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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION
Complaint Resolution Report
Albuquerque Public Schools
Case No. 2324-44
May 3, 2024

This Report does not require corrective action.

On February 29, 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, Principal, SESS Teacher, current Teacher and previous Teacher, and;
- research of applicable legal authority.

Limits to the Investigation

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

Issues for Investigation

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

1. Whether the District failed to develop and implement an IEP and BIP that allowed Student to make educational progress in violation of 34 C.F.R. §§ 300.320-200.328 and 6.31.2.11(B)(1) NMAC; specifically, whether the District;
 - a. Provided the accommodations as specified in the IEP;
 - b. Developed and implemented a BIP that would address Student’s negative behaviors; and
 - c. Followed the appropriate disciplinary procedures when suspending Student;
2. Whether the District’s actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE), in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

General Findings of Fact

1. Student was ten years old and in the fourth grade at District School and was eligible for special education services under the disability category of emotional disturbance (ED).
2. Student’s placement was in the general education classroom. Although Student at times still struggled with behavior, this was rare and the IEP team had determined that a behavior intervention plan (BIP) was no longer needed at the start of the 2023-2024 school year.

3. In previous years, Student had been in a social emotional support services (SESS) classroom and subject to disciplinary removals, including suspensions. Student had a good rapport with the SESS teacher and would often go to see the Teacher when dysregulated.
4. During third grade, Student was assigned to a general education classroom with cross-categorical support.
5. One of Student's accommodations on the January 5, 2023 IEP was to have breaks as needed with the Student's choice of a preferred staff member. Student used those breaks effectively to assist with negative self-talk and feeling overwhelmed.
6. Student would take a break, as needed, or would be encouraged to take a break when Student was becoming agitated.
7. Additional accommodations were extended time for reading and writing assignments and extended time for classroom assessments.
8. At the annual IEP meeting on January 5, 2023, the IEP team noted that behavior was no longer impeding learning, Student no longer needed a BIP, and that accommodations and behavior goals were allowing Student success.
9. At the start of the 2023-2024 school year, Student was assigned to a general education classroom and exhibited some difficulties with transition because of a new teacher; some of Student's preferred staff were no longer at the school but, overall, Student was having success.
10. Student had some incidents that were addressed through restorative justice with the principal.
11. Often, Student would return to the SESS classroom to take a break with Student's former teacher. There were two other staff members that Student would consistently choose for a break.
12. In August, 2023 Student had some peer conflicts on the playground and received two disciplinary referrals that involved the administration. After the second incident, Student threatened self-harm and completed a safety assessment. These incidents were discussed at the IEP meeting.
13. The playground referrals were for fighting and bad language. The incidents were addressed through community service and restorative justice including reading to the principal.
14. On August 25, 2023, an addendum meeting was held because Parent was concerned about the behaviors observed at home. Home behaviors were not observed at school. Student's homework assignments were reduced.
15. Adjustments were made to the IEP including increasing the success on the behavior goal to ten out of ten and decrease in social skills minutes. Thirty minutes was added for

special education study skills and math services and a referral was made for a social work consult.

16. For the remainder of the fall semester, Student's only behavior concerns were peer conflicts on the playground. There were no disciplinary referrals from the classroom.
17. Student's annual IEP meeting was held on January 17, 2024. Student had shown improvement both academically and behaviorally. Student still exhibited negative self-talk and patience. There was a decrease in number of outbursts and staff were working on increasing positive self-talk.
18. Within two weeks of the IEP meeting, Student's behavior changed. There was an increase in dysregulated behaviors and new uncharacteristic behaviors were appearing. Student would seek breaks more often. The cause for the change could not be determined, but it did not appear to be related to anything happening in the school environment.
19. Student met general education expectations and continued to receive support from SESS teacher and other staff in the building.
20. Student reported frustrations about changes at home. Student had some struggles on the playground and attempts were made to improve the climate at recess.
21. Student was using the regulation tools with occasional setbacks and when a conflict arose, it was resolved quickly and Student accepted more responsibility for the conflicts.
22. Student wanted to engage in general education activities and was using strategies to learn. There had been a decrease in special education minutes since the previous year and Student demonstrated continued success.
23. All accommodations were continued since they had been successful and a structured classroom with set expectations was added.
24. Parent informed the team that she was concerned about Student's at home behaviors and was considering an out of home placement for the summer due to Student's behaviors.
25. Student received in school suspension (ISS) for hitting another student on January 19, 2024. Student was to go to the SESS classroom but never arrived.
26. On January 21, 2024, Student had to sit out during physical education because Student threw a ball at another student. Student eloped from the classroom.
27. Student received one day of out of school suspension (OSS) for harassing a kindergarten student by rubbing soap in his hair.
28. On February 6, 2024, Student used threatening language toward the librarian and received 1 day of OSS.
29. Parent was informed by the principal about all of the incidents when they occurred and the discipline imposed.
30. On February 6, 2024, Student was hospitalized for one week for self-harm.

