of four vision assessments conducted as part of the vision assessment.
35. The Student's FBA was conducted by an outside Board Certified Behavior Analyst (BCBA) during the month of October 2023. The BCBA completed the FBA report on October 31, 2023. The Parents report that they received a copy of the FBA from the BCBA and scheduled a time to meet with him to review the FBA and a proposed BIP.
36. On November 8, 2023, the Student received the second of four vision assessments.
37. The Parents and the District agreed for the Student's IEP team to meet on December 4, 2023, to review the Student's IEP.
38. On November 13, 2023, the Student tested positive for COVID for the second time in approximately five weeks, and due to his illness and Thanksgiving break the Student did not return to school until November 27.
39. On November 14, 2023, the Parents, the BCBA, the SEIL and the Student's teacher met to review the FBA and proposed BIP. District staff brought up the issue of providing services in a small group setting. The Parents and District staff report that the Parents asked the District to provide a written proposal for what they were suggesting including the pros and cons of such proposal. District staff agreed to do so prior to the upcoming IEP team meeting.
40. On November 15, 2023, at a parent/teacher conference District staff provided to the Parent a copy of the Student's Progress Report for Term 1. The Term 1 Progress Report for the 2023-2024 school year (2nd grade), and the Student's 2022-2023 and Term 1 of the 2023-2024 grade reports provide, in relevant part, as follows:

STUDENT'S PROGRESS REPORT

Year/Term	Motor Skills	Reading	Math	Functional/Social Comm.	Social/Life Skills	Fine Motor/Self-Regulation Skills
2023/2024 T1	Some Progress	Suff./Insufficient Progress	Insufficient Progress	Insufficient Progress	Insufficient Progress	Sufficient progress/mastered
Description	Student has some progress in walking further distances with less attempts to sit down	Sufficient progress in matching words to pictures. Insufficient progress using letter tiles to spell without max prompts and a model.	Insufficient progress identifying numbers 1-20. Insufficient progress adding within 20 using counters/visuals.	Student's interest and use of his AAC has greatly diminished, 2 or less spontaneous comments, increasingly turns body physically away from tasks and staff	Insufficient progress in selecting, requesting, and maintaining engagement with peers. Insufficient progress voiding in the toilet.	Sufficient progress in initiating and maintaining an efficient grasp. Mastery attending to non-preferred tasks.

STUDENT'S GRADE REPORTS

Year/Term	Reading	Writing	Math	Science	Social Studies	Art/Music/PE	Self Management
2022/2023 Y	1	1	1	3	3	2/3/2	1.5-3
2023/2024 T1	1	1	1	1	1	3/3/2	1-3

41. The Parents report that they were not aware of the Student's lack of progress and regression. The Parents report that they began their own assessment of the Student's

ability to identify numbers 1-20 from a field of three. The Parents report that at home the Student showed he could identify numbers 1-20 from a field of three with 85% accuracy and minimal (1-2) prompting.

42. On November 20, 2023, pursuant to the request of the Parents at the November 14 meeting, District staff met to discuss possible placement options for the Student and developed three options with their pros and cons to discuss with the Parents at the IEP team meeting. These options with their pros and cons were provided to the Parents on November 29.
43. On November 29, 2023, the Student had the third of his four vision assessments.
44. On November 29, 2023, the Parents sent a letter to School staff describing their concerns regarding the FBA/BIP.
45. On December 1, 2023, School staff emailed a draft of the FBA, BIP and Student's present levels for the IEP team meeting scheduled for December 4. The Parents provided feedback on the draft documents through a Parental Concern Letter sent on December 3, 2023.
46. On December 4, 2023, the Student's IEP team met to review the Student's IEP and the October 31, 2023, FBA and proposed BIP. The Functional Behavior Assessment Report was accepted by the team as written and provides, in relevant part, as follows:
 - a. Behaviors observed and/or reported by School Staff:
 - i. hitting with an open hand;
 - ii. throwing items (anything within reach);
 - iii. pushing over chairs;
 - iv. open hand slaps the adult/teacher away;
 - v. kicks adults when taking him to the bathroom and laughs but sometimes is angry;
 - vi. kicks his peers at recess when they try to play with him and laughs like he is playing; and
 - vii. plops to the floor.
 - b. Events that typically precede the problem behavior in the school setting:
 - i. directive or request from authority;
 - ii. unstructured setting;
 - iii. transition time;
 - iv. academic activity;
 - v. when asked to do a chore or helping tasks;
 - vi. when told to do something non-preferred;
 - vii. tasks that are difficult or confuse the student; and
 - viii. when he cannot have something he wants.
 - c. Events that typically follow the problem behavior in the school setting;
 - i. is removed from the setting;

- ii. receives attention;
 - iii. gets corrective feedback;
 - iv. help the student to get on task; student gets out of or delays doing work;
 - v. told “nice hands” and he must pick up whatever he has thrown;
 - vi. verbally correct the student privately;
 - vii. have the student take a break; and
 - viii. provide a reminder of what is and isn’t appropriate in class.
- d. Effectiveness of interventions on behavior (effectiveness rated 0 – 5):
- i. Positive reinforcers:
 - 1. use of technology = 2;
 - 2. teacher praise and social reinforcement (depends on the staff member) = 2;
 - 3. preferred tasks after completing nonpreferred tasks = 3; and
 - 4. structure and predictability = 4.5.
 - ii. Consequences:
 - 1. “When communicating his wants/needs, including tangibles, [the Student] will demonstrate challenging behavior to gain the want/need. When presented with a task that has poor reinforcing value to him and tasks that are difficult for him, [the Student] will demonstrate challenging behaviors to escape the task.”
- e. Analysis and recommendation:
- i. The presumed function or explanation of this behavior is:
 - 1. to get to communicate his wants/needs which may include accessing tangibles; and
 - 2. to escape tasks that have poor reinforcing value to him and that are difficult.
 - ii. Skill deficit: “It is believed that [the Student’s] challenging/maladaptive behaviors are directly linked to skills deficits in the areas of social communication, adaptability/flexibility, and social skills. These skills deficits are most likely related to his diagnosis as a person with an autism spectrum disorder. In addition, his poor expressive communication and receptive communication skills contribute to his issues with maladaptive behaviors.”
 - iii. Performance Deficit: “The maladaptive/challenging behaviors that [the Student] exhibits are not likely linked to performance deficits.
 - iv. Next Steps: a behavior intervention plan is warranted.

