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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION
Complaint Resolution Report
Alamogordo Public Schools
Case No. 2324-43
April 5, 2024

This Report does not require corrective action.

On February 27, 2024, a complaint was filed with the New Mexico Public Education Department's (PED) 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;
- interview with the Parent and the Complainant on March 27, 2024; and
- research of applicable legal authority.

Limits to the Investigation

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

Issues for Investigation

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

1. Whether the District failed to identify and evaluate Student when District was on notice that Student may have a disability and be in need of special education and related services, in violation of 34 C.F.R. § 300.111 and 6.31.2.10(A) and (D) NMAC.
2. Whether the District failed to conduct an initial evaluation upon request from the Parent to determine if the Student qualifies as a child with a disability, in violation of 34 C.F.R. § 300.301 and 6.31.2.10(D) NMAC.
3. Whether the District failed to provide prior written notice (PWN) of its refusal to conduct an initial evaluation after the Parent’s request for same, in violation of 34 C.F.R. § 300.503 and 6.31.2.10(D)(4)(b) NMAC.
4. 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. During the 2022-23 school year, the Student was in the first grade and attended a different district within the State. The then-current district had developed a 504 Accommodation Plan for the Student, in part, due to an Attention-Deficit/Hyperactivity Disorder (ADHD) diagnosis.

2. In April 2023, the Parent submitted documentation to register the Student to attend the District elementary school for the 2023-24 school year. The Student's registration was approved in July 2023.
3. The first day of school was August 11, 2023. The Student began their second-grade year.
4. On August 23, 2023, the District held a meeting with the Parents to develop a new 504 plan. The 504 Plan indicates the Student has ADHD that impacts their concentration. Accommodations were included to utilize in the general education classroom to assist the Student in maintaining focus.
5. On October 24, 2023, the Parent told the District the Student would attend counseling every week for one hour, resulting in removal from school. The Parent indicated in an email to the District that they were "in the process of exploring diagnosis and treatment for potential mood and/or anxiety disorder[s]." The Parent told the Investigator that the Student's pediatrician recommended the Student attend counseling due to destructive behaviors towards Parents.
6. In a letter dated November 7, 2023, the Student's Psychiatrist formally diagnosed the Student with ADHD and Oppositional Defiant Disorder (ODD). The recommendations included parent management training and parent-child interactional therapy. There was no mention as to how the Student's diagnoses may impact the school environment or a recommendation for a special education evaluation. The letter was provided to the school nurse to track the Student's medications.
7. On January 17, 2024, the Parent emailed the District requesting an initial evaluation in the areas of cognitive testing, academics, occupational therapy (OT), executive function, social emotional, adaptive and behavior, and speech language.
8. The Student was referred to the Student Assistance Team (SAT) and an observation took place on January 18, 2024. The observation concluded the Student's performance was "the same" or "average" compared to their peers.
9. A 504 meeting was held on January 18, 2024 and the 504 plan was amended to include accommodations to assist the Student with their emotional regulation.
10. On January 25, 2024, an outside OT examination report was provided to the District. Relevant portions of the report include:
 - a. The Student was referred to OT for worsening meltdowns, tantrums, and anger.
 - b. The Parent reported that the Student has poor sensory and emotional regulation skills resulting in emotional outbursts that interfere with the safety of the Student and those around them. For example, the Student hit a peer at school, tried to get out of a moving car, kicks/throws things, etc.
 - c. The Parent reports the behaviors interfere with the Student's ability to participate at school and in the community.
11. A prior written notice (PWN) dated January 26, 2024 states, in part:

- a. The District rejects the proposal to complete cognitive and academic testing on the Student because the Student is performing better or equal than 38% of their peers in math and better or equal than 89% of their peers in reading and no areas of deficit have been identified.
 - b. The District rejects the proposal to conduct an OT evaluation for the following reasons:
 - i. The outside OT evaluation provided was reviewed and the special education department determined there is a lack of evidence to support the educational impact of fine motor, sensory, and written expression;
 - ii. Outbursts or incidents in which the Student has difficulty managing emotions or their sensory needs are mild, “few and far between,” and easily managed by the classroom teacher; and
 - iii. Student is supported by a 504 plan should the Student need support.
 - c. The District rejects the proposal to complete an executive function assessment because deficits have not manifested in the school environment.
 - d. The District rejects the proposal to complete a social emotional assessment because there are no behavior concerns that warrant a functional behavior assessment (FBA).
 - e. The District rejects the proposal to complete an adapted behavior assessment because the Student does not demonstrate deficits in communication, socialization, daily living skills, or cognitive functioning that significantly impacts their ability to access the general education environment.
 - f. The District rejects the proposal to complete a speech and language evaluation because the Student has not demonstrated a communication disorder that impacts educational participation. However, the District will screen speech and language functioning to determine if an evaluation is appropriate.
12. A speech/language screener was completed on January 29, 2024. The Student exhibited average or above average communicative functioning skills with no concerns noted.
13. A meeting was held on February 13, 2024 to discuss the District’s decision to refuse testing.
14. An observation of the Student was conducted on February 16, 2024. No concerns were noted.
15. The following was noted in the documents provided:
- a. Between August 2023 and January 2024, the Student’s overall iStation assessment scores were between the 76th and 89th percentile in reading and between the 30th and 46th percentile in math.
 - b. The Student has received all A’s or satisfactory grades in all academic classes through quarter three.

