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**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION
Complaint Resolution Report
Clovis Municipal Schools
Case No. C2425-09
October 31, 2024**

This Report requires corrective action. See pages 20-24.

On September 5, 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 Clovis Municipals Schools' responses to the allegations, together with documentation, submitted by the Local Education Agency 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 Clovis Municipal Schools' compliance with federal IDEA regulations and state NMAC rules;
- interviews with the Complainant (with advocate present) and Clovis Municipal Schools employees; 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 allegations related to professional or ethical misconduct by a licensed educator or related service provider, or allegations related to the Americans with Disabilities Act or Section 504 of the Rehabilitation Act are not within the jurisdiction of this complaint investigation and, as a result, were not investigated.

Issues for Investigation

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

1. Whether the District failed to develop and implement an IEP that allowed Student to make progress toward identified goals, in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC; specifically, whether the District:
 - a. Failed to provide regular direct counseling services;
 - b. Failed to implement additional supports and/or services after Student exhibited behaviors that impeded Student's ability to learn and access the general curriculum;
 - c. Failed to establish detailed present levels of academic achievement and functional performance (PLAAFP) in order to develop goals in the individualized education plan (IEP) to adequately address Student's needs; and
 - d. Failed to provide continued services during the period of suspension (over ten days).
2. 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.
3. Whether the District's actions and/or omissions in developing and implementing the IEP resulted in a denial of a free appropriate public education (FAPE), in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

General Findings of Fact

1. Student is 10 years old and attends Elementary School in the District. He is currently in the 4th grade.
2. As a 4th grader, Student is currently attending school under an Individualized Education Program (IEP) (dated January 4, 2024) with a primary eligibility of Other Health Impairment (OHI) – Executive Function/Work Completion. A secondary exceptionality is listed as Gifted with identified areas of need in cognitive, math, and critical thinking.
3. Student also attended School during the 2021-2022 school year under an IEP. The IEP (dated January 19, 2022, with an amendment dated of May 5, 2022) indicated a primary eligibility of OHI – Social-Emotional and Occupational Therapy (OT). A secondary eligibility was listed as Gifted with identified areas of need in cognitive, math, and critical thinking.
4. Student attended school during the 2022-2023 school year with the 2022 IEP for the Fall 2022 term and an annual IEP (dated January 13, 2023) with a primary eligibility of OHI – Social-Emotional and Occupational Therapy (OT), and a secondary eligibility listed as Gifted with identified areas of need in cognitive, math, and critical thinking. The 2023 IEP covered the 2023 Spring school term.
5. The IEPs (dated January 19, 2022, and January 13, 2023) noted that Student has diagnoses of Attention Deficit Hyperactivity Disorder (ADHD)—hyperactive type, Oppositional Defiant Disorder (ODD), and Intermittent Explosive Disorder (IED).
6. The 2022 IEP also states that Student meets state criteria for consideration of eligibility in the category of OHI due to his diagnosis of ADHD and resulting behavioral difficulties in the home and educational settings.
7. Goals in the January 13, 2023, IEP were in both the academic achievement and functional performance areas, including improvement of text fluency; utilization of sensory strategies to participate in school routines and transitions; critical thinking activities that require analysis, synthesis and evaluation to strengthen reading and math skills; and counseling to identify situations that trigger an emotionally frustrating response.
8. Under the IEPs (dated January 19, 2022, and January 13, 2023), it was noted that there were no behaviors that impeded Student’s learning or the learning of others.
9. In April/May 2023 timeframe, a Reevaluation Eligibility Determination revealed that OHI was conducted by an Eligibility Determination Team (EDT). This process included a Review of Existing Evaluation Data (REED).
10. The EDT determined that Student no longer met the criteria for eligibility under OHI or any other eligibility category. The EDT determined that Student continued to be eligible for special education and related services under the category of Gifted.

