



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
Los Alamos Public Schools
Case No. C2324-58
June 18, 2024

This Report does not require corrective action.

On April 19, 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 and the Student; 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. The Complaint Investigator did not investigate any potential systemic claims set forth in the Parents’ Complaint.

Issues for Investigation

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

1. Whether the District was aware, or suspected, that the Student is a student with a disability and failed to comply with its Child Find obligations under the IDEA by failing to take steps to evaluate and identify the Student, as required by 34 C.F.R. § 300.111 and 6.31.2.10(A) NMAC;
2. Whether the District failed to conduct an initial special education evaluation of the Student in response to Parents’ verbal and/or written requests for an evaluation, as required by 34 C.F.R. § 300.301 and 6.31.2.10(D) NMAC;
3. Whether the District used a multi-layered system of supports (MLSS) process, as required by 6.31.2.10(B) NMAC, to delay or deny the provision of a special education evaluation to the Student; and
4. Whether the District’s actions and omissions resulted in a denial of a free appropriate public education (FAPE) to the Student, as required by 34 C.F.R. §§ 300.17 and 300.101, and 6.31.2.8 NMAC.

General Findings of Fact

1. The Student is currently 17 years of age and resides with the Parent within the jurisdictional boundaries of the District.

2. At the time the Complaint was filed, the Student was in the 11th grade at a High School in the District (the School). The Student is currently enrolled in the District and it is reported that he will be attending 12th grade at the School for the 2024-2025 school year.
3. District and Parent records show that the Student has a long history of receiving special education-related services. The Student first began receiving Speech/Language services in preschool. After transitioning to the District, the Student received an Initial Speech and Language Evaluation and an Educational Diagnostic Evaluation in March 2010, which found that the Student had speech/language deficits in the area of articulation, did not demonstrate cognitive developmental delays, but showed moderately low adaptive behavior. The Student was referred to the multidisciplinary team to determine eligibility for special education and/or Section 504 services.
4. District and Parent records provide that in April 2010, the Student's EDT determined that Student met criteria to receive special education services under the disability classification of Speech Language Impairment (SLI) and an IEP was developed for the Student. In September 2011, an Occupational Therapy (OT) Evaluation determined that the Student qualified to receive OT services. The Student was also provided with Tier 2 reading interventions.
5. When the Student was in 1st grade he was diagnosed with ADHD by his psychiatrist. Medication was prescribed but was discontinued later in elementary school. The Student was placed on a Section 504 Plan (504 Plan) which provided accommodations related to his ADHD.
6. In 2015 when the Student was eight years old, the District conducted an Educational Diagnostic Evaluation which determined that the Student did not exhibit any cognitive processing deficits that significantly impacted his educational performance and found that he did not meet the eligibility criteria for a learning disability. The evaluation indicated average range proficiency in written expression. It was determined that the Student continued to be eligible for services under the classification of SLI.
7. In 2016 the Student began receiving Gifted and Talented Education (GATE) services.
8. District records indicate that the Student received special education and related services through an IEP under the eligibility classification of SLI from elementary through middle school. The Student received GATE services under an IEP from 2016 until January 2022. The Student has been eligible to receive 504 Plan accommodations from the District throughout his educational career.
9. District records indicate that in November 2019, the IEP team transferred the Student's accommodations from his 504 Plan to his IEP. In September 2020, the Student's 3-year reevaluation determined the Student continued to be eligible for gifted services.
10. In October and November 2021, the District communicated with the Parent and the Student regarding the Student's lack of participation in GATE and asked whether the

Student would continue to participate in GATE services. In an email to the Student's GATE Case Manager on January 20, 2022, the Parent agreed with the Student about exiting the IEP and moving to the 504 Plan. However, the District reports that by January 2022, the 504 Plan had become outdated and the District and Parent agreed it should be updated.

