



STATE OF NEW MEXICO
PUBLIC EDUCATION DEPARTMENT
300 DON GASPAR
SANTA FE, NEW MEXICO 87501-2786
Telephone (505) 827-5800
www.ped.state.nm.us

ARSENIO ROMERO, PH.D.
SECRETARY OF PUBLIC EDUCATION

MICHELLE LUJAN GRISHAM
GOVERNOR

NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION
Complaint Resolution Report
Clovis Municipal Schools
Case No. 2324-46
May 10, 2024

This Report requires corrective action. See pages 20-25.

On March 11, 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;
- interviews with the Parent, Special Education Director, Case Manager, Principal, Assistant Principal, Social Worker and Instructional Coach/MDR Facilitator 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. Discrimination on the basis of a disability was an issue that was brought up during the investigation but will not be addressed in this report except as it relates to violations of IDEA.

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 follow the IDEA disciplinary procedures when disciplining Student for violations of the District’s code of conduct, in violation of 34 C.F.R. § 300.530 and 6.31.2.11(F)(2) NMAC; specifically, whether the District,
 - a. Failed to conduct a manifestation determination review hearing after request by Parent and failed to provide a prior written notice after refusing request;
 - b. Failed to consider relevant information regarding Student in determining whether the behavior was a manifestation of student’s disability;
 - c. Failed to provide appropriate services when Student’s out of school suspension exceeded 10 days of removal during the 2023-2024 school year; and
 - d. Changed Student’s placement following a disciplinary hearing without the involvement of the IEP team.
2. Whether the District failed to develop and implement an IEP to allow Student to make educational progress in the general education curriculum, in violation of 34 C.F.R. §§ 300.324 and 6.31.2.11(B)(1) NMAC; specifically, whether the District,

- a. Failed to include and provide all needed accommodations on the IEP; and
 - b. Failed to provide meaningful parental participation to Parent in the development and implementation of Student's educational program;
3. Whether the District failed to ensure that special education staff that worked with Student had the appropriate qualifications in violation of 34 C.F.R. §300.156;
 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

Background Information

1. Student was a fourteen-year-old eighth grade student at District middle school during the 2023-2024 school year.
2. Student moved into the District from out of state in sixth grade.
3. Student was eligible for special education services under the category of other health impaired (OHI). Student had been diagnosed with attention deficit hyperactivity disorder, combined type (ADHD). Student also had a history of abuse and trauma.
4. The results from the January 21, 2020 evaluation indicated that Student had severe hyperactivity and impulsivity based on the Connors 3 with a T score of 90. Student was determined eligible for special education services on February 13, 2020.
5. Since Student's arrival in the District, Student has exhibited disruptive behavior including issues on the bus. However, last year Student's behavior incidents decreased and were primarily categorized as disorderly conduct.
6. Many of the code of conduct violations this school year included talking back to teacher, not sitting still, talking out of turn, taking other's property and not patiently waiting when requesting assistance.
7. Consent for an updated Functional Behavior Assessment (FBA) was obtained on December 4, 2023.
8. Student's annual IEP was on December 4, 2023. The previous IEP was March 28, 2023.
9. On January 11, 2024, Parent requested a manifestation determination review (MDR) meeting and/or IEP to assist in addressing the increase in Student's negative behaviors and new behavior patterns. This was after an incident involving throwing a snowball at another student on January 10, 2024. For this infraction, Student received 1 day out-of-school suspension (OSS) according to emails between District and Parent, but the incident was not noted on disciplinary records and Student was noted absent on attendance records.

10. The District denied the MDR request since there had not been a change of placement (6 days of disciplinary removals) for Student. The District indicated in a January 11, 2024 email that the team would meet to finalize the FBA on January 16, 2024.
11. The FBA was completed January 16, 2024.
12. In the March 28, 2023 and December 4, 2023 IEPs, the Student received 235 minutes of special education math services weekly in the special education setting.
13. Student's IEPs listed math, reading and writing as areas of need but there were only goals related to math and career readiness.
14. The District stated during an interview that reading and writing were included as areas of need, but there were no goals related to these subjects because current evaluation data (January 21, 2020 evaluation) indicated the need but the Student had completed a trial in the General Education setting with success. The District stated specialized instruction in reading or writing was no longer needed. Dad consented to having Student in General Education setting.
15. There was no documentation provided to justify the removal of reading and writing services.
16. On the December 4, 2023 annual IEP, the present levels of academic achievement and functional performance (PLAAFP) for math stated "[Student] currently has an 80% average in Math. [Student] scored an 89% on his second nine weeks Midterm assessment. [Student] has mastered identifying rational and irrational numbers, [Student] can follow the laws of exponents with notes, he can identify the slope, functions, and write an equation in slope intercept form. There are days he will follow the classroom expectations and days where correction is necessary." The PLAAFP did not indicate Student's math needs.
17. Student had two goals on the December 4, 2023 IEP: one goal in math and one in career readiness.
18. The math goal stated, "By the end of the IEP, when given a calculator, [Student] will be expected to apply the Pythagorean Theorem to determine unknown side lengths in right triangles in real-world and mathematical problems in two and three dimensions with 70% accuracy based on informal and formal assessments given by the Special Education Teacher."
19. Progress notes in math from March 2024 indicated no progress, but the January, 2024 progress note indicated sufficient progress and stated, "[Student] was able to end the first semester with an 80% average in [Student's] math class. [Student] was able to answer grade level computation questions over the top standards with 89% accuracy on [Student's] midterm and 44% accuracy on [Student's] final for the second nine weeks. The Pythagorean theorem has not yet been taught in the classroom at this point [Student] will continue learning strategies to build up to the concept of the Pythagorean theorem."
20. The career readiness goal stated, "By the end of the IEP date, [Student] will be expected to demonstrate the ability to evaluate and verify the appropriateness of a solution to a