47. On December 4, 2023, following the review and acceptance of the October 31, 2023, FBA, the Student's IEP team reviewed and accepted the Suggested BIP written by the BCBA who conducted the FBA. The December 4, 2023, BIP provides, in relevant part, as follows:
- a. Problem Behavior:
 - i. "Vocal stimulations especially during heavy language instruction, frequency 10+ times per day, moderate to extremely disruptive."
 - ii. "Physical aggression (hitting with open palm, kicking, throwing stuff, frequency 1-3 times per day, intensity: mild to moderate."
 - iii. "Property destruction (swiping things off a desk), frequency hourly 10-15 times per day, intensity mild to moderate."
 - b. Target Goal: "Within an IEP year, [the Student] will express his emotions in an expected manner when he is frustrated in order to excuse himself from overwhelming tasks or situations on four out of five trials as recorded by IEP team data collection."
 - c. Intervention Strategies:
 - i. Environment and/or Circumstances:
 - 1. Classroom routine: "The classroom routine should be very predictable and structured. . . Staff should utilize his preference profile to include a structured system of reinforcement to ensure he understands why he should participate in academic tasks."
 - 2. Staff ratio: "[The Student] should have as much one to one assistance as possible, but staff need to ensure not to create prompt dependence and should encourage independence at every opportunity. . . A system of fading one to one assistance should be established and staff working with him should promote independence versus dependence (eliminating prompts) at every opportunity."
 - 3. Visual schedule/visual aids: "[The Student] has shown to have poor auditory/cognitive processing so expectations should be given to him in a visual format as much as possible paired with a verbal directive including what reinforcer he may be working for (e.g., 'first you have to do these matching activities then you can have your choice')."
 - ii. Curriculum and/or Instruction: "All curriculum and instruction for [the Student] needs to be very specialized and focused at his developmental level (while still being age-appropriate) due to the severity of his disabilities. A baseline of skills was taken from the ABLLS-R and staff working with him should strongly consider using this as a baseline for his

language and learning instruction. Tasks may need to be taught in a discrete format; he will often require reinforcement after each lesson, eventually moving to intermittent and unpredictable reinforcement schedules. Curriculum should be presented at the level where [the Student] is experiencing success. Expectations should be increased as he displays success. This relates to both the complexity of the task and the length of time required for [the Student] to engage in the task or activities. Task and instruction should be presented repetitively (until mastery) to increase his learning opportunities.”

iii. Other Strategies or Positive Supports: “Staff should use explicit reinforcement systems that are clear to him; at first, he will need a period of reinforcement after each work task. Activities for [the Student] should be relatively brief, highly structured and varied to avoid frustration/boredom to prevent problem behaviors. Errorless learning should be used to ensure success while making sure that a prompt fading plan is in place to ensure independence. Staff working with [the Student] should track behavior using a daily progress-monitoring sheet to monitor [the Student’s] performance in school. Contact with family should be frequent, timely, and focused on facts and solving problems (rather than blame).”

d. Rewards/Motivators: “[The Student] will feel greater control when he is a stakeholder in the environment and routine so staff should conduct regular reinforcer surveys. [The Student] needs to develop positive relationships with staff members and peers. This can be accomplished by staff pairing themselves with his preferred tangible reinforcers.”

48. Beginning on December 4, 2023, the Student’s IEP team met on four separate days (December 4, 7, 12 and 15) to review and revise the Student’s IEP. The Student’s revised IEP dated December 15, 2023, provides, in relevant part, as follows:

a. Eligibility: the Student’s primary eligibility: Multiple Disabilities.

b. Strengths/Concerns:

i. Parents: The Student knows letter sounds and may be reading some. Parent Concerns that were noted include:

1. Communication: it is difficult to know what the Student is thinking and what he knows;
2. Reading: the Student will likely require more direct, explicit instruction than his typical peers;
3. Math;
4. toilet training, self-feeding, dressing and hygiene.

- ii. General Education: The Student continues to struggle with staying focused on the task at hand and completing anything independently, including using the restroom. Social interaction and communication with his peers in the classroom is difficult. Testing is difficult.
 - 1. Istation Reading assessments: scores place the Student at 1% or Level 1;
 - 2. Istation Math assessments: scores placed the student at 1% or Level 1.
 - 3. NWEA (Fall): Reading: 108, 1st percentile; Math: 103, 1st percentile.
 - iii. Special Education: The Student works and learns best in a 1:1 learning environment and requires the use of a first/then token board to complete any and all tasks.
 - iv. SLP: The Student uses his communication device to make comments, answer questions or ask questions 10% or less of the time throughout his day, or 0-2 words within a 30-minute session.
 - v. Social Work: The Student needs support with increasing his ability to initiate and maintain engagement during social interactions.
 - vi. PT/APE: The Student needs adult assistance and guidance to move around the school campus and with gross motor activities.
 - vii. OT: The Student requires “moderate-max cueing/encouragement to complete and participate in tasks, improving with repetition.”
 - viii. CTVI: “The Student has a visual diagnosis of Cortical Visual Impairment which causes difficulty visually identifying the most important features of the objects he is viewing. The previously requested Functional Visual Evaluation (FVE) and Learning Media Assessment (LMA) to best determine his visual needs within the academic setting was then in progress as of 12/4/2023.”
- c. Present Levels of Academic Achievement:
- i. Reading: The Student has been receiving 175 minutes of special education reading instruction. The Student has been working on “identifying lowercase letters, letter sounds (initial sound of CVC words), and identifying 1st grade Dolch sight words. Based on classroom observation, when provided a field of 2 in a digital format, [the Student] is able to identify uppercase letters with 80% accuracy (21 letters), and he is able to identify lowercase letters with 60% accuracy (16 letters).” When provided a field of three in a digital format, [the Student] is able to accurately identify 8/26 lowercase letters and 10/26 uppercase letters. The Parent reports that the Student is able to identify his letters and sounds at home.

[The Student] is able to match letters (same to same, uppercase to uppercase, and lowercase to lowercase), with maximum prompting (5+ prompts). Additionally, according to classroom observation, when provided a field of 2 and a picture, in a digital format, [the Student] is able to accurately identify the beginning sound of a CVC word with 50% accuracy. When provided with maximum prompting (5+ prompts) and support, [the Student] is able to match the letters on sight word flashcards (matching same to same), but he has not shown the ability to identify or recognize the same sight words when provided a field of 2. “Based on classroom observation, while in the GE setting, [the Student] is able to follow classroom procedures and routines with maximum prompting (5+ prompts) and adult support. During language-heavy instruction, [the Student’s] vocal stimming increases dramatically. [The Student] has a difficult time attending to instruction. At this time, he is able to attend for up to 1 minute, with adult support.” The Student requires multiple re-directions and at various times becomes visibly frustrated by swiping everything off his desk, throwing items and turning around in his chair refusing to attend to task or instruction. “In a 1:1 setting, when working on IEP goals with the special education teacher, [the Student] is able to attend to task for up to 5 minutes, based on collected data. It is recommended to increase [the Student’s] time in a special education setting in order to increase his time on task and engaged in instruction, in order to address the regression that he is currently demonstrating.” Next steps for [the Student] in the area of Reading include core vocabulary word recognition and spelling of core vocabulary words, which will also reinforce his communication skills using his AAC device. “As of 11/30/23, [the Student] . . . Is currently able to read 9 core vocabulary sight words with 20% accuracy. . . [The Student] is unable to spell the 25 core vocabulary sight words. Insufficient progress has been made on this objective, largely due to regression and an increase in adverse behaviors. . . Supports and services currently or previously tried to improve his time on task and engagement during instruction in his current setting include: short instructions, visual aids, multi-sensory presentation, pre-teaching vocabulary utilizing Core Vocabulary, adapted books with tactile pieces, simplified vocabulary, modified and shortened assignments which target the critical function of GE grade-level curriculum, and continuous reward system throughout instruction. ” It is noted that the Parent believes that the Student’s insufficient progress and regression are not surprising given

the increase in the Student's adverse behaviors. The Parents "prioritize implementing the BIP over making changes to [the Student's] goals at this time."