11. On January 20, 2022, the District and the Parent signed an Addendum to Individualized Education Program exiting the Student from GATE services.
12. District records indicate that in January 2022, the District referred the Student for an initial comprehensive educational evaluation based on the Parent's report and information from the SAT/504 team regarding a concern related to dyslexia and its effect on reading, writing and math. The Parent declined consent for the evaluation and informed the District that the Parent would pursue a private evaluation. The referral for evaluation states that the District "stands ready, willing and able to complete a comprehensive academic evaluation, at any point."
13. District records indicate that on January 23, 2022, the Parent sent an email to District staff expressing her concerns about the Student possibly having dyslexia. The Parent stated that she was "immediately moving to have him referred for an evaluation, but it will take awhile (sic) to get him to the right people and therefore receive the diagnosis. I am hoping that he could enjoy more targeted support in the 504 during this process."
14. On April 4, 2022, the Student's 504 Team, including both the Parent and Student, met to review and update the Student's 504 Plan. The 504 Team discussed and agreed to accommodations for the Specific Need areas of Environment, Assistive Technology and Testing. These accommodations included extended due dates on assignments, teacher lecture notes, speech to text, extra time on tests, alternative assessment, ability to correct spelling, and use of Google Docs, among others.
15. On August 10, 2022, the Parent's privately-obtained Psychoeducational Evaluation of the Student was conducted. The results of this evaluation provide, in relevant part, as follows:
 - a. The Student's work speed for the evaluation was slower than expected for his age. Otherwise, the Student's behavior during the evaluation was typical and appropriate for his age.
 - b. The Student's overall intellectual abilities are in the very superior range.
 - c. Written Language: "Written language skills were average, overall; however, a relative weakness was noted in his low average performance on a test of basic spelling. In contrast, [the Student] performed in the average range on tests of sentence composition and sentence writing fluency... Academic achievement in math and Written language was within normal limits for his age and grade placement."
 - d. "There was no evidence of an autism spectrum disorder. Although [the Student] displays some restricted and repetitive behaviors, he generally demonstrated age

appropriate reciprocal social behavior during this evaluation. Furthermore, results of parent questionnaires completed by his mother suggested that he is displaying age-appropriate social responsiveness.”

- e. The evaluation noted the following diagnoses:
 - i. ADHD, combined;
 - ii. Anxiety Disorder specifically related to food; and
 - iii. Dyslexia; Specific Learning Disorder with Impairment in Reading.
16. On August 24, 2022, the Parent provided a copy of the August 10, 2022, Psychoeducational Evaluation of the student to the District. The District scheduled a meeting of the Student’s EDT to review the evaluation and other data provided by the SAT regarding Tier 1 and Tier 2 interventions.
17. On September 15, 2022, a 504 Plan meeting was held to review and update Student’s accommodations.
18. On October 3, 2022, the Student’s EDT met to determine the Student’s eligibility for special education services. The PWN dated October 3, 2022, provided by the District to the Parent regarding this EDT meeting provides, in relevant part, as follows:
 - a. “The school diagnostician reviewed the data presented in [the Evaluator’s] evaluation dated 8/10/22. Academic performance, processing scores, attention/focus, and anxiety needs expressed in the evaluation were reviewed and the school diagnostician recommendations on report dated 9/13/22 were reviewed.”
 - b. The team reviewed teacher observations and the Student’s classroom performance. “Reports indicated that [the Student] performs at a level commensurate with same age peers... Some miss-spellings in hand written work are noted but these are not noticeably different from peers at this time.”
 - c. “With the exception of the D- in 2nd semester English 9, all of [the Student’s] scores and performances fall within or above expectations for age typical peers.”
 - d. “The team considered Anxiety concerns expressed in Evaluation dated 8/10/22, parent’s reported frustrations and teacher observations and determined that [the Student] does not demonstrate factors that adversely impact his involvement or progress in a regular academic program.”
 - e. “[The Student] has ADHD which has been supported through accommodations in a 504 plan. The team agreed that [the Student’s] attention/focus needs are met with these accommodations and provide him the ability to progress in his academic program without specially designed instruction.”
 - f. The team agreed that the Student “demonstrates significant discrepancy in expectancy and performance in the area of Reading (Characteristics of dyslexia)... Review of student performance, however, showed that [the Student] is

performing at or above his peers in all areas of academics including those impacted by reading ability and does not require specially designed instruction because he performs consistently at or above the level of his peers in all regular education settings, advanced programming, college-level coursework and extracurricular activities.”