11. A May 17, 2023, IEP indicated that, based on assessment and evaluation information and the EDT determination of eligibility, the primary exceptionality was Gifted with identified areas of need in cognitive, math, and critical thinking. There was no secondary eligibility or exceptionality listed.
12. The May 17, 2023, IEP listed the medical diagnoses of ADHD, ODD, and IED. Testing referenced in the IEP dated to 2019 and 2022.
13. Under the May 17, 2023, IEP it was noted that there were no behaviors that impeded Student's learning or the learning of others.
14. The May 17, 2023, IEP indicated that Student would follow the school-wide discipline plan.
15. Occupational therapy was discontinued under the May 17, 2023, Annual IEP. The May 17, 2023, Prior Written Notice (PWN) indicates that "[a]ccording to ongoing, informal assessment, Student does not require intervention by a therapist to access and benefit from special education."
16. The May 17, 2023, PWN indicated the IEP team agreed that Student would continue to receive mental health counseling services as part of the general education program rather than through special education.
17. The May 17, 2023, PWN also indicated Parent verbalized that she disagreed with the decision to drop the special education eligibility of OHI.
18. On July 20, 2023, Parent requested that Student be placed on a 504 Plan.
19. The District's response to Parent's 504 request was sent on July 20, 2023, indicating that the first step would be an eligibility determination, which would be scheduled upon the Student's return to school in August 2023.
20. On August 8, 2023, Parent requested a meeting with District personnel to discuss her request for a 504 Plan.
21. On September 5, 2023, Student was involved in an incident of disorderly conduct when Student stood on top of a toilet in the bathroom, which was reported to the teacher by another student. When Student returned to the classroom, the teacher confronted Student regarding the incident in the bathroom. Student reacted by throwing objects in the classroom. A thrown glue stick grazed another student.
22. On September 7, 2023, Student was involved in a disorderly conduct matter regarding desks that had been rearranged by the teacher. Student called another student names and threw a lunchbox in the classroom when Student became angry with the teacher.
23. On September 8, 2023, Student, while on the playground, "punched a student in the stomach, shoved another student, and called them losers."
24. On September 8, 2023, Parent requested a Student Assistance Team (SAT) meeting.
25. On September 11, 2023, Student was given a two-day In School Suspension (ISS).

26. On September 18, 2023, the District advised Parent that the District would move forward with a 504 Plan indicating that it was appropriate for the Student to be on a Gifted IEP as well as a 504 because of Student's diagnosis of ADHD.
27. On September 19, 2023, Parent received an email from the District which indicated Student would proceed with a 504 Plan. A 504 Plan ultimately was not pursued.
28. On September 19, 2023, Student threw a book, a stool, and three different chairs while in the library.
29. On September 25, 2023, Student hit two students on the playground during afternoon recess.
30. A Behavior Contract was signed by Student, Parent, and Principal on September 25, 2023.
31. Student was given a two-day ISS on September 26, 2023.
32. A healthcare record from a pediatric nurse practitioner (with a date mark of September 27, 2023) opined that Student made "immense improvement" in self-regulation "over the last year with OT given his extensive diagnosis and that Student required additional support and services."
33. This healthcare professional further opined that Student should not have been exited from an IEP, but that Student would benefit from accommodations plan under a 504 plan.
34. The SAT meeting was held on September 29, 2023. Meeting participants discussed prior interventions attempted. The participants also discussed behavior referrals, counseling services, and OT services. Additional behavioral interventions were also discussed.
35. Parent signed a consent for a Functional Behavioral Assessment (FBA) on September 29, 2023.
36. A request for a Behavior Assistant (BA) was also submitted by District on September 29, 2023.
37. A BA began day-to-day work with Student in December 2023.
38. The District Special Education Director and Teacher on Special Assignments (TOSA) confirmed that during this time frame, the District considered, sometime in September 2023, that the Student was potentially eligible for special education services under the IDEA for a disability and determined that Child Find activities were in effect, as well as procedural safeguards under the IDEA.
39. On October 11, 2023, Student engaged in a fighting incident on the playground with another student.
40. On October 11, 2023, Student was placed on a two-day ISS.
41. On October 24, 2023, Student kicked another student in the chest while on the playground.