- ii. Math: The Student has been receiving 175 minutes of special education Math services. The Student has been working on "one-to-one correspondence to 20, identifying numbers 1-20, and adding within 20. Per his progress report notes from the end of the 2022-23 school year, [the Student] is able to identify numbers 1-11 from a field of 3 with 80% accuracy, and he is able to identify numbers 12-16 from a field of 2, with 70% accuracy. [The Student] is continuing to work on 1:1 correspondence, as well as adding, but he currently requires maximum support (5+ prompts). Based on classroom observation, [the Student] is currently able to match numbers (same to same) with moderate prompting (3-4 prompts). He is also able to sort objects based on color and shape with moderate prompting (3-4 prompts). [The Student] prefers to complete his learning activities in a digital format, but for Math, [the Student] has demonstrated the need to use tactile manipulatives while counting instead of counting items on a screen. Based on classroom observation, while in the GE setting, [the Student] is able to follow classroom procedures and routines with maximum prompting (5+ prompts) and adult support. At this time, he is able to attend for up to 1 minute, with adult support. He requires multiple re-directions to task, and at various times throughout the school day, he becomes visibly frustrated. This behavior is displayed through swiping everything off his desk, throwing items across the classroom, and turning around in his chair refusing to attend to task or instruction. In a 1:1 setting, when working on IEP goals, [the Student] is able to attend to task for up to 5 minutes, based on collected data. It is recommended to increase [the Student's] time in a small group setting in order to increase his time on task and engaged in instruction. Next steps for [the Student] in the area of Math include continuing to work on 1:1 correspondence through addition and subtraction with the use of counters, as well as continued instruction in the area of number identification of numbers 1-20. As of 11/30/23, [the Student] has made insufficient progress on these objectives. At this time, [the Student] has displayed regression in number identification. He is currently able to identify numbers 1-20 from a field of 3, with 50% accuracy." It is noted that the Parent provided input stating that at home Parents have seen the Student consistently identify numbers 0-20 from a field of 3 with 85%-

100% accuracy and minimal prompts. The District's response was that the Student "is not generalizing the skill of number identification from home to school."

- d. Annual Goals:
 - i. Motor Skills: with two objectives;
 - ii. Reading: continued goal for reading and spelling 25 core vocabulary words, with two objectives;
 - iii. Math: the goal was continued for adding and subtracting within 20, with three objectives;
 - iv. Functional/Social Communication: continued goal with three objectives;
 - v. Social/Life Skills: modified goal with two new objectives;
 - vi. Fine Motor/Self-Regulation Skills: continued goal with three modified objectives.
- e. Instructional Accommodations were updated and increased in the areas of ELA, Math, Related Arts, Science and Social Studies.
- f. The Alternate Assessment box was not checked.
- g. Participation with non-disabled peers:
 - i. Lunch/Breakfast;
 - ii. Health Services;
 - iii. Recess/Passing Period;
 - iv. Extra-curricular Activities;
 - v. Special Interest Groups/Clubs sponsored by District;
 - vi. Assemblies;
 - vii. GE Transportation;
 - viii. Field Trips; and
 - ix. GE Counseling Services.
- h. Schedule of Services:
 - i. Special Education & Related Services:
 - 1. ELA services were increased to 450 minutes/week in the SE Setting;
 - 2. ELA inclusion services for 150 minutes/week in the GE Setting;
 - 3. Math services were increased to 250 minutes/week in the SE Setting;
 - 4. Math inclusion services for 125 minutes/week in the GE Setting;
 - 5. APE, Small Group individual and/or group, for 30 minutes/week in the SE Setting;
 - 6. Speech-Language, individual and/or Group, for 60 minutes/week in the SE Setting;

7. Social Work, individual and/or group setting for 30 minutes/week in the SE Setting;
 8. PT, Small Group, individual and/or group, for 30 minutes/week in the SE Setting;
 9. OT, individual and/or group, for 30 minutes/week in the GE Setting;
 10. Audiology, individual services for 60 minutes/year in the SE Setting;
 11. School Transportation, daily in the SE Setting; and
 12. Adult assistance for 493 minutes/week in the GE Setting.
- ii. Supplementary Aids and Services:
 1. Access to AT device (currently using Proloquo 2 Go 2) and/or low-tech picture communication symbols, Daily, across all settings;
 2. Adult Assistance (constant adult supervision with up to a 1:1 ratio, at times), Daily, across all settings; and
 - iii. Supports for School Personnel:
 1. Consultation for AT device implementation, programming, maintenance, training for teachers and paraprofessional support staff, 1x/month;
 2. SLP consult to staff, 15 minutes/week;
 3. DHH Consult to Staff, 30 minutes/week;
 4. CTVI consultation to staff, 20 minutes/month;
 5. Consultation for AT, 1x/year, as needed; and
 6. Training in evidence-based practices for students with autism, specifically in errorless learning, discrete trial, reinforcement systems/schedules, 1x/year+, as needed.
 - iv. Required Supports for Student Within a Special Education Setting:
 1. High Contrast Visuals;
 2. Large Size Visuals, 3 x 3 or 4 x 4;
 3. Use of Red and Yellow with dark background to gain visual attention;
 4. Consider placing items at an incline using a three ring binder or slant board;
 5. Adult assistance with up to a 1:1 ratio; and
 6. Adherence to the Behavior Intervention Plan.
 - i. Least Restrictive Environment (LRE):
 - i. Impact Statement: “[The Student’s] exceptionality interferes with developing an understanding of concepts and grade-level content, interferes with the acquisition of new skills/content, interferes with the

ability to initiate and maintain appropriate social interactions with peers and/or adults, and it negatively impacts oral expression.”

- ii. Continuum of Alternative Placements:
 1. The Student cannot be served 100% in the general education setting: “Due to the Student’s academic and functional needs, he requires highly individualized supports and modifications to meet his educational needs require [sic]; therefore, he requires a more specialized setting with less distractions that [sic] the general education setting can provide.”
 2. Combination of general education and special education settings: “Due to [the Student’s] academic and functional needs, he requires combination of large and small group instruction. Small group instruction in the special education setting is required in order to provide the following modifications to environment, curriculum/instruction and positive supports, which are in accordance with [the Student’s] identified strengths and needs as stated in the present levels of performance and the Behavior Intervention Plan:”
 - a. “Environment routine: [The Student] requires a classroom routine that is very predictable and structured.”
 - b. “Curriculum and Instruction: [The Student’s] curriculum and instruction needs to be very specialized and focused at his developmental level (while still being age-appropriate) due to the severity of his disabilities. Tasks that may need to be taught in a discrete format; he will often require reinforcement after each lesson, eventually moving to intermittent and unpredictable reinforcement schedules. Curriculum should be presented at the level where [the Student] is experiencing success. Expectations should be increased as he displays success. This relates to both the complexity of the task and the length of time required for [the Student] to engage in the task or activities. Tasks and instruction should be presented repetitively (until mastery) to increase his learning opportunities.”
 - c. “Positive Supports: [The Student] requires explicit reinforcement systems that are clear to him; at first, he will need a period of reinforcement after each work task. Activities for [the Student] should be relatively brief, highly

structured and varied to avoid frustration/boredom to prevent problem behaviors. Errorless learning should be used to ensure success while making sure that a prompt fading plan is in place to ensure independence.”