- g. The Parents and Student disagreed with the EDT decision and asked that their disagreement with the decision in be documented in the PWN.
19. At the request of the Parent, a second meeting of the Student’s EDT was held on November 7, 2022. The Parent provided significant written input and concerns to the District in advance of the EDT meeting. The EDT reviewed and discussed at length the proposed exceptionalities of ED, OHI and SLD and determined that the Student “does not require specialized instruction in order to progress in or access his current regular education and advanced school programming at this time.”
20. District records indicate that from November 7, 2022, through May 27, 2023, the Student received Tier 2 reading and spelling interventions from a licensed English Teacher in a college prep elective, which was available to all students. This instruction was provided one-on-one because the Student was the only student who signed up for the class, and the Student a earned an A+ in the class.
21. On August 29, 2023, the SAT reviewed the Student’s records and teacher, parent and student reports and determined that the Student no longer demonstrated the need for Tier 2 reading interventions.
22. On February 8, 2024, the Parent sent an email to the Assistant Coordinator of Student Services and other School staff requesting an evaluation for the Student in the areas of Autism and SLD in written expression and any other areas of suspected disability. The Parent indicated that the Student’s “sensory needs and language challenges are suggestive of autism.” The Parent further reported that the Student “masks his challenges at school.” The Parent also expressed concern that the Student must rely excessively on the use of assistive technology and accommodations. The Parent and Student reported that “[e]ven with technology, the writing process is agonizing, time-consuming, and the end result often requires a lot of editing for syntax because the construction is so awkward that meeting is lost.”
23. On February 12, 2024, the Parent sent an additional email to District staff expressing concern that the level of support the Student was receiving appeared to be, at times, “modified assignments that supported reading fluency deficits, and the ability to understand directions and language.” The Parent reported her concern that this level of support the Student is receiving may be “setting him up for a lot of difficulty in college.” The Parent further reported that the Student feels that his current D in history is “because he finds it really hard to keep up with the reading and writing.”

24. On February 20, 2024, the District provided Prior Written Notice to the Parent regarding the Parent's request for an evaluation related to Autism and SLD. The District's response to the Parent's request for an evaluation is as follows: "Based on current performance data, historical assessment data, neuropsychological evaluation results, response to reading interventions, and teacher and counselor report, [the Student] is able to access and progress with general education curriculum and instruction with 504 accommodations, in addition to Universal Design for Learning (UDL) and differentiation provided to all students in general education. (See attached notes/data above.) At this time, there is not sufficient evidence that [the Student] has an obvious disability and/or needs special education and related services related to a disability. School staff do not currently suspect Autism or SLD exceptionalities. [The Student's] current 504 accommodations related to documented dyslexia, anxiety and ADHD support his ability to access the general education curriculum."
25. The February 20, 2024, PWN includes the following notes/data regarding the District's refusal to conduct a special education evaluation for the Student:
- a. Team Input:
 - i. Classroom/School Performance:
 1. During the Student's three years of high school, the Student has enrolled in advanced courses including AP courses and dual credit courses at UNM-LA with success.
 2. The Student is taking advanced math and is enrolled in pre-calculus.
 3. The Student's current weighted GPA was a 3.167 [actually was 3.649]. The Student's first semester grades of the 2023-2024 school year were all A's and B's. The Student received one D for a semester grade in 9th grade English and has not received any failing grades.
 4. Teachers report that the Student performs at least within grade-expectations across classes and he interacts with peers and is able to successfully work independently and in peer groups. The Student occasionally has missing assignments but typically completes class assignments.
 - a. The Student's math teacher reports that he has used extended time on tests for 3/10 test/quizzes.
 - b. The Student's Latin teacher reported that the Student uses the following accommodations: sitting close to instruction, E textbook, working at his own pace, using resources on tests, occasionally using Google Docs and its built-in spell-and grammar-check. Most work uses smaller amounts of

writing and the Student seems to prefer doing those on paper. The Student seems to be fine with the teachers standard assessment format.