problem in 3 out of 4 scenarios based on data collection completed by the Special Education Teacher.”

21. Progress notes in both January and March, 2024 for the career readiness goal indicated no progress. In the March, 2024 progress note, the case manager met with Student 15 minutes weekly but had not had the opportunity to fully discuss appropriate solutions. She has met with Student to discuss several behavior concerns.
22. The December 4, 2023 PWN “discussed a possible general education trial for Math in the spring. The team indicated [Student] was able to understand the taught content, but struggled with regulating behavior during instruction and independent practice.”
23. Student’s IEP did not contain goals to address organization, focus and other needs related to Student’s disability or severe ADHD. District stated Student’s disability needs were addressed through the behavior intervention plan (BIP).
24. Student received math special education services from a licensed substitute teacher. The teacher provided special education services in the special education room. The teacher has been in this position since 2015. The substitute teacher did not have a teaching degree or provisional certification nor was there evidence that the teacher had or was presently working on obtaining appropriate training or certification. She was listed as the only special education teacher on the FBA and signed the March 13, 2024 change of placement IEP as a special education teacher.
25. The FBA noted that Student’s behaviors were both skill and performance deficits. Student could at times remain focused and on task when redirected if disruptive or off task. Student’s behavior was a skill deficit because Student was unable to make the right choices to prevent misbehavior
26. The FBA stated Student problem behaviors were a tendency for taking other people’s belongings, no regard for consequences of actions, getting off task easily, displaying extensive movement, talking back to staff, disrupting peers and instructors, using inappropriate language and taking long and frequent bathroom breaks requiring redirection.
27. The FBA indicated that positive praise was not very effective to modify Student’s behavior. The most effective positive reinforcers were participation in athletics and reward incentives for good behavior.
28. The BIP was revised on January 25, 2024. The BIP listed the problem behaviors including “non-adherence to authority or consequences, disruptive to staff and peers, needs redirection, has extensive movement (i.e. trouble keeping hands to self, getting out of seat, leaving class, taking things from students/staff), is observed being out of class often, using inappropriate language (i.e. cussing, name calling).” The motivators in the BIP were limited to verbal praise, verbal affirmation and contact with parent, as appropriate.
29. The IEP listed an accommodation of paper assignments for student. The team agreed, although this was not noted on the IEP that Student would not have access to a Chromebook except for testing.

30. After the first ten days of suspension, the District proposed virtual learning with the use of a Chromebook while Student was at home. At school, Student was not able to have access to a Chromebook because of inappropriate use and access. Student was unable to access the Chromebook at home without proper supervision since Parent was at work when Student was at home.

MDR 1

31. The first MDR meeting was held on January 30, 2024 concerning disciplinary removals beginning on October 18, 2023 and the final incident was January 18, 2024 when Student brought a vape to school and received five days of out of school suspension (OSS). On January 26, 2024, Student received 1.5 days of in school suspension (ISS) for throwing a chair across the gym floor.
32. During the MDR meeting, Parent brought research about the prevalence of substance abuse and ADHD and a letter from Student's physician that Student was impulsive.
33. The report from the MDR meeting repeated the information from the December 4, 2023 IEP including Student's Connors 3 score and grades. There was no explanation or justification on that form why the behaviors including vaping were or were not a manifestation of Student's disability under OHI because of Student's severe ADHD.
34. The District staff indicated during the MDR meeting that they only looked at the vaping incident as it related to [Student's] disability. They did not consider all relevant information in making the manifestation determination including previous behaviors that resulted in disciplinary removals. The person who observed the vape was not a part of the MDR team so the team could not ask questions about the incident.
35. The MDR report stated that incident was not District's failure to implement the IEP. The only statement regarding Student's special education services was, "[Student's] BIP was updated on 1/25/24. Consent to conduct an updated FBA was received prior to the drug related incident. BIP was updated on 1/25/24. BIP review will be looked at when EDT is completed this Spring."
36. Parent disagreed with the determination and "believes that accommodations were not in place and the long-term sub is not qualified to teach special education based on her credentials."
37. A disciplinary hearing was held immediately following the MDR meeting. Student was suspended for five days for the vaping incident prior to the disciplinary hearing.

