



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](http://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

Case No. C2324-51

May 17, 2024

**This Report does not require corrective action.**

On March 18, 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.<sup>1</sup> 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;
- review of the District's compliance with federal IDEA regulations and state NMAC

---

<sup>1</sup> 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.

rules;

- interviews with the Parent, 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 Parents were denied meaningful Parental participation by Parents in violation of 34 C.F.R. § 300.321 (a)(I); 34 C.F.R. § 300.501(b) and (c)(I) and 6.31.2.13 (C) NMAC, specifically, whether the District,
  - a. Failed to timely convene an IEP meeting as requested by Parents; and
  - b. Failed to consider the Parents' and Physical Therapist's recommendations regarding consultation services.
2. Whether the District failed to develop and implement an IEP that addressed the provision of physical therapy consultative services, in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.II(B)(I) NMAC.
3. Whether the District's actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE), in violation of 34 C.F .R. § 300.101 and 6.31.2.8 NMAC.

### **General Findings of Fact**

#### **Background Information**

1. Student is 15 years old with dual exceptionalities in autism and giftedness. Student is eligible for special education services under IDEA.

2. At the September 21, 2021, IEP meeting, the team discussed concerns about Student's pain, joints, ability to move around campus/access to educational environment and ability to safely participate in physical education (PE). The IEP team, based on input from Parents, referred Student for a PT evaluation.
3. The physical therapy (PT) Evaluation by a District physical therapist indicated that Student would not be able to participate or would participate with accommodations in PE given his motor skill performance, functional balance, and mobility scores.
4. The PT Evaluation also noted that Student had missed 7<sup>th</sup> grade PE, and, further, there existed specific areas of weakness particularly in upper limb coordination, running speed and agility, and, to a lesser extent, strength.
5. The PT Evaluation recommended participation in PE with accommodations as enumerated.
6. An IEP Addendum was developed by the IEP Team after a meeting on April 14, 2022.
7. The PWN, dated April 14, 2022, indicated the IEP Team's acceptance of Student participating in PE with accommodations.
8. An IEP meeting was held on September 22, 2022. The PWN, also dated September 22, 2022, indicated that PT would provide consultation during Student's initial participation in a yoga course with the intent that such services would be faded out over the course of the semester thereby providing Student with the least restrictive environment (LRE).
9. Parents reported Student's dermatographia condition can cause welts even with the slightest of touch or contact. The September 22, 2022, PWN also indicated the Student was excused from PE due to dermatographia (allergy to touch or skin contact), which could be caused even with a soft touch or contact. Dermatographia is a skin condition that would substantially impact Student's ability to engage in any contact with other students during group activities. Even brushing Student's skin with a piece of gym equipment could cause a severe skin reaction.
10. An Addendum to the September 22, 2022, IEP was created after an IEP Team meeting on March 16, 2023. The IEP Team determined that Student no longer needed PT intervention during yoga for the remainder of the 8<sup>th</sup> grade. Student did well once yoga movements were learned. However, the PT consult option would remain in place for any other fitness-type of classes attended.
11. An IEP meeting was held on September 18, 2023. Parents attended and participated in this IEP meeting. Parents participated as a team member and made recommendations related to Student's special education, accommodations, and related services.
12. The September 18, 2023, PWN detailed Parents' request for Student to have access to a physical therapy-supported PE program.
13. Parents' request was based on Student's physical limitations combined with Student's compliance with instructor requests as reported by Parents and staff.