42. Student was placed on ISS from October 25 through October 27, 2023. However, District indicates that Parent opted for Out of School Suspension (OSS) for October 26-27, 2023.
43. All 4 ISS events (from September 11 to October 25, 2023) occurred while Student was subject to the school's discipline plan according to the May 17, 2023, IEP. The record reflects that student continued to receive educational services during these suspensions.
44. On November 2, 2023, Student assaulted a fellow student. A short time later, Student threw quarters toward the building principal, destroyed bulletin boards in the hallway, and kicked the principal in the shin.
45. On November 2, 2023, a hearing was held on Student's two assaults against students and staff. Student was placed on OSS from November 2 to November 9, 2023.
46. All 3 OSS events totaling 10 days of suspension (from November 2, 2023, to November 9, 2023, as well as the two dates in October previously opted for by Parent) were related to 1 fight and 3 assaults.
47. On November 3, 2023, Parent requested a Manifestation Determination Review (MDR).
48. A Manifestation Determination Review meeting was held on November 9, 2023. The MDR team agreed that the recent disciplinary incidents on November 2, 2023, was a manifestation of the Student's disability of ADHD, ODD, and IED.
49. On December 8, 2023, a Functional Behavioral Assessment (FBA) was completed. The FBA concluded that Student's behavior patterns indicated a Behavioral Intervention Plan (BIP) was warranted.
50. A PWN dated December 8, 2023, indicated the school team accepted the FBA data that was conducted during the FBA process and the findings of the FBA. This PWN further noted that the school team agreed to move forward with a BIP.
51. A PWN dated December 11, 2023, indicated that the EDT presented its evaluation information to the team. The team accepted that an FBA was completed on December 8, 2023. The team accepted the FBA data, including new evaluations, assessments, achievement test, interviews and other information (e.g., medical diagnosis, classroom observations, new data/ratings in the areas of social/emotional, executive functioning, etc.). The PWN dated December 11, 2023, indicated the team agreed that a Behavioral Intervention Plan (BIP) would be completed.
52. The PWN dated December 11, 2023, further indicated that the team accepted the eligibility of OHI as the primary eligibility for special education services. The IEP also accepted the Gifted exceptionally and further agreed to a number of services.
53. On December 14, 2023, a BIP was completed.
54. The BIP addressed two behavioral problems (refusal and aggression) with associated target goals.

55. The BIP then addressed intervention strategies, curriculum and instruction, other strategies and supports, desired replacement behaviors, consequences, crisis plan, and progress monitoring and behavior plan.
56. A PWN dated December 14, 2023, confirmed the team's acceptance of the BIP with a number of Parent's suggested modifications accepted by the team.
57. An IEP team meeting was held on January 4, 2024.
58. The primary disability was listed OHI–Occupational Therapy. A secondary exceptionality was listed as Gifted with areas of need in cognitive, math, and critical thinking.
59. The IEP set forth data from a number of tests, evaluations, and additional data and information gathered covering academic achievement and functional performance.
60. The IEP also confirmed that behavioral interventions, strategies, and accommodations were included in the document. Additionally, annual goals (with short-term objectives or benchmarks), where appropriate, were included in the IEP.
61. Among other areas, the January 4, 2024, IEP addressed Present Levels and Annual Measurable Goals in Identified Areas of Needs (PLAAFP) in Student's functional performance related to Student's struggle with identifying personal triggers that provoke anger, anxiety, stress and frustration and utilizing health coping strategies.
62. The IEP addressed this PLAAFP by stating that Student qualifies for school-based counseling services to enhance student learning and support post-secondary readiness. The professional judgment of the Licensed Master Social Worker (LMSW) and observations of campus staff (including mental health personnel) indicate that Student's most pressing issue with participating and successfully navigating the school setting is Student's inability to identify and regulate anger.
63. The Annual Goal associated with this PLAAFP provided that Student will recognize personal triggers and will utilize coping strategies 80% of the time as measured by self-reports, staff reports, counseling sessions, discipline records, behavior assistant data, and therapy notes. Parent proposed that the goal should have been 60% rather than 80%. This recommendation was rejected by the IEP team.
64. The IEP's Schedule of Services for the Annual Goal provided for counseling services to be conducted for 30 minutes weekly.
65. Further, the January 4, 2024, IEP stated that "under the direction of the Mental Health Provider, IEP goals and objectives will be supported by IEP implementers through an integrated service delivery model, which may include consultation, parent contact, modeling, individual counseling, group counseling, and in-direct services."
66. As with all prior IEPs, the January 4, 2024, IEP indicated that Student's progress on annual measurable goals would be reported quarterly.
67. The PWN dated January 4, 2024, reflected the IEP team's acceptance of OHI as the primary eligibility and GT as an exceptionality.