MDR 2

38. Student continued to have behavioral incidents resulting in disciplinary removals. Following an incident involving the theft of \$50 on February 26, 2024, a MDR meeting was scheduled.

39. The District's disciplinary records were inconsistent with respect to type and number of removals. On various documents, the number of OSS days ranged from 15 to 22.5. The number of ISS days could not be determined nor verified that they should not be included on the removal count for change of placement. Student received at least 8.5 ISS days but there were also behavior lists when, in some instances, Student was placed in ISS according to District records.
40. The second MDR meeting on March 6, 2024 was separated into two major incidents. The first incident discussed involved Student spraying other students with cleaning solution, including spraying one student in the face.
41. The March 6, 2024 MDR report noted that Student had received 20 days of OSS this year. The PWN from the MDR meeting stated that the Student had received 17 days of OSS this year. The disciplinary records and attendance records indicate that Student has had 15 days of OSS this year.
42. The March 6, 2024 MDR report form stated that Student had 5 days of OSS due to the incident with a spray bottle. The discipline records indicate Student had only a conference regarding the spray bottle and no disciplinary removal.
43. The team determined that the spray bottle incident was a manifestation of Student's disability.
44. At that same MDR meeting, the team addressed the second incident involving looking through another student's book bag and stealing \$50. Law enforcement and Parent were notified after the incident.
45. In the PWN from the MDR meeting, it was noted that Parent commented about Student's history and pattern of stealing. Stealing was noted as a problem behavior on the January 16, 2024 FBA. The MDR report emphasized the incident occurred in the morning, but Student did not admit to the theft for a "significant time." The MDR form listed what information was looked at but there was no explanation of why this information established that the conduct was or was not a manifestation of Student's disability. The MDR team did not consider all relevant information as it pertained to this Student in determining whether this was or was not a manifestation. For example, the FBA indicated that stealing was a problem for this Student, yet there was no explanation on the IEP about the problem behaviors on the FBA and conduct in question.
46. The staff member who was present during the incident was not a member of the MDR team and limited the team's opportunity to know antecedents and circumstances surrounding the incident which could provide relevant information about whether the conduct was a manifestation.
47. The MDR team determined that the behavior was not a manifestation of Student's disability.
48. The PWN from that MDR meeting noted that Student was entitled to seven days of compensatory education services. No consistent explanation was provided for the reason for the compensatory services.

49. It was also noted on the PWN that Student had expressed “ if students have an IEP or use his Dad then they won’t get into trouble.”
50. The documentation from both MDR meetings indicated that the team considered the goals and services on Student’s IEP as it relates to the behaviors but did not consider the characteristics of the underlying disability of ADHD which include impulsivity, acting out, not sitting still and talking back.
51. The MDR team did not consider all of Student’s behaviors that resulted in disciplinary actions but only reviewed the theft as to whether that behavior was a manifestation of Student’s disability.

Change of Placement

52. A disciplinary hearing was held on March 8, 2024 with the special education director as hearing officer. The findings from the hearing stated:
“After careful consideration of all the facts, the Hearing Officer has determined the following:
 - [Student] was permitted to return to school on March 6, 2024.
 - An IEP meeting shall be held for a significant change of placement.
 - Beginning March 11,2024, [Student] shall be placed in a restricted Disciplinary Alternative Education Program (DAEP) at Yucca Middle School. This placement duration is for a minimum of 45 school days.
 - All academic services received by [Student] will be delivered in DAEP.

Failure to comply with the conditions set forth by the results of the Hearing for the remainder of the current school year shall result in the reconvening of a hearing to determine appropriate action. Any further violations may result in additional disciplinary measures up to and including suspension or expulsion from the [District] Municipal Schools.”

53. The IEP team met on March 13, 2024 after Student was placed at DAEP on March 11, 2024. The IEP team affirmed the placement ordered from the hearing officer. There was no evidence that the IEP team considered all the required components in determining Student’s placement or ensured that Student would receive FAPE in DAEP. The IEP team did not consider revising the BIP or providing additional services and supports since Student had been suspended more than 15 days that school year because of behavior.
54. During that meeting, the IEP team reduced the amount of math services for Student from 235 minutes weekly to 15 minutes daily or 75 minutes weekly. There was no explanation on the IEP or PWN about the reason for the reduction in services. During the interview, the District stated that the change in minutes was because the 15 minutes a day of one-to-one services in the DAEP was equivalent to the 47 minutes of daily math services

Student had been receiving in the special education setting. The December 4, 2023 IEP and staff noted that Student received one-to-one instruction for 235 weekly minutes of math services.