3. The placement in the general education setting is reduced or limited: “The grade-level standards for the [Student’s] assigned grade level exceed his present level of educational performance; therefore, the [Student] requires a structured, specialized environment to close the gap as the [Student] would not benefit satisfactorily from instruction within the general education setting. [The Student] is integrated into the general education setting for portions of ELA and Math structured daily, as well as Related Arts. Further reintegration in the general education setting is a priority and will be determined based on [the Student’s] progress on his IEP goals and objectives.”
 4. Consideration of any potential harmful effect on the Student: “There is the potential for [Student] to have reduced access to the general education curriculum, and there is also reduced access to peer modeling. Parents are concerned that [the Student] will be stigmatized by a significant increase in special education minutes, and he may lose connection with his classmates. Therefore, parents are concerned he may run the risk of becoming a visitor in the class rather than a member of the class. The IEP team, excluding parents, agree that the benefits in selecting the above LRE outweigh the potential harmful effects on the [Student] or on the quality of services that the [Student] needs.”
 - j. The IEP states that the following individuals attended the Student’s December 15, 2023, IEP team meeting: the Student, both Parents, District Representative, Special Education Teacher, General Education Teacher, Evaluation Representative, SLP, Related Services Provider, SSW, APE, PT, AT, DHH, CTVI, a second AT, State Ombudsman, District Elementary SE Director and Audiologist, for a total of 19 individuals.
49. The PWN provided by the District to the Parents regarding the Student’s December 15, 2023, IEP provides, in relevant part, as follows:
- a. The Student Profile was accepted as an accurate portrayal of Student’s strengths and needs.
 - b. Following the completion of the FVE and LMA assessments, the IEP team agreed to reconvene to discuss required additions to the IEP. The CTVI “noted that a lot

of movement and unpredictability in an educational setting can possibly negatively impact a student with a visual impairment because it is difficult to visually navigate random, unpredictable movement.” The team agreed to add the additional accommodations of a slant board, enlarged monitor, and presenting visual cues in the Student’s left field of vision.

- c. The IEP team adopted the October 31, 2023, FBA as written.
- d. The team determined that the suggested BIP is appropriate to meet the Student’s behavioral needs with positive support, and is designed to address vocal stimulation, physical aggression and property destruction across all school settings in a positive manner.
- e. The IEP team discussed Common Core standards versus Alternate standards. Alternate standards are directly aligned with the Common Core standards, and Alternate standards and Alternate assessments are dependent on each other. At that time, the District was modifying the Common Core standards with respect to the Student’s Annual Goals, and the assessment tools being used were NWEA and Istation.
- f. The Parent stated that Student’s “behaviors might be a result of toilet training as well as the assessments . . .” “The team discussed that an increase in academic rigor, assessments, as well as sensory stimulation (visual, etc.) might be contributing to the behaviors as well as the limited progress that is noted in the present levels of performance. The FBA and BIP include recommendations that are best implemented without a lot of distractions and can be implemented with fidelity.”
- g. The Parents proposed immediately implementing the BIP but this proposal was rejected because the District determined that the team needed to consider the remaining components of the IEP which will impact the implementation of the BIP before implementing individual components of the IEP.
- h. The IEP team meeting was tabled and reconvened on December 7, 2023.
- i. The team engaged in a discussion regarding small group SE settings, which means that there are no GE students in the group at that time. “Parent noted that as the setting becomes more restrictive, it seems to be a one-way street and it is difficult to get students back into the GE setting. District discussed that inclusive practices are a priority for each student in [the District]. [The District] offers a continuum of services, which include social communication programs, social skills programs, full inclusion, small group, etc. which are in accordance with the student’s IEP. The District stated that “meaningful inclusive practices are a priority of all District programs.”
- j. The IEP team meeting was tabled and reconvened on December 12, 2023.

- k. The IEP team discussed that when the Student is distracted he will play with saliva, raspberries, vocal stimming, rocking, turning away from task, and taking shoes off. The team agreed that these behaviors can be attributed to communication deficits. “The team discussed that when [the Student] is working in the small group setting he does not demonstrate the ‘off task’ behaviors as much. He will turn away, but won’t demonstrate as many of the above listed behaviors. These behaviors do increase when [the Student] is participating in Istation and NWEA assessments.”
- l. The District and Parent proposed and accepted allowing the Student to participate in the New Mexico Alternate Assessment. The team reviewed the Alternate Assessment Addendum. “Based on present levels of performance in home, school and the community, as well as evaluation/eligibility information provide sufficient data and documentation to support that [the Student] is eligible to participate in the NM Alternate Assessment and it is the most appropriate assessment for him at this time. . . The team discussed that with this addendum, [the Student] will be assessed by teacher/staff-created assessments.”
- m. The District proposed increasing the Student’s SE ELA service minutes to 450 minutes/week. This proposal was accepted. “Based on present levels of performance, the recommendations in the BIP, and data collected by the team, this time of SE ELA support is necessary to meet [the Student’s] educational needs.” It was further noted that “when [the Student] makes progress and his levels become closer to the general education curriculum, he will be integrated back into the general education class for core instruction. Supports in the general education classroom are not providing the level of instruction [the Student] needs at this time.” This proposal was objected to by the Parents who stated that “[h]earing, vision, and behavior need to be addressed before significant changes are made.” The Parent also pointed out that aggressive behaviors decreased when toilet training stopped, and that better engagement and communication has recently increased, which could allow the Student to be more receptive to instruction. The Parent proposed that ELA minutes should be increased more gradually to see at what point the Student’s improved receptivity to instruction allow him to be successful. The Parents also stated that “the Special Education teacher indicated that [the Student] has not necessarily been more successful or receptive to instruction within the SE classroom.” The District responded that the data shows that the Student’s “attention to task in the GE setting is 1 minute while attention to task in the SE setting is 5 minutes,” and the “only identified barrier of participation in the SE setting is specific to when [the Student] is required to Istation and NWEA.”