68. The IEP team also accepted that Student would receive a total of 30 minutes of mental health counseling per week.
69. The IEP team rejected a recommendation from Parent regarding development of social skills as the IEP team determined that Student needed to first gain skills related to self-regulation.
70. A District Progress Note dated March 13, 2024, indicated that Student often refused to go to counseling and became agitated if push-in services were used. The note concludes by observing that Student has not made progress toward Student's goals and that "the provider will continue to utilize new strategies to get Student to participate in counseling."
71. A District Progress Note dated May 16, 2024, indicated that there was insufficient progress due to Student's refusal to attend or participate in counseling and that the provider would continue to work on building rapport and utilizing new strategies to help Student meet his IEP goals.
72. The mental health counseling records provided by the District reflect that over the course of Term 3 and Term 4, during the 2023-2024 school year, Student received counseling services during "crisis" situations.
73. These counseling records also showed that Student received a total 2 hours and 45 minutes of counseling time over these two terms devoted to work the IEP goal, set forth in Paragraph 64 above, related to social/emotional issues.
74. There is no documentation that the IEP team convened to discuss and/or take action concerning the insufficient progress made towards the annual goal related to mental health counseling.
75. During Term 3 and Term 4, the General Education Teacher provided weekly newsletters to parents (including Parent) advising of work that would be accomplished in academic areas, including reading, math, writing.
76. Daily homework assignments were sent home with Student, as well as any other associated documents and information.
77. Email communications from the General Education Teacher to Parent reflect regular updates on assignments, homework, and class activities.
78. These emails provided updates on Student's behaviors, including Student's numerous exits from the classroom, classroom interruptions, and interactions with other students and staff.
79. Parent also had access to the District's online system to track Student's progress in class.
80. Student's ABC Notes, prepared by the BA, also extensively documented Student's numerous refusals to engage in classroom assignments and classroom engagement, as well as Student's activities outside the classroom.

81. The District Progress Note dated March 15, 2024, in connection with Academic Achievement, indicated sufficient progress in academics as follows:
 - a. Final Grades for Term 3: Language Arts (B+), Math (A), Science (B), and Social Studies (A).
 - b. iStation assessment results for March 2024: Overall Math—Level 2, 36th percentile; Overall Reading—Level 3, 44th percentile; Text Fluency--23rd percentile; Reading Comprehension--46th percentile; Vocabulary--72nd percentile; and Spelling--27th percentile.
 - c. Final Grades for Term 4: Language Arts (B+), Math (B+), Science (A+), and Social Studies (C).
 - d. iStation assessment results for April 2024: Overall Math—Level 1, 2nd percentile; Overall Reading—Level 2, 34th percentile; Text Fluency—1st percentile; Reading Comprehension--18th percentile; Vocabulary—54th percentile; and Spelling--57th percentile.
82. There was no grade assigned for Student’s Music elective class for either Term 3 or Term 4.
83. During an interview with the investigator, the BA indicated that Student refused to attend the Music elective class because Student “hated Music.”
84. Instead of attending Music, Student would often go to PE or would go outside on the school grounds.
85. The General Education Teacher indicated during an interview that she talked to Parent regarding Student’s nonattendance in the Music class. Parent’s response was that there should be more concentration on Student’s core classes. No specific date of this conversation was provided.
86. The District records did not indicate there were written communications to Parent in connection with Student’s lack of attendance in the Music elective class.
87. There is no evidence that the IEP team convened to address Student’s lack of attendance in the Music elective course.
88. During Term 3 and Term 4 of the 2023-2024 school year, Student was involved in three separate incidents of student threats.
89. The District’s Threat Assessment Team (TAT) completed Threat Credibility Assessments on the first two threats. As a result of these investigations, the TAT determined that the threats on two occasions were not credible. As a result of a TAT investigation related to the third threat, the TAT determined the threat was credible and made several recommendations.
90. A BIP dated May 13, 2024, identified Problem Behavior and Target Goals in the areas of Refusal and Aggression both related to skill and performance deficits. Intervention

strategies covering environment and/or circumstances were listed, curriculum and/or instruction, as well as other strategies and supports.

91. The May 13, 2024, BIP also provided for progress monitoring.
92. The PWN dated May 13, 2024, also reflected the IEP team's review, discussion, and action related to the May 13, 2024, BIP, including, among other items, the IEP team's acceptance that the reference to the District's discipline matrix was not applicable.
93. The last day of school was May 23, 2024.
94. The IEP team did not convene to address any of the three Threat Credibility Assessments conducted in Terms 3 and 4.