55. Parent stated the change in Student's service minutes was not addressed during that IEP meeting.

56. Student's day in the DAEP program started at 9:30 and ended at 2:30. The general education class day was from 8:20 to 3:30 p.m. The District stated that Student received all services but the Student did not have physical education and the periods of instruction for certain subjects were reduced. For example, history/science was 30 minutes in total for both classes but each class was fifty minutes in the general education program.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to follow the IDEA disciplinary procedures when disciplining Student for violations of the District's code of conduct, in violation of 34 C.F.R. § 300.530 and 6.31.2.11(F)(2) NMAC; specifically, whether the District,

- a. Failed to conduct a manifestation determination review hearing after request by Parent and failed to provide a prior written notice after refusing request;**
- b. Failed to consider relevant information regarding Student in determining whether the behavior was a manifestation of student's disability;**
- c. Failed to provide appropriate services when Student's out of school suspension exceeded 10 days of removal during the 2023-2024 school year; and**
- d. Changed Student's placement following a disciplinary hearing without the involvement of the IEP team.**

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. When a change of placement occurs, then the District must convene a MDR meeting. 34 C.F.R. § 300.530(e). The MDR meeting must determine whether the violations of the code of conduct were a manifestation of the child's disability. 34 C.F.R. § 300.530(e). During the MDR meeting, two questions must be answered to determine if the conduct was a manifestation of the child's disability. Was the conduct in question caused by or had a direct and substantial relationship to

the child's disability or the district's failure to implement the IEP? 34 C.F.R. 300.530(e)(1). The MDR meeting is conducted by the District and should include the parent and relevant members of the IEP team. 34 C.F.R. § 300.530(e). The MDR meeting must consider all relevant information in the child's file including but not limited to the IEP, any teacher observations and relevant information provided by the parents. 34 C.F.R. § 300.530(e). The MDR team may remove a student with a disability that has violated the district's code of conduct to an IAES, another setting or suspend for not more than ten days provided the same discipline would be made for a child without a disability. 34 C.F.R. § 300.530 (b).

Information about a student's actions before, during, and after a conduct code violation can shed light on whether his disabilities played a role in his behavior. *C.D. v. Atascadero Unified School District*, 83 IDELR 80 (C.D. Cal. 2023).

A prior written notice (PWN) must be sent before the district proposes or refuses to initiate or change the identification, evaluation, educational placement or the provision of FAPE. 34 C.F.R. § 300.503 (a).

The school may discipline a student with a disability in a similar manner to the discipline for non-disabled students when the conduct is not a manifestation of their disability 34 C.F.R. 300.530 (c). When a student with a disability has been removed from the current placement for 10 school days, special education and other services must be provided to student, albeit, in an alternative location 34 C.F. R § 300.530 (b)(2).

School officials may remove a student to an IAES for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability in three situations:

1. The student carries or possesses a dangerous weapon at school;
2. The student knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance at school or
3. The student inflicts seriously bodily injury upon another person 34 C.F.R. § 300.530 (g).

Placement is a decision for the IEP team, including the parents. 34 C.F.R. § 300.116. The IEP team is responsible for determining the interim alternative setting for services when a change of placement has occurred. 34 C.F.R. 300.531. When determining placement for a student, the IEP team must ensure Student is receiving a FAPE. 34 C.F.R. § 300.101(a).

Although there is no requirement to conduct an MDR prior to the 10 days suspension, guidance from OSERS and OSEP indicates that a District may have the authority for short term suspensions for students with disabilities for ten days in a school year but they have the ongoing obligation to determine and implement interventions including behavioral interventions and supports to ensure students receive FAPE in the LRE. Disciplinary removals should trigger the need for an IEP meeting to consider additional supports especially when there is repeated misconduct. *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSPE 2016). When making the determination regarding a manifestation, the IEP team should consider adding positive behavioral interventions and supports in response to misconduct that impeded student's learning or others. The District should convene an IEP team meeting to address behavioral concerns, especially after a reasonable parental request. *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSPE 2016).

a. Failed to conduct a manifestation determination review hearing after request by Parent and failed to provide a prior written notice after refusing request;

After multiple ISS and OSS, Parent requested a MDR meeting to discuss Student's increasing negative behaviors and new behavior patterns. The District told the Parent that they would not be convening an MDR meeting because Student had not been suspended for 10 days. The District would not convene an MDR at that time nor did they hold an IEP meeting to determine if additional behavioral interventions and supports were needed to ensure Student received a FAPE. The District failed to provide Parent with the PWN after the District refused the request even though the educational program and/or placement may change following an MDR meeting. An IEP meeting was held on December 4, 2023 at Parent's request.

While an MDR may not be required before the Student has been suspended for 10 days, OSEP and OSERS have both indicated that the District's obligation to provide FAPE, which can include addressing behavioral needs, is ongoing and the District does not need to wait for the ten days. The District was not required to convene an MDR following Parent's request for an MDR but the District failed to address at the December IEP meeting if additional supports and services were needed as Student's negative behaviors were increasing.