- n. The Parents proposed that the BIP be implemented in the GE setting prior to making significant changes to the Student's Schedule of Services in his IEP. The Parent's advocate, who is also a state Behavioral Ombudsman, "emphasized the importance of keeping [the Student's] environment consistent so the team can assess if the new BIP helps [the Student] in his current environment. This is especially important as [the Student] is a child with autism and is highly responsive to routines. If a significant change to [the Student's] environment coincides with the implementation of the BIP, any data collected might be measuring how well or poorly [the Student] is responding to the change in environment rather than to how [the Student] is responding to the interventions and approaches contained within the BIP." The District rejected the Parent's proposal and stated that "solely implementing the BIP in the GE setting will not provide [the Student] with an appropriate education. The grade-level standards for 2nd graders exceeds his present level of educational performance; therefore, [the Student] requires specialized instruction, including the BIP in a structured specialized environment to close the gap as [the Student] would not benefit satisfactorily from instruction within the general education setting with supplementary aids and services. District proposes increasing [the Student's] support in the small group, SE setting in order to support [the Student's] needs in all areas."
- o. The IEP team agreed to provide the Student's Social Work and SLP services in the small group SE setting.
- p. The District proposed to provide 250 minutes/week in the SE small group setting for Math support and 125 minutes/week in the GE setting for Math. Supports in the general education classroom are not providing the level of instruction the Student needs at this time. The District notes that when [the Student] makes progress and his levels become closer to the general education curriculum he will be integrated back into the general education class for core instruction. The Parent accepted the District's proposal to increase the Student's Math instruction minutes in the small group special education setting.
- q. The IEP team meeting was adjourned and reconvened on December 15, 2023.
- r. The Parents proposed that "significant changes not be made to [the Student's] schedule of services as the [District] audiologist is continuing to test and assess [the Student's] hearing. Once [the Student's] hearing changes are fully known, applicable environmental and instructional modifications and accommodations can be put into place." The District rejected the Parent's proposal. The Student has a history of the presence of fluid and negative pressure in his right ear. The Student's educational services has included appropriate accommodations and best practices for students who may be experiencing hearing differences due to

fluid, including short instructions, repeated instructions, visual aids, multimodal and/or multi-sensory presentation, pre-teaching of vocabulary, frequent models of picture symbols, and use of an AAC device. “Based on data as referenced in trimester 1 progress toward goals and the present levels of performance, core instruction in the general education classroom is not appropriate for the Student at this time despite the modification of curriculum, accommodations, and the provision of supplementary aids and services. Providing instruction, in accordance with the Student’s identified areas of need, in the general education classroom, would result in creating class-within-a-class which is not appropriate for [the Student] nor the other students in the classroom.”

- s. The IEP team reviewed the FVALMA report and its recommendations from the CTVI. “The team agrees that [the Student] requires a light board with backlighting. The environmental needs to include dimmable areas. Tactiles and visual reference are necessary for [the Student’s] visual needs. TVI presented that [the Student] would traditionally be in a separate setting with opportunities for a dimmed room and bright lights for his first exposure to content. When working in the GE setting, options could be wearing a hat or using a shadowbox.”
- t. In response to the request by the Parents, the District proposed a discussion of how the Student’s ELA work is modified in GE. The following summary was provided: “Elkonin boxes are used to build the Core vocabulary words, as the GE peers are listening to a story together (through the GE LEA curriculum), [the Student] is listening to a story on his device with visual supports. The team has attempted to read the books to him but [the Student] does not respond. The team has incorporated icons into the curriculum text. Books related to the unit theme from the library have been incorporated and trialed and [the Student] has not demonstrated attention or comprehension that is assessed in the GE classroom. [The Student] participates in calendar activities with core vocabulary and maximal adult support. [The Student’s] communication device has been used to model core vocabulary words.”
- u. The District proposed that the Schedule of Services set forth in the Student’s IEP, which includes a combination of general education and special education settings with special education and related services, constitutes the Least Restrictive Environment to serve the Student. “The team discussed alternatives, as listed in the above entries, and District has concluded that the schedule of services is appropriate to meet [the Student’s] needs.”
- v. The Parents proposed that the team describe what programming and potential outcomes will look like if the Student’s time within the special education classroom increases. “District described that the special education teacher and

related service providers will implement [the Student's] IEP and there will be peers at [the Student's] level to engage in during instruction.

- w. The District and the Parents agreed that the District will implement the revised IEP beginning on January 9, 2024.
 - x. The Parents retracted their agreement for the Student to participate in the Alternate Assessment. The Parents note "that this IEP changes many factors for [the Student]. Parents would like to eliminate one of those factors by leaving [the Student] on traditional assessment." The District indicated that the Student would be required to participate in Istation the following week and the District did not agree that this is what is best for the Student. The IEP team will need to discuss participation in state/district assessments when the team reconvenes in February.
50. On December 11, 2023, the Student had the last of his four vision assessments with the CTVI. On December 14, 2023, the CTVI provided a copy of the Student's completed Functional Visual Evaluation and Learning Media Assessment (FVELMA) report to the District and Parents. The evaluation report was completed 69 calendar days after the Parents provided consent. The Student's IEP team discussed the evaluation and the recommendations from the CTVI at the Student's IEP team meeting on December 15, 2023. The Parents met with the CTVI on December 20, 2023, to discuss the assessment with the CTVI. On December 22, 2023, the Parents and District received the finalized FVELMA report from the CTVI.
51. On January 8, 2024, the Parents filed their state complaint against the District. The Parents also requested a "stay put" be put into place to maintain the Student's previous placement pending the outcome of the state complaint. The District declined the stay put request.
52. On January 9, 2024, the District began implementing the Student's December 15, 2023, IEP.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to appropriately determine the educational placement of the Student in the Student's most recent IEP, by failing to ensure that the placement decision was made in conformity with the Least Restrictive Environment (LRE) provisions set forth in the IDEA and state rules, as required by 34 C.F.R. § 300.114 through 300.120; and 6.31.2.11 (C) NMAC, by:

- a. **failing to ensure that to the maximum extent appropriate, the Student is educated with children who are nondisabled, and that special classes, separate schooling, or other removal of the Student from the general educational environment occurs only if the**

nature or severity of the Student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, as required by 34 C.F.R. § 300.114; and 6.31.2.11(C) NMAC;

- b. failing to ensure that the placement decision for the Student was made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, as required by 34 C.F.R. § 300.116(a); and 6.31.2.11(C) NMAC;
- c. failing to give consideration to any potential harmful effect on the Student or on the quality of services that the Student needs, as required by 34 C.F.R. § 300.116(d); and 6.31.2.11(C) NMAC;
- d. failing to ensure that the Student was not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum, as required by 34 C.F.R. § 300.116(e); and 6.31.2.11(C) NMAC;
- e. failing to determine if the Student has a visual disability, which impacts the Student's ability to access education, ability to develop language or communication, social emotional development, and/or overall development prior to determining the Student's placement in the least restrictive environment, in compliance with 34 C.F.R. §§ 300.114 through 300.120 and 6.31.2.11(C) NMAC, as required by 6.31.2.11(L)(4)(d) NMAC.

In 1982, the U.S. Supreme Court held that "the Individuals with Disabilities Education Act establishes a substantive right to a 'free appropriate public education' for certain children with disabilities. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176 (1982). *Endrew F. v. Douglas County Sch. Dist.*, 580 U.S. 386 (2017); 69 IDELR 174, 177 (2017). Students with disabilities who are eligible under the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. § 300.1(a); 6.31.2.7(B)(20) NMAC. In 2017, the Court in *Endrew F.* further described what a FAPE requires, and the IEP process to provide a FAPE to an eligible student, as follows:

A FAPE, as the Act defines it, includes both "special education" and "related services." § 1401(9). "Special education" is "specially designed instruction ... to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child ... to benefit from" that instruction. 20 U.S.C. §§ 1401(26), (29). A State covered by the IDEA must provide a disabled child with such special education and related services "in conformity with the [child's] individualized education program," or IEP. 20 U.S.C. § 1401(9)(D).