14. The IEP team discussed PE as a requirement for graduation, as well as a possible waiver obtained from a medical provider.
15. The IEP team then recommended Student complete the PE credit through an online class allowing for adapted physical activity for an individual student. Parents did not agree with this option stating that expecting Student to complete an independently completed PE program would be too difficult to manage for Student.
16. Parents then requested an adapted PE program with physical therapy supports.
17. The IEP team agreed to reconsider this proposal after information could be gathered about what type of PE program can be adapted onsite, as well as consulting with the physical therapist about Student's physical needs to complete a PE program. The IEP team agreed to revisit Parents's proposal during the following semester prior to the next school year.
18. The PWN, dated February 27, 2024, set forth the proposed actions as a result of the February 27, 2024, IEP Addendum meeting. Parents attended and participated in this IEP meeting.
19. During the meeting, Parents indicated they would provide medical documentation regarding Student's medical diagnosis and physical participation at school. The IEP team accepted this proposed action.
20. During the IEP meeting, Parents disagreed with other IEP team members concerning a recommendation that Student earn PE credit through the "regular virtual HOPE program" as that program would allow Student to obtain Student's PE credit while also taking into account Student's physical and medical condition, including dermatographia.
21. Parents were concerned that the online PE program would seclude Student from participating with other students.
22. This PWN also indicates that the IEP team considered the input from the District's physical therapist recommending that Student participate in the online HOPE program, as well as the private physical therapist.
23. The IEP team ultimately determined the HOPE program was a viable option providing Student with the least restrictive environment.
24. The District physical therapist later reported that the physical therapist had contacted the private physical therapist.
25. According to the District physical therapist, the private physical therapist agreed that Student should not take the regular in-person PE class during the 2024-2025 school year. This recommendation was based on the fact there are too many activities Student would not be able to participate in because of the potential for physical contact with other students, including during group activities, or contact with objects.
26. The District's physical therapist had two separate communications with the private physical

therapist (February 27 & 28, 2024) confirming that the private physical therapist's recommendation was that Student should not take regular PE.

27. Further, the two physical therapists recommended that Student take the online HOPE option for PE credit.
28. The District did not receive any response to multiple requests from the District to the Student's physician.
29. Subsequent to the February 27, 2024, IEP meeting, Parents requested another IEP meeting.
30. Parents were pursuing the same issue which had been addressed during the February 27, 2024, IEP team meeting.
31. The District indicated that a meeting could be held if any additional information became available.

### **Discussion and Conclusions of Law**

#### **Issue No. 1**

**Whether the Parents were denied meaningful Parental participation by Parents in violation of 34 C.F.R. § 300.321 (a)(I); 34 C.F.R. § 300.501(b) and (c)(I) and 6.31.2.13(C) NMAC, specifically, whether the District,**

- a. Failed to timely convene an IEP meeting as requested by Parents; and**
- b. Failed to consider the Parents' and Physical Therapist's recommendations regarding consultation services.**

Under the IDEA, parents are mandatory members of the IEP team. 34 CFR 300.321 (a)(1). This means that districts must take steps to ensure that one or both parents of a student with a disability are present at each IEP meeting or are afforded the opportunity to participate in the meeting. 34 CFR 300.322 (a).

Most courts have held that parental participation in the IEP decision-making process means more than an opportunity to speak. To comply with the IDEA's requirements, a district must generally show that it came to the IEP meeting with an open mind and that it was "receptive and responsive" to the parents' position at all stages of the process. *See R.L. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182, 757 F. 3d 1173 (11th Cir. 2014). *See also R.K. and D.K. v. Clifton Bd. of Educ.*, 64 IDELR 96 (3d Cir. 2014, unpublished) (holding that a preschooler's parents meaningfully participated in the IEP meeting where they actively engaged in discussions about the child's services, and the district conducted an independent assessment of the private program they requested); and *Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109, 392 F. 3d 840, (6th Cir. 2004), cert. denied, 110 LRP

Complaint Resolution Report – C2324-51 – Page 5

46999 , 546 U.S. 936 (2005) (ruling that a Tennessee district violated the IDEA when it predetermined the placement of a student with autism before the IEP meeting and only permitted the parents to voice their opinions "after the fact").

**a. Failed to timely convene an IEP meeting as requested by Parents.**

The IEP team held an annual IEP meeting on September 18, 2023. Parents attended and actively participated in that meeting. During that IEP meeting, Parents recommended Student participate in PE class with direct physical therapy support. Parents stated that the online HOPE program, under discussion by the IEP team, would seclude Student from participating in PE with other students. However, the IEP team allowed for additional information to be gathered based on Parents' recommendation. An additional IEP meeting was to be held at a later date.