As to Issue No. 1a, the District is not cited, and Corrective Action is not required.

b. Failed to consider relevant information regarding Student in determining whether the behavior was a manifestation of student's disability;

When conducting an MDR, the team must consider all relevant information in the Student's file. That may include details about the incident, teacher observations, FBAs, BIPs, previous incident reports, the IEP and parent's input. Although the MDR forms at both MDR meetings for this

Student listed the information reviewed, there was no explanation why the conduct in question was or was not a manifestation of Student's disability. The MDR form was a litany of the information on the PLAAFP and not an explanation of the team's analysis. Based on the MDR form and PWN, the MDR team did not consider all relevant information when making the manifestation determination. That is not to say that the conduct in question in the MDR meetings was a manifestation of the Student's disability. That cannot be determined unless all relevant information is considered in that analysis.

The MDR team should include relevant members of the IEP team and there should be an opportunity for the team to review information about the incident, both before and after the incident because that information is relevant to the manifestation determination. This did not happen. There were two MDR meetings for three significant incidents during the 2023-2024 school year. The conduct in question in the first incident was bringing a VAPE to school. The second incident was spraying fluid into another student's face and the third incident involved stealing \$50. The last two incidents were combined into one MDR meeting. At both MDR meetings, the District considered only the last incident of misconduct to determine whether that conduct was a manifestation. Student had been subject to ten days of disciplinary removal. All of those incidents were relevant to the question of whether the behavior was a manifestation of Student's disability. Only focusing on the last incident without analysis of all of Student's behaviors as substantially related to or caused by the disability is a procedural violation. When determining whether behavior is a manifestation of Student's disability, all relevant information must be considered which includes all of Student's misconduct. In two instances, the misconduct was not a manifestation, but in the other, it was a manifestation. For the MDR where the conduct was a manifestation of the Student's disability, it is required the BIP be reviewed and revised as appropriate. The BIP was revised on January 25, 2024 but not revised after the March 6, 2024 MDR.

As to Issue No, 1b, the District is cited, and Corrective Action is required.

c. Failed to provide appropriate services when Student's out of school suspension exceeded 10 days of removal during the 2023-2024 school year

Although there is some question about the number of days of disciplinary removal for this Student, at the time of the first MDR in January 2024, Student's removals had exceeded ten days during the 2023-2024 school year. The District proposed virtual services for Student during the period of suspension. Student's accommodations on the IEP provided for paper assignments. This was an accommodation because Student would misuse the Chromebook. The proposal was that Student could participate in Google meets and in academics other than math, Student could receive paper assignments. On the IEP, the Chromebook was limited to tests only. Although there was a computer at Student's home, Student had issues with misuse of computers and, therefore,

paper assignments or another way to access instruction should have been provided for the Student's instruction during periods of suspension as required by the IEP.

As to Issue No. 1c, the District is cited, and Corrective Action is required.

d. Changed Student's placement following a disciplinary hearing without the involvement of the IEP team.

Two days after the last MDR meeting on March 6, 2024, a disciplinary hearing was held. At the conclusion of that hearing, the hearing officer ordered a 45-day placement in an interim alternative education setting (IAES), the District's DAEP to begin March 11, 2024 when Student returned to school following the five-day suspension. Student had already been disciplined for the conduct in question with the five-day suspension. It is the responsibility of the IEP team to determine the IAES and to ensure that Student continues to receive FAPE in the alternative setting. The IEP team did not consider LRE, additional services or supports or any of the other IDEA requirements to ensure the provision of FAPE. The DAEP program was a shortened day for Student and in addition, the math minutes that Student had been receiving were reduced from 235 minutes per week to 75 minutes per week without an explanation or justification for the shortened day or reduction in service minutes. It appeared that the IEP team just affirmed the hearing officer's Order without consideration of Student's FAPE needs.

As to Issue No. 1d, the District is cited, and Corrective Action is required.

As to Issue No. 1, the District is not cited for 1a, but is cited for 1b, 1c and 1d and Corrective Action is required.

Issue No. 2

Whether the District failed to develop and implement an IEP to allow Student to make educational progress in the general education curriculum, in violation of 34 C.F.R. §§ 300.324 and 6.31.2.11(B)(1) NMAC; specifically, whether the District,

- a. Failed to include and provide all needed accommodations on the IEP; and**
- b. Failed to provide meaningful parental participation to Parent in the development and implementation of Student's educational program;**

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).

Parental participation is more than the chance to speak during the meeting; districts must consider parents suggestions and as appropriate, include them in the IEP. *R.L. V. Miami-Dade County School Board*, 757 F.3d 1173 (11th Cir. 2014); *Deal v. Hamilton County Board of Education*, 392 F3d 840 (6th Cir. 2004). Hearing and addressing Parent's concerns do not require that all requests be included in the IEP. *R.K. and D.K. v. Clifton Board of Education*, 587 F. App'x 17, unpublished (3rd Cir. 2014)

Parents, as required members of the IEP team, must have adequate information to make informed decisions. 34 C.F.R. § 300.321(a)(1). Every IEP for a student must contain "[a] statement of the child's present levels of academic achievement and functional performance, including -- How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children)." 34 C.F.R. § 300.320(a)(1). This statement of PLAAFP assists in determining the needs of an individual student to develop annual goals to allow the student to receive FAPE and make progress in the general education curriculum. *Bakersfield City School District*, 51 IDELR 142 (SEA CA 2008). The PLAAFP must be comprehensive and provide baseline data that reflects all the child's needs, both academic and nonacademic. This also should include relevant background information about needs, strengths, interests and learning styles. 34 C.F.R. § 300.324(a). The PLAAFP must be individualized to reflect the unique needs and abilities of a particular student. *Letter to New*, 211 IDELR 464 (OSEP 1987).