- c. The Student's Illustrator teacher reported that when the Student has questions "he speaks to me...If he needs extension on due dates, I approve them."
- d. The Student's Biology teacher reported that "[the Student] self advocates his needs when applicable. He is a natural learner in Biology and understands the concepts well and has been able to express his understanding of all of our coursework so far."
- e. Feedback from the Student's teachers indicates that "his level of comprehension of content knowledge, ability to express knowledge, and demonstrate learned skills is strong, overall. Teachers implement 504 accommodations and do not have concerns related to [the Student's] ability to access and progress with the general education curriculum and standards, at this time."

b. Assessment Data:

- i. 5/27/22 AP Physics I score = 3;
- ii. 5/24/23 AP Computer Science A score = 5;
- iii. 1/14/20 MAP Reading Assessment = 91st Percentile;
- iv. Formal Neuropsych Evaluation on 8/10/22:
 - 1. superior cognitive abilities, average working memory and low average processing speed;
 - 2. reading, writing and math scores fell within the average range on WJ-IV;
 - 3. word reading efficiency (TOWRE-2), and phonological memory and rapid symbolic naming (CTOPP-2) fell below the average range;
 - 4. DSM-V diagnoses:
 - a. Dyslexia: Specific Learning Disorder with Impairment in Reading;
 - b. Other Specified Anxiety Disorder related to food; and
 - c. ADHD.
 - 5. EDT conducted on 11/7/22 confirmed disability but determined that Student's "needs could be met through MLSS interventions and Section 504 accommodations."

c. Response to Intervention (RtI) Data:

- i. Student completed a MLSS, Layer 2 Reading Intervention Course during the 2022-2023 SY, and met or exceeded all program benchmarks;
 - ii. Demonstrated progress on oral reading fluency benchmarks as follows:
 1. Kent State Oral Reading Fluency Scores for 10th Grade Reading Passages (targeted reading rate for Winter = 130-180 and for Spring = 140-190):
 - a. 12/6/22: 101 WCPM; accuracy 98%; fluency 12/16;
 - b. 12/15/22: 116 WCPM; accuracy 98%; fluency 12/16;
 - c. 2/2/23: 134 WCPM; accuracy 98%; fluency 14/16;
 - d. 4/22/23: 126 WCPM; accuracy 97.6%; fluency 13/16.
 2. The Student did not need Layer 2 Reading Interventions for the 23-24 SY.
 - iii. During the 23-24 SY the Student attends regular check-ins with his counselor to discuss grades and needs, and the Student consistently reports that he is doing well and does not report any school-related anxiety.
 - d. The Student has a Section 504 Plan that teachers follow.
26. The Student took the national Common Lit Assessment during the 2022-2023 school year. The District’s Special Education Coordinator reports that the assessment demonstrates that the Student “is able to produce clear, cogent, and accurate thinking in written form, placing him in the 89th percentile of all students who took the common lit assessment in the nation. Other writing samples that [the Student] produced during September 2023 demonstrated similar sophistication and complexity, effectively employing transitions (“Another detail”) and correctly using parallel phrases and conjunctions: ‘Another detail about the school’s culture is shown through the many signs and trophies representing our care for academics and sports. Some examples around the school are trophy cases with athletic achievements, along with signs and clothing celebrating our seniors for getting so far, and encouraging them to finish the last stretch to graduation.’. . . In-class writing assignments that [the Student] produced in April 2024 also demonstrate his ability to effectively express himself in writing.”
27. The Student continued to receive Section 504 accommodations for writing during the 2023-2024 school year. The documentation includes the writing samples from the Student identified above. The reports from the Student’s teachers do not indicate any significant current concerns with the Student’s written expression.
28. Student’s cumulative GPA is currently a 3.649. The Student is on track for graduating in May, 2025.
29. Student’s grade reports for relevant periods of 2022-2023 and 2023-2024 school years are as follows:

STUDENT'S GRADE REPORTS

Year/Term 2022/2023	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Q3	A+	B-	B+	B	A	A	A	
Q4	B+	A+	A+	B-	B+	A-	A+	
S2	A	A-	A+	B	A-	A	A+	
2023/2024	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Q1	A-	A+	B		B+	A	B+	
Q2	A	A+	B		A-	A	B+	
S1	A-	A+	B+	A+	A-	A	A-	A+
	[REDACTED]			[REDACTED]				[REDACTED]
Q3		A	A+	A	A+		C	
Q4		A	A	B	B+	A	B	
S2		A	A+	A-	A	A	C+	A+

Discussion and Conclusions of Law

Issue No. 1

Whether the District was aware, or suspected, that the Student is a student with a disability and failed to comply with its Child Find obligations under the IDEA by failing to take steps to evaluate and identify the Student, as required by 34 C.F.R. § 300.111 and 6.31.2.10(A) NMAC;

Students with disabilities who are eligible under the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 CFR § 300.1(a); 6.31.2.7(B)(19) NMAC. The IDEA and its implementing regulations, and state rules, use the term "child find" to describe the affirmative and continuing obligation of school districts to identify, locate and evaluate all children with disabilities residing within the district's jurisdictional boundaries who are in need of special education and related services. 34 CFR § 300.111; 6.31.2.10(A) NMAC.