The IEP is “the centerpiece of the statute's education delivery system for disabled children.” *Honig v. Doe*, 484 U.S. 305, 311 (1988). A comprehensive plan prepared by a child's “IEP Team” (which includes teachers, school officials, and the child's parents), an IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B) (internal quotation marks omitted). These procedures emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. 20 U.S.C. § 1414. The IEP is the means by which special education and related services are “tailored to the unique needs” of a particular child. *Rowley*, 458 U.S., at 181.

The IDEA requires that every IEP include “a statement of the child's present levels of academic achievement and functional performance,” describe “how the child's disability affects the child's involvement and progress in the general education curriculum,” and set out “measurable annual goals, including academic and functional goals,” along with a “description of how the child's progress toward meeting” those goals will be gauged. 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(III). The IEP must also describe the “special education and related services ... that will be provided” so that the child may “advance appropriately toward attaining the annual goals” and, when possible, “be involved in and make progress in the general education curriculum.” 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

Andrew F., 69 IDELR, at 177.

The Tenth Circuit Court has characterized the obligation to educate disabled children in the least restrictive environment (“LRE”) in which they can receive an appropriate education as one of the most important substantive requirements of the IDEA. *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 977 (10th Cir. 2004) (quoting *Murray v. Montrose County School District RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995), *cert. denied*, 516 U.S. 901 (1995) (citations omitted). However, the school district is required by statute and regulations to provide an appropriate education, not the best possible education or the placement the parents prefer. *O’Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 708 (10th Cir. 1998).

All of the issues raised by the Parents in this complaint investigation are related to the decision by the Student’s IEP Team to change the Student’s placement in the December 15, 2023, IEP. The identified issues are both substantive and procedural in nature. The first issue deals specifically with whether the placement decision was made in conformity with the LRE provisions set forth in the IDEA and State rules. The IDEA Federal regulations and State rules require each public agency to ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled, and that special classes, separate schooling, or other removal of children with

disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes, with the use of supplementary aids and services, cannot be achieved satisfactorily. 34 C.F.R. § 300.114 (a); and 6.31.2.11(C)(2)(a) NMAC. However, full inclusion is not required for all students with disabilities. In *Letter to Wohle*, 50 IDELR 138 (OSEP 2008), the Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA's provision on mainstreaming students with disabilities into general education classrooms is a strong preference rather than a mandate. The regular education environment may not be the appropriate placement option for each child with a disability, but districts cannot remove students with disabilities from the general education environment merely because they require modifications of the general education curriculum. *St. Louis Developmental Disabilities Treatment Ctr. Parents' Assoc. v. Mallory*, 556 IDELR 117 (W.D. Mo. 1984), *aff'd*, 557 IDELR 104 (8th Cir. 1985); *Lachman v. Illinois State Bd. of Educ.*, 441 IDELR 156 (7th Cir. 1988), *cert. denied*, 111 LRP 7412, 488 U.S. 925 (1988); and *DeVries v. Fairfax County Sch. Bd.*, 441 IDELR 555 (4th Cir. 1989).

The term "inclusion" is commonly understood to mean that a student with disabilities receives at least portions of his education in the regular education classroom. "Full inclusion" is the placement of the student in the mainstream general education setting for the entire school day, with all activities delivered in that environment. There are some slight differences between the terms "inclusion" and "mainstreaming" which are important to note. One due process hearing officer highlighted the subtle differences between the two terms by noting:

Although not defined by statute or regulation, the term "inclusion" is generally recognized by educators to mean the placement of a child with a disability in a regular education class with the child's age-appropriate peers. The child with a disability receives appropriate special education services to support his or her placement in the regular education class, while working towards the achievement of his or her IEP annual goals. Inclusion should not be confused with mainstreaming, which is the placement of a child with a disability in a regular education class with the expectation that he or she will meet the curriculum requirements for the class, with supplementary aids and services.

Board of Educ. of the City Sch. Dist. of the City of Rochester, 26 IDELR 823 (SEA NY 1997).

If a child can't receive FAPE in a full inclusion setting, a district may place the child in a more restrictive environment. However, that placement must have the capacity to carry out all services set forth in the student's IEP. Federal regulations and State rules require that "each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The continuum must include the alternative placements listed in the definition of special education under § 300.39

(instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.” 34 C.F.R. § 300.115; and 6.31.2.11(C)(2)(b) NMAC. The IDEA and implementing regulations do not define the terms "resource room" or "itinerant instruction." They merely mention these terms as examples of supplementary services that can be provided in conjunction with regular education. *Letter to Copenhaver*, 25 IDELR 1213 (OSEP 1997). The term "itinerant" instruction generally refers to a variety of services, which can be offered at various locations throughout the school building. A "resource room" is a specially equipped and staffed classroom in a regular school in which students with disabilities spend part of their day receiving individualized instruction or skills remediation with the balance of the day spent in a regular classroom. See *New Haven Bd. of Educ.*, 110 LRP 4313 (SEA CT 10/30/09). Even though a mainstreaming preference clearly exists, maintaining a less restrictive environment at the expense of educational benefit or safety is neither appropriate nor required. See *Hartmann v. Loudoun County Bd. of Educ.*, 26 IDELR 167 (4th Cir. 1997), *cert. denied*, 111 LRP 18076 , 522 U.S. 1046 (1998).

The Tenth Circuit Court (which includes New Mexico) applies the two-part test from *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989), to determine whether a school district has complied with the IDEA's LRE requirement. See *T.W. v. Unified Sch. Dist. No. 259*, 136 F. App'x 122, 127 (10th Cir. 2005)("In determining whether a school district has complied with the LRE mandate, we follow the so-called *Daniel R.R.* test."); *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 977 (10th Cir. 2004)("[T]his court is persuaded by the *Daniel R.R.* test and by the reasoning of the other circuits who have adopted it."); See also *Hernandez v. Lujan Grisham*, 508 F. Supp. 3d 893 (D. N.M. 2020). In applying this test, the task is "not to second-guess state and local policy decisions," but to evaluate "whether state and local school officials have complied with the act." *Daniel R.R.*, 874 F.2d at 1048.

The first prong of the *Daniel R.R.* test asks "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child." *Daniel R.R.*, 874 F.2d at 1048. The Tenth Circuit LRE standard includes at least five factors to consider when analyzing the first prong of the test: (1) whether the district has taken steps to accommodate the child with disabilities in regular education (by providing supplementary aids and services or modifying its regular education program); (2) whether these efforts were sufficient or token (the requirement that districts modify and supplement regular education is broad; however, districts need not provide every conceivable supplementary aid or service to assist the child. Likewise, mainstreaming would be pointless if instructors were forced to modify the regular education curriculum to the extent that the child is not required to learn any of the skills normally taught in regular education.); (3) whether the child will receive an educational

benefit from regular education. However, academic achievement is not the only purpose of mainstreaming. Integrating a handicapped child into a nonhandicapped environment may be beneficial in and of itself; (4) the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education (since, on the one hand, the nonacademic benefit that the child receives from mainstreaming may tip the balance in favor of mainstreaming, even if the child cannot flourish academically; while on the other hand, mainstreaming may not provide an education that is attuned to the child's unique needs); and (5) the effect the child's presence has on the regular classroom environment and, thus, on the education that the other students are receiving. *Id.* at 1048.