The IEP team met again on February 27, 2024. Based on the information available to it, including Student's physical and medical limitations, the IEP team determined that the Student should attend the online HOPE program, and, further that, an individualized health plan for the online PE course will allow Student to engage in the activities Student knows how to do independently and safely to work toward satisfactory completion of the PE requirement. 71 Fed. Reg. 46589 (August 14, 2006) (There is a strong preference in favor of educating children with disabilities in the regular classroom with appropriate aids and supports because a regular classroom placement is not appropriate for every child with a disability. Placement decisions will be made on a case-by-case basis and must be appropriate for the needs of the child.).

Here, the records reflect that parents were active participants throughout the IEP decision-making process. They were involved in discussions regarding all issues, including providing recommendations for related services. Districts should consider the parents' suggestions and, to the extent appropriate, incorporate these in the IEP. District disagreed with Parents' recommendation. However, such disagreement does not amount to a lack of parental participation. *See, e.g., Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109, 392 F. 3d 840, (6th Cir. 2004), *cert. denied*, 110 LRP 46999 , 546 U.S. 936 (2005), *on remand*, 46 IDELR 45 (E.D. Tenn. 2006), *aff'd*, 49 IDELR 123 (6th Cir. 2008); *J.D. v. Kanawha County Board of Educ.*, 48 IDELR 159, Civil Action No. 2:06-cv-00167 (S.D. W.Va. 2007), *aff'd*, 110 LRP 57258 , 357 F. App'x 515 (4th Cir. 2009, *unpublished*), *cert. denied*, 110 LRP 57264 , 131 S. Ct. 107 (2010); and *E.S. v. Smith*, 74 IDELR 153 (4th Cir. 2019, *unpublished*). While a District must follow the federal mandate to "consider" parent input, the mandate does not mean "acquiesce." The IDEA does not require districts "simply to accede to parents' demands without considering any suitable alternatives." *Blackmon v. Springfield R-XII Sch. Dist.*, 31 IDELR 132, 198 F. 3d 648 (8th Cir. 1999).



After the February 27, 2024, IEP meeting, Parents requested another IEP meeting. However, the issues raised by Parents for requesting a subsequent meeting addressed the same issues. There was no new information or data for the District to consider as part of this request. 34 CFR 300.24(a) and (b).

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

**b. Failed to consider the Parents' and Physical Therapist's recommendations regarding consultation services.**

Over the last two school years, the IEP addressed Student's physical and medical limitations. During the annual IEP meeting in September 2021, Student's limitations were noted and PE modifications were implemented. Student also underwent a physical therapy evaluation in March 2022. During an IEP meeting in April 2022, the IEP team modified PE accommodations based in part by information provided by Parents.

In September 2022, Parents notified the IEP team, during the annual IEP team meeting, that Student had dermatographia. IEP Team accepted Parent's recommendation to excuse Student from PE "due to dermatographia (allergy to touch)" because "even a softer touch will bring up welts due to the allergic reaction." During the September 2023 IEP meeting, the IEP considered information from Parents, District physical therapist, and other information. The records specifically reflect that Parents were significantly engaged in discussions concerning options for completion of the PE credit requirement. Ultimately, the IEP Team recommended that Student satisfy the high school PE credit through the online HOPE program.

The record reflects that the IEP team considered Parents' recommendations, as well as the recommendations from the two physical therapist. Special education services under the IDEA include instruction in physical education designed to meet the unique needs of a student with a disability, 34 C.P.R. § 300.39 (a)(1)(ii). The District considered and provided modifications and services for Student allowing for progress in developing physical and motor fitness and fundamental motor skills and patterns. Section 300.39 (b)(2).

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

**Issue No. 2**

**Whether the District failed to develop and implement an IEP that addressed the provision of physical therapy consultative services, in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.II(B)(I) NMAC.**

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 (9<sup>th</sup> Cir. 1996). Special education services under the IDEA include instruction in physical education designed to meet the unique needs of a student with a disability, 34 C.F.R. § 300.39 (a)(1)(ii).

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). 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 (PLAAFP), 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. 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). 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 (9<sup>th</sup> Cir. 2007).

Special education services under the IDEA include instruction in physical education designed to meet the unique needs of a student with a disability. 34 CFR 300.39 (a)(1)(ii). The IDEA defines physical education as:



1. The development of: A) physical and motor fitness; B) fundamental motor skills and patterns; and C) skills in aquatics, dance, individual and group games, and sports (including intramural and lifetime sports); and
2. Includes special physical education, adapted physical education, movement education, and motor development. 34 CFR 300.39 (b)(2).