Under the Federal regulations and State rules, in order to qualify for special education and related services, a student must be between the ages of 3 and 21 and must satisfy both parts of a two-part test:

1. The student must meet the definition of one or more of the categories of disabilities which include: an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic

impairment, autism, traumatic brain injury, other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities; and

2. The student must be shown to be in need of special education and related services as a result of his disability or disabilities.

34 CFR 300.8 (a)(1); 6.31.2.7(B)(2) NMAC. Giftedness is not a disabling condition that meets the IDEA two-part test for eligibility. *Letter to Anonymous*, 55 IDELR 172 (OSEP 2010). If a child has one of the disabilities identified above, but only needs related services and not special education, the child is not a child with a disability under the IDEA. 34 C.F.R. § 300.8(a)(2)(i). However, if the related service that the child requires is considered "special education" under state standards, the child will be eligible under the IDEA. 34 C.F.R. § 300.8(a)(2)(ii).

The requirements of Child Find apply to, among others, students who are suspected of being a student with a disability and who are in need of special education and related services, even though they are advancing from grade to grade. 34 CFR §§300.101(a), 300.111(c)(1); 6.31.2.10(A) NMAC. The obligation to evaluate arises when there is a reason to suspect a disability and the student "demonstrates an obvious need for special education or related services by reason thereof..." 6.31.2.10(B)(3) NMAC. "[D]etermining child find duties implicates a subjective inquiry into whether a school should reasonably suspect a student has a qualifying disability." *D. T. v. Cherry Creek Sch. Dist. No. 5*, 55 F.4th 1268, 1275 (10th Cir. 2022). *See also, Boutelle v. Bd. of Educ. of Las Cruces Public Schools*, Civ No. 17-1232GJF/SMV, 8 (D.N.M. 2018).

The first issue raised by the Parents is that the District knew, or should have suspected, that the Student was a student with a disability who may be in need of special education services and, therefore, should have taken steps to evaluate the Student following the Parent's request for an evaluation on February 8, 2024. The Parent argues that the District refused to evaluate the Student because he is Gifted and receives good grades and is passing from class to class. The Parent's Complaint states that the Parents and the Student "suspect that [the Student] may have a Specific Learning Disability in Written Expression..." and "also suspect that [the Student] may have autism." With respect to written expression, the Parent reports that the Student estimates that he is doing "about 25% of required reading for some assignments before being given [Section 504] modifications and accommodations so that he can still earn passing grades...and...he is often allowed an oral response accommodation in lieu of a written response." The Parent further reports that the Student "has extreme difficulty creating written composition at home...his frustration levels are very high...[a]nd he requires hours of editing support, instruction, and help at home, from his parents to complete a written assignment." With respect to the Parent's suspicion of autism, the Complaint identifies a very long list of Student behaviors reported by the Parent and the Student at home and at School. The Parent reports that many of these behaviors

are not seen at school by teachers or staff because the Student successfully “masks” many of these behaviors.

The District counters the Parent’s Complaint by arguing that the Student’s “diagnostic test scores, good grades, self-advocacy with teachers in the classroom, and the lack of inappropriate behavior or extreme anxiety in school provided evidence that the 504 accommodations were helping [the Student] succeed.” As noted above, the Parent obtained a private Psychoeducational Evaluation of the Student in August 2022, to evaluate the Student’s reading skills and autism concerns. The Parent obtained this evaluation after refusing consent for an evaluation offered by the District. The August 2022 evaluation indicated that the Student’s math and written language were within normal limits for his age and grade placement, and that there “was no evidence of an autism spectrum disorder. Although [the Student] displays some restricted and repetitive behaviors, he generally demonstrated age appropriate reciprocal social behavior during this evaluation.” The Student was diagnosed with ADHD, Anxiety Disorder specifically related to food, and Dyslexia: Specific Learning Disorder with Impairment in Reading. While the 2022 evaluation recommended an IEP for the Student, the Student’s EDT subsequently determined that the Student did not have a need for special education and that the Student’s needs were being met by his Section 504 accommodations. It should be noted that in April 2024, after the Parent’s request for an evaluation and after the filing of the Complaint by the Parent, the Parent obtained an additional private evaluation. Due to its timing, the April 2024, evaluation is not being considered in connection with the current complaint investigation.