The second prong of the test asks "if [education] cannot [be achieved satisfactorily in the regular classroom] and the school intends to provide special education or to remove the child from regular education, whether the school has mainstreamed the child to the maximum extent appropriate." *Daniel R.R.*, 874 F.2d at 1048. The IDEA and its regulations "do not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services." 34 C.F.R. § 300.551; *Lachman*, 813 F.2d at 296 n. 7 (citing *Wilson v. Marana School District No. 6 of Pima County*, 735 F.2d 1178, 1183 (9th Cir. 1984)). Thus, the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops. If the school officials have provided the maximum appropriate exposure to non-handicapped students, they have fulfilled their obligation under the [IDEA]." *Daniel R.R.*, 874 F.2d at 1048.

With respect to the District's placement decision for the Student in the December 15, 2023, IEP, the issue at hand is not whether the District erred in removing the Student from a full inclusion or mainstreamed placement in the general education classroom. The Student was already receiving Math and ELA special education services and other related services in the special education setting prior to the current change of placement. The issue is whether removing the Student from the general education setting by significantly increasing the Student's time in the small group special education setting is the student's LRE and is necessary for the Student to receive FAPE.

In applying the facts set forth above to the first prong of the *Daniel R.R.* test, the complaint investigator makes the following conclusions: (1) It is concluded that the District did take steps to accommodate the Student in the general education classroom by significantly modifying the 2nd grade core curriculum, providing a full-time 1:1 aide, providing a significant number of

classroom accommodations and providing a broad range of supplemental aids and services such as alternate modes of communication including an AAC device, sign language, picture boards and visual schedules, accommodations for the Student's hearing and vision deficits such as tactile teaching methods, pre-teaching, multi-modal and/or multi-sensory presentations, and frequent models and picture symbols. (2) It is concluded that the District may not have provided every conceivable supplementary aid or service, but the District's efforts have not been token. (3) It is concluded that the Student was not receiving an appropriate educational benefit under the September 12, 2023, IEP. The Student is extremely behind his 2nd grade peers in ELA and Math according to his Istation and NWEA assessments (both at 1%). The stress from taking these assessments appears to be a contributing factor to the Student's negative behavioral issues. The Student's academic Annual Goals are significantly modified from the 2nd grade Common Core standards that his nondisabled peers work on for ELA and Math. The Student's teachers all describe the Student's present academic level as pre-primer, which is a pre—preschool level, far removed from the 2nd grade core curriculum. The Student's Progress Reports and grades clearly indicate that the Student is making insufficient progress on his academic and functional Annual Goals. (4) It is concluded that the Student does receive some nonacademic benefits from the general education classroom, such as interactions with and modeling from peers. It is reported by Parents and school staff that other students do attempt to socially engage with the Student. However, teachers report that these benefits are limited because of the Student's lack of engagement with his peers due to limited social skills and the fact that he is nonverbal and communication is very difficult between the Student and his peers. (5) It is concluded that the Student's effect on the regular classroom environment is mixed. The Student has had some reported positive interactions with his peers, which appear to always be initiated by peers rather than by the Student. However, the Student also exhibits frequent vocal stimming, task refusal, a lack of appropriate social interactions, and some physical aggression with peers and staff. The Student does have Functional/Social Communication and Social/Life Skills goals on which he is working. Finally, weighing all of the above factors together, it is concluded that the Student cannot presently be satisfactorily educated solely, or at the level provided for in the Student's September 8, 2023 IEP, in the regular education classroom with use of supplemental aids and services.

With respect to the second prong of the *Daniel R.R.* test, it is concluded that the District has mainstreamed the Student to the maximum extent appropriate. The Student's IEP provides for 125 minutes per week of Math and 150 minutes per week of ELA services, as well as Science, Social Studies and Related Arts, in the general education setting. Moreover, the Student is with his nondisabled peers for lunch, recess, extracurricular activities, special interest groups, assemblies, field trips and transportation. The IEP also indicates that the Student's schedule will be reevaluated and revised when the Student's progress makes it possible to integrate him back into the general education classroom. It should be noted that the Student is still receiving

instruction aligned with the Common Core standards and not under the Alternate Assessment. The District has proposed a change to the Alternate Assessment, but the Parents have indicated they are not yet ready to agree with that change.

The IDEA Federal regulations and State rules provide that in determining the educational placement of a child with a disability the District must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and must consider any potential harmful effect on the child or on the quality of services that he or she needs. 34 C.F.R. § 300.116(a) and (d); and 6.31.2.11(C) NMAC. With respect to the many EDT and IEP team meetings that were conducted to determine the Student's placement in the September 8, 2023, and December 15, 2023, IEPs, the facts set forth above provide that there were up to 19 individuals at these meetings. In addition to the Parents, GE teacher, SE teacher and District Representative, the following licensed professionals participated in the meetings: Evaluation Representative, SLP, Related Services Provider, SSW, APE, PT, AT, DHH, TSVI, a second AT, District Elementary SE Director and Audiologist. At the IEP meetings in December 2023, the Parents were also represented by an experienced professional from the State Ombudsman's office. It is concluded that the foregoing group of individuals were knowledgeable about the Student, the meaning of the evaluation data and the placement options available for the Student.

The Student's December 15, 2023, IEP and the corresponding PWN provided to the Parents, document lengthy discussions by the IEP team regarding the potential harmful effect of the team's placement decision on the Student. "There is the potential for [Student] to have reduced access to the general education curriculum, and there is also reduced access to peer modeling. Parents are concerned that [the Student] will be stigmatized by a significant increase in special education minutes, and he may lose connection with his classmates. Therefore, parents are concerned he may run the risk of becoming a visitor in the class rather than a member of the class. The IEP team, excluding parents, agree that the benefits in selecting the above LRE outweigh the potential harmful effects on the [Student] or on the quality of services that the [Student] needs." It is concluded that the Student's IEP team did consider the potential harmful effects of the placement decision on the Student.

It should be noted that in making the above factual findings the complaint investigator has reviewed and relied upon the extensive documentation provided by the District and the Parents. The investigator has also relied upon the written and oral reports of the District staff who work with the Student as well as the written and oral reports by the Student's Parents. The Investigator has found the District staff and the Parent's statements to be credible. It is evident that the District staff and the Parents are very invested in the education of the Student. The Parents have been, and are, very strong advocates for the Student. One of the concerns expressed by the

Parents is that they have documented the Student's letter and number recognition and 1:1 correspondence when working with the Student at home to sometimes be higher than the results reported by District staff when the Student is assessed in the school environment. However, these results can both be accurate, and the reason for the difference may stem from several factors such as very different environmental conditions, and differences in behavior, at home versus at school. It appears that accurately assessing what the student knows is critical, and is going to continue to be a big challenge for those working with the Student, going forward.

Therefore, in view of the foregoing facts and legal authorities, it is concluded that the District has not failed to ensure that to the maximum extent appropriate, the Student is educated with children who are nondisabled, and that special classes, separate schooling, or other removal of the Student from the general educational environment occurs only if the nature or severity of the Student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. It is further concluded that the District did not fail to ensure that the placement decision for the Student was made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. It is further concluded that the District did not fail to give consideration to any potential harmful effect on the Student or on the quality of services that the Student needs. It is further concluded that the District did ensure that the Student was not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

As to Issues Nos. 1(a) 1(b), 1(c) and 1(d), the District is not cited.