31. Prior to Student's return on February 13, 2024, the team met to discuss a plan for Student's return.
32. At the addendum meeting on February 20, 2024, the team reviewed the social work evaluation, and discussed the need for a BIP. The team noted that Student responded well to interventions and discussed the recent behaviors and suspensions.
33. Parent expressed concern that Student could not meet with person of choice on break as required by the accommodation on the IEP. Parent believed when Student could not deescalate or meet with the support person, Student would act out and immediate response was suspension.
34. Student had three support persons. Student would choose the person but if that person was unavailable for some reason, Student could choose another person.
35. The IEP team agreed to conduct a functional behavior assessment (FBA) and add 210 minutes of social work services.
36. One week later, on February 28, 2024, Student was involved in a fight at recess with another student. There was a history of conflict between the two students. Prior to the incident, there had been attempts to resolve the conflicts between the two students including the involvement of the SESS teacher and reducing the two students' contact. After the incident Student went to SESS teacher for support for 45 minutes and met with the principal with the SESS paraeducator present.
37. Parent was informed about this and all other incidents.

Parent stated that if Student was able to access preferred support person, there would be no escalation and no need for suspension. The principal was imposing discipline without consideration of the accommodations on the IEP.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to develop and implement an IEP and BIP that allowed Student to make educational progress in violation of 34 C.F.R. §§ 300.320-200.328 and 6.31.2.11(B)(1) NMAC; specifically, whether the District;

- a. Provided the accommodations as specified in the IEP;**
- b. Developed and implemented a BIP that would address Student's negative dyregulated behaviors; and**
- c. Followed the appropriate disciplinary procedures when suspending Student**

Special education is "specially designed instruction provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability." 34 C.F.R. § 300.39(a)(1). This

specialized designed instruction is adapting the content, methodology or delivery of instruction to address the unique needs of an individual child. 34 C.F.R. § 300.39(b)(3). These unique needs are more than academic needs but can include social, health and emotional needs. *County of San Diego v. California Special Education Hearing Office*, 93 F.3d 1458 (9th Cir. 1996). Behavioral needs are also part of the IEP process and can be addressed in a behavioral intervention plan (BIP). A BIP is usually a component of the IEP to address behaviors that interfere with the student's learning and are inconsistent with school expectations. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSERS 2022).

IEPs are developed during an IEP meeting. An IEP meeting must be held annually but districts are encouraged to consolidate IEP team meetings. 34 C.F.R. § 300.324 (a)(5). The IEP team must consider the student's strengths, any concerns of the parents, results of evaluations, and academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a)(1).

A child's annual IEP must include measurable annual goals, both academic and functional, that meet the child's needs that result from the child's disability and allow the child to participate in and make progress in the general education curriculum. The IEP goals must address all the child's needs that result from the child's disability. 34 C.F.R. § 300.320(a)(2). Annual goals should reflect what is reasonably expected to be accomplished during the annual IEP period. *Letter to Butler*, 213 IDELR 118 (OSERS 1988). The annual goals should be specific to be able to determine progress made and the specific skills needed to achieve progress on goals. 64 Fed. Reg. 12, 471 (1999). An IEP must be implemented with all required components. 34 C.F.R. § 300.324(b)(ii)(a). However, only material failures of implementation will result in a denial of FAPE. *See Van Duyn v. Baker School District*. 5J, 502 F.3d 811, 822 (9th Cir. 2007).

When a special education student violates the District's code of conduct, the student is subject to the same disciplinary actions as the general education students receive until there is a change of placement. 34 C.F.R. § 300.530 (a). A change of placement occurs when the removal is for more than ten consecutive days or the child has been subjected to a series of removals that constitute a pattern because the series of removals totals more than ten school days in a school year or because the behavior is substantially similar to the child's behaviors in the previous incidents that resulted in removals and additional factors such as the length of each removal, the total amount of time removed and proximity of the removals. 34 C.F.R. § 300.536.

a. Provided the accommodations as specified in the IEP

In the most recent IEP, Student had five accommodations. The one of concern in this complaint was the ability for Student to take a break as needed with a preferred staff member of Student's choice. Parent agrees that the other accommodations have been provided to Student. Although Parent believes that Student was not allowed to take breaks with a preferred staff member, there is no evidence that Student could not take a break or choose the preferred staff member. At times, the preferred staff member may not be available but Student could choose someone else. Student had a good rapport with the SESS teacher and would often take a break with that teacher but other staff in the building were available when Student requested a break with other staff. Student's dysregulated behaviors have increased since the end of winter break and the IEP team has been attempting to implement strategies to assist Student in managing behaviors. Although the cause behind the increase in behaviors has not been determined, Student has not been denied a break with a preferred staff member.