The facts set forth above show that during the year preceding the filing of Parent’s Complaint, the District was fully aware of the Student’s disabilities of ADHD, dyslexia, and mild anxiety that were confirmed by the August 2022 evaluation. Two meetings of the Student’s EDT in October and November 2022, agreed with these diagnoses but determined that the accommodations being provided to the Student under his 504 Plan were effective in allowing the Student to access his general education courses and he did not require specially designed instruction. The Student continued to be involved in his general and advanced coursework and continued to receive almost all A’s and B’s. The Student’s English teachers consistently state that the Student’s written work is above average for his age and grade. The Student did not have any notable behavioral issues and continued to have regular check-ins and receive counseling from the school counselor during the 2023-2024 school year. The Student did not report any school-related anxiety. Generally, the only negative comments from his teachers involve missing assignments. Under the facts and circumstances set forth above, it is concluded that it was reasonable for the District to not be aware or suspect that the Student had a SLD in written expression and/or autism that required special education and related services in order for the Student to access his general education curriculum, and, therefore, did not fail to comply with its Child Find obligations under the IDEA by failing to take steps to evaluate and identify the Student.

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

Issue No. 2

Whether the District failed to conduct an initial special education evaluation of the Student in response to Parents' verbal and/or written requests for an evaluation, as required by 34 C.F.R. § 300.301 and 6.31.2.10(D) NMAC.

The Federal regulations and State rules provide that a parent may request an initial special education evaluation at any time before, during or after the MLSS process. 6.31.2.10(B)(2) NMAC. If the student is suspected of having a disability and demonstrates an obvious need for special education or related services by reason thereof, then the student shall be referred for a full and individual evaluation for special education without undue delay. 6.31.2.10(B)(3) NMAC. "The public agency shall respond to a parental request for initial evaluation or reevaluation to the public agency no later than 15 school days from the receipt of the request. 6.31.2.10(D)(3) NMAC. The public agency shall respond to a parental request for initial evaluation or reevaluation by providing prior written notice consistent with 34 CFR Sec. 300.503 that proposes to conduct the requested evaluation or reevaluation, providing a copy of the procedural safeguards notice to parents required by 34 CFR Sec. 300.504, and seeking parental consent for the evaluation, or providing prior written notice consistent with 34 CFR Sec. 300.503 of the public agency's refusal to conduct the evaluation or reevaluation and a copy of the procedural safeguards notice required by 34 CFR Sec. 300.504." 6.31.2.10(D)(4) NMAC. A parent may use the IDEA procedural safeguards of mediation, state complaint, or due process hearing as set forth in 6.31.12.13 NMAC to challenge the public agency's response to a request for evaluation or reevaluation, or the failure to respond to a parent's request for evaluation or reevaluation. 6.31.2.10(D)(6) NMAC. Moreover, "consistent with the consent requirement in 34 CFR Sec. 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability or if the child's educational needs have changed." 34 C.F.R. § 300(b); 6.31.2.10(D)(1) NMAC. It is important to note that neither the Federal regulations nor the State rules require that the referral, or parental request, for a special education evaluation be in writing. 6.31.2.10(D)(2) NMAC.

A student's EDT team, not a student's physician, makes the determination as to whether the student is eligible for special education and related services under the IDEA. *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 616 F.3d 632 (7th Cir. 2010); *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007); and *Sebastian M. v. King Philip Reg'l Sch. Dist.*, 685 F.3d 79 (1st Cir. 2012). "In interpreting evaluation data for the purpose of determining if a child is a child with a disability under 34 CFR 300.8, and the educational needs of the child, each public agency must draw upon information from a variety of sources, including aptitude and achievement tests, parent input,

and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior, and ensure that information obtained from all of these sources is documented and carefully considered.” 34 C.F.R. § 300.306(c)(1). The failure of an IEP team to consider relevant information about the student in making an eligibility determination may result in a denial of FAPE. *Lauren G. v. West Chester Area Sch. Dist.*, 906 F. Supp. 2d 375 (E.D. Pa. 2012).