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. As part of the program development process, the IEP team must "consider whether the child needs AT devices and services." 34 C.F.R. § 300.324 (a)(2)(v). 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). Each IEP developed for a

student with a disability must describe: How the district will measure the student's progress toward annual goals and when progress reports will be provided. 34 C.F.R. § 300.320 (a)(3). 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).

A determination of a student's least restrictive environment (LRE) is one of the substantive and procedural requirements in the development of the IEP. 34 C.F.R. § 300.320 (a); The section of the IEP that discussed participation in general education and activities specifically refers to the explanation of the extent, if any, to which the child will not participate with nondisabled peers, the student's LRE. 34 C.F.R. § 300.320 (a). IDEA mandates that students are to be educated to the maximum extent appropriate with their peers. 34 C.F.R. § 300.114 (a). IDEA provides for a continuum of placements to ensure that students are educated in their LRE. 34 C.F.R. § 300.115. LRE decisions are focused on the individual needs of the child. 34 C.F.R. § 300.116. Placement decisions must be considered on an individual basis considering the unique needs and tailored to reasonably promote child's educational success. 34 C.F.R. §§ 300.114 through 34 C.F.R. 118. A change in location of services does not always mean there has been a change in placement. A placement is a point along the LRE continuum of placement options, while a location is the physical location where the child receives related services, such as a classroom. However, a change in location may give rise to a change in placement if the change in location substantially alters the student's educational program. 71 Fed. Reg. 46,588 (2006). *Letter to Tymeson*, 81 IDELR 23 (OSEP 2022). The following factors are determinative in analyzing whether a change of placement has occurred: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements. *Letter to Fisher*, 21 IDELR 992 (OSEP 1994).

a. Failed to include and provide all needed accommodations on the IEP;

Student had several accommodations listed on the IEP and there was no evidence that the accommodations were not provided to Student while Student attended District's school. However, the services while Student was suspended involved use of a computer instead of paper assignments. The use of paper assignments was an explicit accommodation to be provided to Student.

As to Issue No. 2a, the District is cited, and corrective action is required.

b. Failed to provide meaningful parental participation to Parent in the development and implementation of Student's educational program

Parent attended and participated in all IEP and other meetings pertaining to Student's educational program. During the IEP meetings, Parent wanted it noted on the IEP that the Chromebook was not available to Student unless there was direct supervision of Student or for tests. Although this was implemented in the classroom, that was not specifically included on the IEP but Student received paper assignments. Parent also wanted an increase in special education services when Student went to the DAEP program and was concerned about Student's placement and reduction in services. Some of Parent's issues were include in the IEP. Meaningful parental participation does not require that all proposals be included in the IEP or educational program. The Parent is a member of the IEP team and decisions are made through consensus. That happened here.

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

As to Issue No. 2, the District is cited on 2a and not cited on 2b.

Issue No 3

Whether the District failed to ensure that special education staff that worked with Student had the appropriate qualifications in violation of 34 C.F.R. § 300.156.

IDEA requires that individuals employed as a public-school special education teacher must meet the qualification requirements for the State that they work in. 34 C.F.R. § 300.156(c). States may allow for provisional certification as teachers work toward the appropriate certification to teach special education students. When uncertified substitute teachers are acting as a special education teacher on a long-term basis, it is more likely that would be a denial of FAPE. *S.B. v. Murfreesboro City Schools*, 67 IDELR 117 (MD TN 2016).

Student's math teacher was a long-term substitute and had been since 2015. The teacher did not have a college degree nor any training or certification as a teacher, much less a special education teacher. There was no plan for the substitute teacher to obtain certification nor request for a provisional certificate. This was a violation of IDEA.

As to Issue No. 3, the District is cited, and Corrective Action is required.

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.

Students who are eligible for special education services are entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. A District is obligated to provide a FAPE to students within their jurisdiction who have been determined eligible for special education services. 34 C.F.R. § 300.17. The determination of whether there has been a denial of FAPE requires consideration of two components: substantive and procedural. The question one must answer to determine the substantive standard is whether the IEP was “reasonably calculated to allow the child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas County School District. RE-1*, 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 does not review or revise the IEP. *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSPE 2016).

Student’s disability was OHI because of an ADHD, combined type diagnosis. Student’s PLAAFP indicated that Student was impulsive, unable to sit still, disruptive, lack of focus and patience based on test results from 2020. Student had multiple ISS and OSS totaling more than 20 days in this school year. The IEP listed reading, math and written language as areas of need, yet there was nothing in the PLAAFP indicating what Student’s needs were except for grades and test results from the 2020 evaluation. There were no reading or written language goals and the District was discussing placing Student back in general education math. The team noted that Student was able to complete the math work but behaviors got in the way. If Student no longer needed services in reading, math and written language, then Student should be assessed and, if appropriate, dismissed from those services.