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

b. Developed and implemented a BIP that would address Student's negative behaviors

Student previously had a BIP but that was discontinued because the IEP team, which included the Parent, determined that Student no longer needed a BIP, and that the interventions and goals were working and Student was achieving success. During the second semester when Student's dysregulated behaviors increased, the IEP team met and agreed to conduct an FBA and develop a BIP. As of the date of this report, the FBA has been completed and reviewed by the IEP team and they are in the process of developing a BIP. While BIPs are one method of addressing Student's behaviors that impact learning, other strategies including goals, accommodations and other supports and services can be implemented to address behaviors. When Student's dysregulated behaviors increased, the IEP team met multiple times to strategize what could be done to assist Student with managing behaviors since Student had been previously successful with the goals and other interventions on the IEP.

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

c. Followed the appropriate disciplinary procedures when suspending Student

This school used a combination of restorative justice and the District's model for controlling Student's behaviors. Previously, instances of violations of the code of conduct were addressed through restorative justice. Student's behaviors were addressed and the behavior did not reappear. Shortly after the IEP on January 17, 2024, Student's behaviors changed and were violations of the code of conduct. Fighting and the other incidents were behaviors that warranted OSS in the District's model. When Student exhibited those behaviors, Student was subject to the same discipline that the general education students would receive for the same conduct. Although Student's IEP provided Student a break with a preferred staff member when

needed, there was nothing on the IEP indicating that Student was not subject to the District's disciplinary procedures. Student had only received 3 days of OSS and two days of ISS. Student received detention and other methods of restorative justice. The total number of disciplinary removals was less than ten days and, therefore, there had been no change of placement warranting a manifestation determination review meeting. The IEP team met after Student was suspended and hospitalized and strategized ways to turn Student's behaviors around and get Student back on track, including developing a BIP. Since the incident on February 28, 2024, Student has not had any additional behaviors warranting OSS.

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

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

Issue No. 2

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

Students who are eligible for special education services are entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. A District is obligated to provide a FAPE to students within their jurisdiction who have been determined eligible for special education services. 34 C.F.R. § 300.17. The determination of whether there has been a denial of FAPE requires consideration of two components: substantive and procedural. The question one must answer to determine the substantive standard is whether the IEP was "reasonably calculated to allow the child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas County School District. RE-I*, 580 US 386,137 S. Ct. 988 (2017). The Court in *J.L. v. Mercer Island School District*, 592 F.3d 938, 951 (9th Cir. 2010), held that a procedural violation may be a denial of FAPE when it resulted in the loss of an educational opportunity, infringed on parents' opportunity to participate in the development of the IEP or deprived the student of an educational benefit. All circumstances surrounding the implementation of the IEP must be considered to determine whether there was a denial of FAPE. *A.P. v. Woodstock Board of Education*, 370 F. Appx. 202 (2d Cir. 2010).

Recent guidance from OSERS and OSEP outlined examples of when a child's IEP was not reasonably calculated to provide meaningful educational benefit. These examples include displaying a pattern of behaviors that impede learning and not receiving behavioral supports; the child has 10 days or less disciplinary removals for separate incidents of misconduct that impede learning the IEP team but does not address behavioral supports and child demonstrates lack of

progress on goals because of disciplinary removals but the IEP team does not review or revise the IEP. *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSPE 2016).

While it is concerning that Student, who had previously been successful, has begun to exhibit behaviors that resulted in OSS, the IEP team has met and continues to meet to review what has been done and strategize what else can be done to reduce Student's dysregulated behaviors and focus back on success. Student has made amazing progress since when Student was in the SESS classroom. The IEP goals and supports and services were developed and implemented to allow Student success which was realized. Circumstances changed and Student began to exhibit dysregulated behaviors and the IEP team promptly met to address those behaviors and are in the process of developing a BIP. There is nothing on this record to indicate a substantive denial of FAPE.

Although Parent believes that Student was denied accommodations and therefore, was unable to regulate emotions and acted out resulting in OSS, the record does not support that position. Student was provided breaks with the person Student chose. When dysregulated behaviors increased, the IEP team met to strategize how to address Student's behaviors. Student was making progress both academically and functionally. When Student violated the code of conduct, Student was subject to the same discipline as other nondisabled students. There were no procedural violations.

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

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

Investigated by:

/s/ Michele Bennett

Michele K. Bennett

Complaint Investigator

Reviewed by:

/s/ Miguel Lozano

Miguel Lozano, Esq.

Chief Counsel, Office of Special Education

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Director, Office of Special Education