As noted above, the obligation to evaluate arises “if the student is suspected of having a disability and demonstrates an obvious need for special education or related services by reason thereof...” 6.31.2.10(B)(3) NMAC. A student with an impairment is not eligible for special education under the IDEA unless he has an educational need for such services. *See, e.g., D.L. v. Clear Creek Indep. Sch. Dist.*, 695 F. App'x 733 (5th Cir. 2017) (holding that a high schooler with anxiety, depression, and ADHD did not require special education or related services under the IDEA). Special education services are not required where the disability does not have an adverse effect on the student's educational performance. *Durbrow v. Cobb County Sch. Dist.*, 887 F.3d 1182 (11th Cir. 2018) (After finding that a high schooler's ADHD did not impede his academic performance during his first three years in a magnet program for high-achieving students, the 11th Circuit ruled that the student did not establish a need for special education.). *See also, J.D. v. Pawlet Sch. Dist.*, 33 IDELR 34 (2d Cir. 2000); *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007); *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 616 F.3d 632 (7th Cir. 2010); and *C.M. v. Department of Educ., State of Hawaii*, 476 F. App'x 674 (9th Cir. 2012, unpublished).

A student who is eligible as a "student with a disability" is eligible under the IDEA regardless of the student's academic success. The student's academic achievement is irrelevant when the student otherwise meets the eligibility criteria. *Williamson County Bd. of Educ. v. C.K.*, 52 IDELR 40 (M.D. Tenn. 2009). However, a district's duty to evaluate a student diagnosed with an IDEA-eligible disability hinges on whether it believes the student needs specialized instruction as a result. Evidence of a student's solid academic performance can bolster a district's argument that a special education evaluation was unnecessary. *Legrís v. Capistrano Unified Sch. Dist.*, 3:07-0826, 79 IDELR 24 (9th Cir. 2021, unpublished) (The student's ability to earn A's, B's, and C's in the general education curriculum with Section 504 accommodations showed that the district had no reason to suspect a need for special education.) Evidence that a student with an impairment has made non-trivial educational progress after receiving general education interventions is a strong indicator that he does not require IDEA services. *See, e.g., M.P. v. Aransas Pass Indep. Sch. Dist.*, 2:15-CV-233, 67 IDELR 58 (S.D. Tex. 2016).

On February 4, 2024, the Parent made an appropriate request to the District for a special education evaluation of the Student. On February 20, 2024, the District provided timely Prior Written Notice to the Parent refusing the Parent's request for an evaluation related to Autism

and SLD in written expression. It is concluded that the District's decision not to evaluate the Student, as described in the PWN, contained an explanation of why the District refused to evaluate the Student. It is concluded that the PWN contained a description of each evaluation procedure, assessment, record, or report the District used as a basis its decision. It is further concluded that the District's decision was based on data drawn from a variety of sources including: Classroom/School Performance, Assessment Data including the most recent August 10, 2022, Neuropsychological Evaluation, RtI Data, and the Student's 504 Plan. It is further concluded that it was reasonable for the District not to suspect the Student of having autism or a SLD in written expression that required special education, and to determine that the Student did not otherwise demonstrate an obvious need for special education or related services.

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

Issue No. 3

Whether the District used a multi-layered system of supports (MLSS) process, as required by 6.31.2.10(B) NMAC, to delay or deny the provision of a special education evaluation to the Student.

The State rules provide that the District shall follow the multi-layered system of supports as a proactive system for early intervention for students who demonstrate a need for educational support for learning as set forth in Subsection D of 6.29.1.9 NMAC. This support shall be provided regardless of whether a student has been referred for a full and individual evaluation for special education and related services or has been identified as eligible for special education. A student's participation in the multi-layered system of supports does not prevent the full and individual evaluation for special education of the student. A student may receive a full and individual evaluation for special education and related services at any time before, during, or after the implementation of the multi-layered system of supports. A parent may request a full and individual evaluation or special education and related services at any time. If the student is suspected of having a disability and demonstrates an obvious need for special education or related services by reason thereof, then the student shall be referred for a full and individual evaluation for special education without undue delay. 6.31.2.10(B) NMAC. *See "A Response to Intervention (RtI) Process Cannot Be Used to delay or deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA)". Memorandum to State Directors of Special Education OSEP 11-07, 56 IDELR 50 (OSEP 2011). See also El Paso Independent School District v. Richard R., 567 F. Supp. 2d 918, 941, 947-48 (W.D. Tex. 2008) , aff'd in part, rev'd in part, 591 F.3d 417 (5th Cir. 2009), cert. denied, 130 S. Ct. 3467, (2010).*