Student’s behavior was the primary issue but there were no goals or other supports and services to assist Student with behavior. Student had a BIP that was last revised on January 25, 2024 but the plan did not correspond to the behaviors and motivators on the FBA completed January 16, 2024. Significantly, Student was still receiving OSS after the BIP revision and was placed in an IAES because of Student’s behaviors. Student’s behaviors were impeding learning, yet the IEP

did not address that need. At the IEP meeting on March 6, 2024, the IEP team did not consider other supports, services or goals that would allow Student to make educational progress. Student has received special education instruction from a teacher without appropriate certification and qualifications. All of these factors demonstrate that the IEP was not reasonably calculated to allow Student to make progress in light of Student’s circumstances. This was a substantive denial of FAPE.

There were also procedural violations on this record. As noted above, Student had ongoing behavioral issues that resulted in suspensions. Student’s special education teacher was not qualified to provide special education instruction. The IEP team did not timely meet to consider what other options there were for assisting Student. The educational services provided in the home during the suspensions were not appropriate because Student could not use the Chromebook without supervision. The MDR did not consider all relevant information when determining whether Student’s behavior was a manifestation of the disability. Student’s placement in an IAES was not a decision of the IEP team but was a decision by the hearing officer affirmed after placement by the IEP team without ensuring Student received FAPE. These violations denied Student meaningful educational benefit that resulted in a denial of FAPE.

As to Issue No. 4, the District is cited, and Corrective Action is required.

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. § 300.530 and 6.31.2.11(F)(2) NMAC	The District failed to follow the IDEA disciplinary procedures when disciplining Student for violations of the District’s code of conduct when the District; Failed to consider relevant information regarding Student in determining whether the behavior was a manifestation of student’s disability; Failed to provide appropriate services when Student’s out of school suspension exceeded 10 days of removal during the 2023-2024 school year; and Changed Student’s placement following a disciplinary hearing without the involvement of the IEP team.

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. §§ 300.324 and 6.31.2.11(B)(1) NMAC	The District failed to develop and implement an IEP to allow Student to make educational progress in the general education curriculum, specifically, the District; and Failed to include and provide all needed accommodations on the IEP.
34 C.F.R. § 300.156	The District failed to ensure that special education staff that worked with Student had the appropriate qualifications.
34 C.F.R. § 300.101 and 6.31.2.8 NMAC	The District's actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE).

Required Actions and Deadlines

By May 17, 2024, the ***District's*** Special Education Director must assure the OSE in writing that the District will implement the provisions of this Corrective Action Plan (CAP). The OSE requests that the District submit all documentation of the completed corrective actions to the individual below, who is assigned to monitor the District's progress with the Corrective Action Plan and to be its point of contact about this complaint from here forward:

Dr. Elizabeth Cassel
Corrective Action Plan Monitor
Office of Special Education
New Mexico Public Education Department
300 Don Gaspar Avenue
Santa Fe, NM 87501
Telephone: (505) 490-3918
Elizabeth.Cassel@ped.nm.gov

The file on this complaint will remain open pending the PED's satisfaction that the required elements of this Corrective Action Plan are accomplished within the deadlines stated. The District is advised that the OSE will retain jurisdiction over the complaint until it is officially closed by this agency and that failure to comply with the plan may result in further consequences from the OSE.

Each step in this Corrective Action Plan is subject to and must be carried out in compliance with the procedural requirements of the IDEA 2004 and the implementing federal regulations and State rules. Each step also must be carried out within the timelines in the Corrective Action Plan.

If a brief extension of time for the steps in the Corrective Action Plan is needed, a request in writing should be submitted to the Corrective Action Plan Monitor. The request should include the case number, the date for the proposed extension, and the reason for the needed extension. The OSE will notify the parties of any extension granted.

Please carefully read the entire CAP before beginning implementation. One or more steps may require action(s) in overlapping timeframes. All corrective action must be completed no later than May 10, 2025 and reported to the OSE no later than May 24, 2025. All documentation submitted to the OSE to demonstrate compliance with the CAP must be clearly labeled to indicate the state complaint case number and step number.