The Parent's Complaint alleges that the District failed to determine if the Student has a visual disability prior to determining the Student's current placement. The facts set forth above show that prior to the beginning of the 2023-2024 school year, the Student had been diagnosed with a CTVI. During ESY for the Student during the Summer of 2023, the DHH teacher noted that the Student seemed to respond to strategies designed for students with visual impairments. On September 8, 2023, the SE teacher proposed conducting a FVELMA to determine the Student's visual needs. The Parent provided consent for this evaluation on October 6, 2023. The FVELMA was completed on December 14, 2023, and a copy was provided to the District and the Parent on that date. The Student's IEP team met to finalize the IEP on December 15, 2023, and the PWN provides that the IEP team discussed the FVELMA on that day. The recommendations of the CTVI were discussed and accepted by the IEP team and were included in the Student's IEP. However, the Student's Eligibility Determination Team (EDT) had not yet met to review the FVELMA report to formally determine eligibility.

With respect to special education evaluations, the State rules provide that after obtaining written consent from parents to evaluate their child, the district must complete the evaluation and then

convene the student's EDT within 15 school days to determine eligibility for special education services. 6.31.2.10(J)(1) NMAC. A copy of the evaluation report must be provided to the parents no less than two days prior to the EDT meeting. 6.31.2.10(G)(4) NMAC. The student's IEP team must meet thereafter to determine the Student's appropriate placement in the LRE. In reviewing the foregoing facts, it is concluded that the District completed the FVELMA within a reasonable time under the circumstances and the Student's IEP team did receive and discuss the results of the evaluation during the IEP team meeting on December 15, 2023. The team agreed to include the CTVI's recommendations from the evaluation in the Student's IEP. Moreover, at the time that the Parents filed their Complaint on January 8, 2024, the District was not in violation of the requirement to convene the EDT to determine eligibility for special education services because only six school days had elapsed since the evaluation was completed. The District is certainly obligated to hold an EDT meeting to determine eligibility for the Student and then if appropriate conduct an IEP team meeting to determine the services needed by the Student, but those activities are outside of the investigatory window of this complaint investigation.

Therefore, it is concluded that the District did not fail to determine if the Student has a visual disability prior to determining the Student's placement in the LRE.

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

Issue No. 2

Whether the District predetermined the Student's placement decision by: failing to afford the Parents an opportunity to participate in meetings with respect to the educational placement of the Student and the provision of FAPE to the Student, as required by 34 C.F.R. §§ 300.501(b) and (c) and 300.327; and 6.31.2.11(B)(2) NMAC.

The Parents have raised a procedural argument that the District predetermined the placement of the Student in special education classes for ELA and Math, such that the Parents had no meaningful participation in the process. This argument is not supported by the findings of fact set forth above. The facts show that the Parents were afforded full and meaningful participation in the IEP development and implementation process. The Parents received almost daily communication with school staff. The Parents participated in all of the many IEP team meetings that were held during the 2023-2024 school year, as well as parent-teacher conferences and other ad hoc meetings with school staff. The documentation does indicate that school staff members met on many occasions without the parents. However, these meetings were not IEP team meetings but were planning meetings that school staff are entitled to hold without parents. In particular, the meeting of District staff on November 20, 2023, to discuss and develop various placement options, with their pros and cons, to propose to the Parents at the December 2023, IEP team meetings was held with the knowledge of, and at the request of, the Parents. It is

evident from the facts that very lengthy discussions took place at the December 2023, IEP team meetings regarding these proposals and counterproposals. Many proposals by the Parents were accepted by the team. Therefore, it is concluded that the District did not predetermine the placement decision ultimately set forth in the Student's December 15, 2023, IEP.

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

Issue No. 3

Whether the District's actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE), in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

An allegation of a denial of FAPE to a disabled student can be based on either substantive grounds or procedural violations of the IDEA. 20 U.S.C. § 1415(f)(3)(E). *Hendrick Hudson Central School Dist v. Rowley*, 458 US 176; 102 S Ct 3034; 73 L Ed 2d 690 (1982); *Sytsema v. Academy School District No. 20*, 538 F.3d 1306 (10th Cir. 2008). "The IDEA also sought to maximize parental involvement in educational decisions affecting their disabled child by granting parents a number of procedural rights. For example, parents are entitled to: (1) examine all records relating to their child, 20 U.S.C. § 1415(b)(1); (2) participate in the IEP preparation process, *Id.*; (3) obtain an independent evaluation of their child, *Id.*; (4) receive notice before an amendment to an IEP is either proposed or refused, §1415(b)(3); (5) take membership in any group that makes decisions about the educational placement of their child, §1414(f); and (6) receive formal notice of their rights under the IDEA, §1415(d)(1)." *Ellenberg ex rel. S.E. v. New Mexico Military Institute*, 478 F.3d 1262 (10th Cir. 2007). The IDEA's "procedural guarantees are not mere procedural hoops through which Congress wanted state and local educational agencies to jump. Rather, the formality of the Act's procedures is itself a safeguard against arbitrary or erroneous decision making." *Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036, 1041 (5th Cir. 1989) (internal quotation marks omitted).

However, proving a procedural violation is only a first step to obtaining relief. In *Sytsema*, the court held that an "IEP's failure to clear all of the Act's procedural hurdles does not necessarily entitle a student to relief for past failures by the school district." *Sytsema*, 50 IDELR at 216; quoting *Garcia v. Bd. Of Educ. Of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1125-26 & n.4 (10th Cir. 2008) ("[O]ur precedent hold[s] that procedural failures under IDEA amount to substantive failures only where the procedural inadequacy results in an effective denial of a FAPE."); quoting *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996) (holding that a procedural failure did not entitle a student to relief because that deficiency did not result in the denial of a FAPE). Congress provided in the 2004 amendments to the IDEA that to find a

denial of FAPE based on a procedural violation, the procedural violation must have: (1) impeded the student's right to a FAPE, (2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or (3) caused a deprivation of educational benefits. 34 C.F.R. § 300.513(a)(2).

It has been concluded above that the Student's FVELMA evaluation and evaluation report were completed in a timely manner by the District and reviewed and considered by the Student's IEP team at the December 15, 2023, IEP team meeting. The facts indicate that the parties were immediately given access to the report and the team discussed and considered it during the IEP team meeting in which placement was determined by the team. The Parents received the evaluation report before placement was determined and more than two days prior to an EDT meeting to determine eligibility. The facts also establish that the Student was not deprived of any educational benefit due to the School's evaluation process. The IEP includes accommodations recommended by the CTVI. Therefore, it is concluded that the District's actions and/or omissions towards the Student did not result in a denial of a FAPE for the Student.

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

This report constitutes the New Mexico Public Education Department's final decision regarding this complaint.

Investigated by:

/s/ Wallace Calder

Wallace J. Calder, Esq.

Complaint Investigator

Reviewed by:

/s/ Miguel Lozano

Miguel Lozano, Esq.

Chief Counsel, Office of Special Education

Reviewed and approved by:

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Margaret Cage, Ed.D.

Director, Office of Special Education