A district may attempt pre-referral interventions before referring a student for an IDEA evaluation. *See, e.g. M.G. v. Williamson County Schs.*, 720 F. App'x 280 (6th Cir. 2018, *unpublished*) (The fact that a kindergartner with speech and motor difficulties had been found ineligible for IDEA services less than a year earlier justified a Tennessee district's decision to address her ongoing deficits in a response to intervention process.). However, a district may not reject a referral or delay an initial evaluation on the basis that pre-referral interventions have not been implemented with a particular child if there is a basis for suspecting the child has a disability and needs special education. *See Memorandum to State Directors of Special Educ.*, 116 LRP 21359 (OSEP 04/29/16).

The documentation clearly indicates that the District has conducted several special education evaluations of the Student during the time he has attended the District. In 2022, the Student was exited from his Gifted IEP, and shortly thereafter the District referred the Student for a special education evaluation. The Parent refused consent for that evaluation. The Parent obtained a private evaluation of the Student in August 2022 to evaluate the Student in the areas of reading and autism. In November 2022 the Student's EDT reviewed the August 2022 evaluation and determined that the Student was not eligible because he did not demonstrate a need for special education services and that his needs could be met by his Section 504 accommodations. The Student was enrolled in a college reading skills class during the 2022-2023 school year, which the District identifies as a MLSS Layer 2 Reading Intervention Course, and met or exceeded all program benchmarks and received an A+ in the class. The Student did not need Layer 2 reading interventions during the 2023-2024 school year. The Student did continue to receive 504 Plan accommodations in his general education classes for reading and writing, ADHD and anxiety during the 2023-2024 school year. The Student continued to receive A's and B's (and one C+) in his courses during the 2023-2024 school year.

On February 8, 2024, the Parent requested an evaluation of the Student for written expression and autism. On February 20, 2024, the District provided PWN to the Parent refusing to evaluate the Student. It is concluded under the facts set forth above, that the District did not use the MLSS process to delay or deny the provision of a special education evaluation to the Student.

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

Issue No. 4

Whether the District's actions and omissions resulted in a denial of a free appropriate public education (FAPE) to the Student, as required by 34 C.F.R. §§ 300.17 and 300.101, and 6.31.2.8 NMAC.

The IDEA clearly provides that failing to comply with the Federal and State child find requirements is a matter of serious concern that can deny FAPE to a student whom a district should have identified. The failure to identify and evaluate may entitle the student to compensatory education accruing from the time the district first should have suspected the disability and the student's need for special education. *T.B. v. Prince George's County Bd. of Educ.*, 897 F.3d 566 (4th Cir. 2018), *cert. denied*, 139 S.Ct. 1307 (2019); *Robertson County Sch. Sys. v. King*, 95-5526, 24 IDELR 1036 (6th Cir. 1996, *unpublished*); *Lakin v. Birmingham Pub. Schs.*, 70 F. App'x 295 (6th Cir. 2003); and *Department of Educ. v. Cari Rae S.*, 158 F. Supp. 2d 1190 (D. Hawaii 2001). In this matter, the District refused the Parent's request for an evaluation of the Student for autism and written expression. It has been concluded above that the District's refusal to evaluate was reasonable and appropriate under the facts set forth above. Therefore, it is concluded that the District's actions and omissions did not result in a denial of a FAPE to the Student.

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

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

Investigated by:

/s/ Wallace J. Calder

Wallace J. Calder, Esq.

Complaint Investigator

Reviewed by:

/s/ Miguel Lozano

Miguel Lozano, Esq.

Chief Counsel, Office of Special Education

Reviewed and approved by:

DocuSigned by:
Margaret Cage
1D32A08CC33B4F2...
Margaret Cage, Ed.D.

Director, Office of Special Education