- c. On January 12, 2024, an incident occurred in PE. Specifically, the Student did not want to participate in the activity because they were overstimulated. The teacher required the Student to participate anyway. Later, when the general education teacher retrieved the students from PE class, the Student was observed crying and had thrown their watch and water bottle to the ground. The general education teacher allowed the Student to walk the hallways and come to class when they were ready. The Student returned to class in a matter of minutes.
 - d. A log was kept by the school nurse indicating instances in which the Student visited. The following was noted, in part:
 - i. December 12, 2023: In the morning, the Student reported to the nurse that they were nervous about the upcoming Christmas program. The Student returned to class. Later that afternoon, the Parent removed the Student from school for the remainder of the day.
 - ii. December 19, 2023: The Student did not go outside for recess and elected to eat lunch in the nurse's office.
16. During the interview with the Investigator, the Parent indicated the Student has aggressive behaviors at home but exhibits avoidance behaviors at school. The Parent stated they requested an initial evaluation, in part, because the Student has challenging behaviors at home and they are struggling.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to identify and evaluate Student when District was on notice that Student may have a disability and be in need of special education and related services, in violation of 34 C.F.R. § 300.111 and 6.31.2.10(A) and (D) NMAC.

The IDEA mandates that states develop and implement adequate procedures to identify, locate, and evaluate children with disabilities who may need special education and related services. 34 C.F.R. § 300.111(a) and 6.31.2.10(A) NMAC.

An essential element of child identification is the special education referral, which places upon districts an affirmative obligation to evaluate a child where there is: (1) a reason to suspect a qualifying IDEA disability and (2) a need for special education and related services. 34 C.F.R. § 300.111(c). A student suspected of having a disability shall be referred for an evaluation if the student “demonstrates an obvious need for special education.” 6.31.2.10(B)(3) NMAC. The threshold for suspecting a disability is relatively low. *Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190,

1195 (D. Haw. 2001). The actions of a district in terms of whether it had knowledge of, or reason to suspect a disability, must be evaluated in light of the information that it knew, or had reason to know, at the relevant time. *Oxnard Sch. Dist.*, 118 LRP 48450 (SEA CA 11/13/18). It should not be based on hindsight. *Id.*

An ADHD diagnosis does not automatically trigger a district's obligation to evaluate a child under the IDEA. *See e.g., Metro Nashville (TN) Pub. Sch. Dist.*, 113 LRP 9959 (OCR 10/05/12). A district must evaluate a child with a medical diagnosis of ADHD if the district suspects or has reason to suspect that the child may have a disability in one or more of IDEA's eligibility categories and, as a result, be in need of special education services.

The evidence does not demonstrate the District had a reasonable suspicion that the Student had a qualifying IDEA disability and was in need of special education services. The Student performed well on their iStation assessments and the Student's behaviors at school were not indicative of a disability requiring special education services. Furthermore, the Student's teacher did not have any concerns regarding the Student's academics or behaviors. While the Student has an ADHD and ODD diagnoses, any difficulties focusing are managed through the Student's 504 plan and do not limit the Student's ability to access the general education curriculum. In addition, even though the Student may have concerning behaviors at home, the behaviors are not manifesting in the school environment. As a result, the District had no obligation to evaluate the Student.

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

Issue No. 2

Whether the District failed to conduct an initial evaluation upon request from the Parent to determine if the Student qualifies as a child with a disability, in violation of 34 C.F.R. § 300.301 and 6.31.2.10(D) NMAC.

As stated above, the IDEA imposes an affirmative obligation on districts to evaluate a child where the district has reason to suspect a qualifying IDEA disability and a need for special education and related services. 34 C.F.R. § 300.111(c) and 6.31.2.10(B)(3) NMAC.

A district may initiate a special education evaluation, or a parent may request one. 34 C.F.R. § 300.301(b) and 6.31.2.10(D) NMAC. If a parent requests an evaluation, the district must either (1) agree to evaluate the child and obtain parental consent for the evaluation or (2) deny the request to evaluate and provide the parent with prior written notice explaining its decision. 34 C.F.R. § 300.503(a) and 6.31.2.10(D)(4). The district must respond to a parent's request for an initial evaluation within 15 school days from receipt of the request. 6.31.2.10(D)(3) NMAC.

Here, the Parent requested an initial evaluation on January 17, 2024. Nine days later, on January 26, 2024, the District provided a PWN explaining why it was denying the Parent's request for an initial evaluation. For the reasons stated above, the District did not err in issuing the PWN declining Parent's request for an evaluation.

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

Issue No. 3

Whether the District failed to provide prior written notice (PWN) of its refusal to conduct an initial evaluation after the Parent's request for same, in violation of 34 C.F.R. § 300.503 and 6.31.2.10(D)(4)(b) NMAC.

A district must provide PWN if it denies a parent's request for an initial evaluation. 34 C.F.R. § 300.503 and 6.31.2.10(D)(4)(b) NMAC. The PWN must be provided within 15 days from the receipt of the evaluation request. 6.31.2.10(D)(3).

As stated above, the District provided PWN to the Parent nine days following their request for an initial evaluation, in conformity with the IDEA and NMAC regulations.

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

Issue No. 4

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

A student *eligible* for special education is entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC.

As discussed above, the District was under no obligation to evaluate the Student and Student has not been determined to be eligible for special education and related services. Therefore, the District did not have an obligation to provide FAPE to Student as of the date of this complaint. Thus, the District did not deny the Student FAPE.

As to Issue No. 4, the District is not cited.

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

Investigated by:

/s/ Emily Adams

Emily Adams, 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