Physical education services must be made available to every child with a disability unless the district does not provide physical education services to children without disabilities in the same grades. 34 CFR 300.108 (a). Districts must afford each child with a disability the opportunity to participate in the regular physical education program available to nondisabled children unless: the child is enrolled full time in a separate facility; or the child needs specially designed physical education, as prescribed by the child's IEP. 34 CFR 300.108 (b).

Under the IDEA's LRE mandate, students should be educated in the regular class to the maximum extent appropriate, and this mandate includes PE. 34 CFR 300.114; 71 Fed. Reg. 46,577 (2006). It is appropriate for a student who does not need any accommodations or modifications to participate fully and successfully in a mainstream PE class. In a regular PE program, the child with a disability can participate in the same program available to nondisabled students. *See* 34 CFR 300.108 (b). *See also Merrill v. Enlarged City Sch. Dist. of Troy*, 61 IDELR 111, 2013 NY Slip Op 31109 (N.Y. Sup. Ct. 2013, unpublished) (finding that a district did not need to place a 7-year-old in adapted PE because his Section 504 team determined that he could safely participate in regular PE).

Students with disabilities who can participate in state-mandated regular PE, with or without supplementary aides and services, must be provided an equal opportunity to participate. *Letter to Irby*, 55 IDELR 231 (OSEP 2010). If a district believes it may be appropriate for a student with a disability receiving adapted PE to transition back to regular PE, it may need to convene the student's IEP team in case the transition constitutes a change in placement. *See Letter to Tymeson*, 81 IDELR 23 (OSEP 2022). Adapted physical education is PE instruction designed for students whose disabilities prevent safe or successful participation in regular PE. 34 CFR 300.39 (a)(1); and 34 CFR 300.39 (b)(3).

A student's IEP team, not a student's physician or other health care providers, determines whether a student needs specialized education, such as adapted PE or alternative PE class, in order to receive educational benefit. *See Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307, 616 F. 3d 632 (7th Cir. 2010) (finding that an administrative law judge inappropriately relied on a physician's testimony that a grade schooler with a rare joint disorder required adapted PE). When including activities such as adapted PE in a student's IEP, the IEP team must identify to what extent the student will participate in those activities. *Board of Educ. of the Gates-Chili Cent. Sch. Dist.*, 44 IDELR 84 (SEA NY 2005).

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.

The records reflect that the District developed and implemented an IEP that addressed addressing Student's ability to participate in a regular PE class. Parents' request for physical therapy consultation services related to PE beginning during the 2023-2024 school year were not part of the current IEP. The District considered Parents' recommendations, as well as the recommendations of the District's physical therapist and the private therapist. The District's actions reflect an appropriate placement in the least restrictive environment through the online PE program.

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

**Issue No. 3**

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

Students who are eligible for special education services are entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. A District is obligated to provide a FAPE to students within their jurisdiction who have been determined eligible for special education services. 34 C.F.R. § 300.17. The determination of whether there has been a denial of FAPE requires consideration of two components: substantive and procedural. The question one must answer to determine the substantive standard is whether the IEP was "reasonably calculated to allow the child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County School District*. RE-I, 137 S. Ct. 988 (2017). Here, the Student's physical and medical conditions prevent him from meaningful participation in a regular PE setting. There is no evidence that Student cannot progress on goals established in the online HOPE program in satisfaction of the PE credit requirement.

All circumstances surrounding the implementation of the IEP must be considered to determine  
Complaint Resolution Report – C2324-51 – Page 10

whether there was a denial of FAPE. *A.P. v. Woodstock Board of Education*, 370 F. Appx. 202 (2d Cir. 2010). There is ample evidence that the District considered Parents' request for Student to participate in a regular PE class setting with consultation services. However, under the circumstances, the District determined the online HOPE program was the least restrictive environment. This decision was reasonably calculated to allow Student to make progress towards attainment of the required PE credit in light of the Student's physical and medical circumstances. There was no procedural violation on this record. There was also no substantive denial of FAPE.

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

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

Investigated by:

*/s/ 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