Corrective Action Plan

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED OSE</u>	<u>Document Due Date</u>
1.	As described above, the District will submit a written assurance to the PED OSE Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan (CAP).	May 17, 2024	Written Assurance Letter/Email	May 17, 2024
2.	The District Special Education Director and the school principal shall meet with the PED OSE Education Administrator assigned to the District and the PED OSE CAP Monitor to review the Complaint Resolution Report, the CAP, and any other measures that the District plans to take to ensure that the violations are corrected and do not recur. The District Special Education Director shall be responsible for arranging this meeting with OSE.	May 24, 2024	Notes from meeting prepared by the District	May 31, 2024

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED OSE</u>	<u>Document Due Date</u>
3.	<p>The District will hold a Facilitated IEP meeting as soon as possible which shall address:</p> <ul style="list-style-type: none"> • appropriate measurable goals, including behavioral goals; • appropriate positive behavioral interventions and supports including revision of BIP, • appropriate accommodations, • appropriate supplementary aides and services, program modifications and supports. • Special education services and service time based on the goals and needs of Student • Student Placement in the least restrictive environment including considerations of behaviors or other areas of concern that are impeding Student’s access to the general education setting; • compensatory education services required in Step 4. <p>The Facilitator shall be independent of the District and shall be selected from the PED list of approved facilitators. The Facilitator shall be paid for by the District.</p>	June 28, 2024	<ol style="list-style-type: none"> 1. Invitation to facilitated IEP meetings, 2. IEP and BIP 3. Prior Written Notices, and 4. Agenda for facilitated IEP team meetings 	July 5, 2024

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED OSE</u>	<u>Document Due Date</u>
	<p>The FIEP meeting shall be held on a date and time that is convenient for the parent. The parent will be provided with a copy of the IEP and PWN at the conclusion of the FIEP meeting.</p> <p>The District shall also ensure that the IEP team includes, but is not limited to, parents, special education teacher, general education teacher, and any related services providers.</p>			
4.	<p>The School shall provide Student with the following compensatory education:</p> <ul style="list-style-type: none"> a. 60 hours of One-to-One Math Instruction/Tutoring to include instruction in areas of foundational math in which Student exhibits deficiencies; and b. 50 hours of transition and career readiness related services or social work with the distribution of hours to be determined by the IEP team. <p>The schedule/plan for compensatory services should be developed in collaboration with the parent during the FIEP meeting required in Step 3 and can include</p>	May 9, 2025	<p>Documentation of delivery/provision of compensatory education services, including logs of services recorded in the PED-approved Excel spreadsheet log provided by the OSE CAP monitor.</p> <p>Prior Written Notice containing plan for compensatory services.</p>	<p>Monthly from date of compensatory services plan until the compensatory education hours are completed.</p> <p>July 25, 2024</p>

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED OSE</u>	<u>Document Due Date</u>
	<p>provisions for services in the summer months.</p> <p>The plan for compensatory education shall be documented in Student’s IEP or through a formal prior written notice.</p> <p>If the District cannot provide compensatory education through District employed providers, it shall contract with a private provider to deliver these hours of compensatory education.</p>			
5.	<p>The District shall arrange to provide training to District staff (including special education teachers, special education administrators, and related service personnel). The training shall be provided by a person with expertise in special education who was not involved in responding to this complaint and who is approved by PED. The training shall be conducted at District’s expense. The training shall address the following special education topics:</p> <ul style="list-style-type: none"> • Development of an IEP that provides FAPE especially when behavior impedes learning • Requirements for dismissal or removal of services from the IEP including 	August 30, 2024	<p>Submission of proposed trainer and trainer’s resume and proposed presentation for PED approval.</p> <p>Confirmation of the date of the training.</p> <p>Confirmation of attendees at the training and plan for addressing the provision of training to those staff not in attendance.</p>	<p>August 2, 2024</p> <p>August 9, 2024</p> <p>September 6, 2024</p>

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED OSE</u>	<u>Document Due Date</u>
	<p>determining needs and special supports and services for students</p> <ul style="list-style-type: none"> • When IEP Meetings should be held when increasing behaviors impede learning or progress • Requirement to utilize qualified staff for special education and related services • Disciplinary procedures of IDEA, specifically: <ul style="list-style-type: none"> ○ procedures for conducting an MDR ○ calculation of days of disciplinary removal ○ relevant information to be considered and appropriate team members ○ determination of whether conduct was a manifestation of a student’s disability ○ provision of appropriate services to student when there had been 10 days of disciplinary removal • Required Procedures for disciplinary hearings 			

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED OSE</u>	<u>Document Due Date</u>
6.	District will develop and submit a comprehensive plan to address recruitment and retention of qualified and licensed secondary special education teachers, which shall include recruitment from both inside and outside of the State.	July 1, 2024	Comprehensive Plan to address recruitment and retention of licensed special education teachers	July 1, 2024
7.	District shall submit, on a monthly basis, all documentation related to its activities and continued attempts to recruit and retain qualified and licensed special education teachers.	Ongoing starting July 31, 2024	Documentation related to activities and continued attempts to recruit and retain licensed special education staff	Submitted Monthly until all secondary special education teaching positions are filled.

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

Investigated by:

/s/ Michele Bennett

Michele K. Bennett, Esq.

Complaint Investigator

Reviewed by:

/s/ Miguel Lozano

Miguel Lozano, Esq.

Chief Counsel, Office of Special Education

Reviewed and approved by:

DocuSigned by:
Margaret Cage

1D32A08CC33B4F2
Margaret Cage, Ed.D.

Director, Office of Special Education