Discussion and Conclusions of Law

Issue No. 1

Whether the District failed to develop and implement an IEP that allowed Student to make progress toward identified goals, in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC; specifically, whether the District:

- a. Failed to provide regular direct counseling services;**
- b. Failed to implement additional supports and/or services after student exhibited behaviors that impeded Student's ability to learn and access the general curriculum;**
- c. Failed to establish detailed present levels of academic achievement and functional performance (PLAAFP) in order to develop goals in the individualized education plan (IEP) to adequately address Student's needs; and**
- d. Failed to provide continued services during the period of suspension (over ten days).**

1.a. Failed to provide regular direct counseling services.

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). 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)(i)(ii).

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 (9th Cir. 2007).*

The Parent's complaint states that Student was not receiving his weekly scheduled counseling direct service time since the implementation of the January 4, 2024, IEP. Student's service logs show crisis responses by the counselor and other team members, as well as other counseling sessions or the counselor's attempts to engage Student in counseling sessions. Parent stated in her Complaint that the District previously stated that they do not count crisis responses as regular direct counseling service time. The District did not refute this point in either of its two separate responses to Parent's Complaint regarding counseling services nor during interviews with District personnel as part of this investigation.

The counseling records do reflect numerous occasions in which Student refused to participate in counseling sessions. These counseling records also show that Student received only 2 hours and 45 minutes of counseling time devoted to work the IEP goal set forth in Paragraph 69 related to social/emotional issues. The progress notes reflect insufficient progress due to Student's refusal to participate in counseling.

The January 4, 2024, IEP set an annual goal for weekly counseling sessions of 30 minutes' duration to help Student "identify personal triggers that will provoke (i.e., anger, anxiety, stress, frustration) responses and utilize healthy coping strategies 80% of the time as measured by self-reports, staff reports, counseling sessions, discipline records, behavior assistant data, and therapy notes." There was a failure by the District to ensure that progress was made on this annual goal with insufficient counseling sessions as outlined in the January 4, 2024, IEP. When Student was not receiving counseling sessions (whether Student refused to participate or otherwise), the IEP team needed to meet to consider what other supports and services were needed to engage Student in counseling. There was no such IEP meeting held to discuss how to increase Student's engagement toward reaching the annual goal.

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

1. b. Failed to implement additional supports and/or services after Student exhibited behaviors that impeded Student's ability to learn and access the general curriculum.

School districts are required to develop, implement, review, and revise an IEP in compliance with legal requirements. 34 C.F.R. § 300.320 0 300.328; 6.31.2.11 NMAC.

Parent indicated in the State complaint that Student struggled to sit for any instruction by his General Education Teacher. She stated that this circumstance was not known to her until a BIP Review meeting in the mid-spring 2024. Further, the District did not add any services or supports to address this issue.

From the beginning of Term 3 on January 8, 2024, the General Education Teacher provided weekly newsletters to parents (including Parent) advising of work that would be accomplished in academic areas, including reading, math, and writing. In addition, daily homework assignments were sent home in a Student folder, as well as any other associated documents and information.

In addition, email communication from the General Education Teacher to Parent reflect regular updates on assignments, homework, and class activities. Parent had access to grades to monitor Student's progress. These emails also provided updates on Student's behaviors, including Student's numerous exits from the classroom, classroom interruptions, interactions with other students and staff. Parent also had access to the District's online system to track Student's progress in class. Student's ABC notes, prepared by the BA, also extensively document Student's numerous refusals to engage in classroom assignments, and classroom engagement, as well as Student's activities outside the classroom.

While Student did refuse to engage in learning activities throughout Terms 3 and 4, grades and assessments indicated Student did obtain sufficient progress toward academic achievement goals as articulated in the January 4, 2024, IEP. However, when a student is not regularly engaging in the classroom, learning is interrupted. The IEP team should have met to review Student's behaviors and the impact of those behaviors on Student's engagement in the general education classroom. Based on the review of those current behaviors, the IEP could then discuss and adopt additional services and supports to increase the Student's classroom engagement. The IEP could then be revised with sufficient measurable goals to monitor Student's progress. Finally, additional IEP team meetings could be scheduled to evaluate the effectiveness of the services and supports.

Parent also indicated she was not made aware of Student's refusal to attend the Music elective class and that no additional services or supports were provided to address this issue resulting in

Student not being able to attend the 3rd grade class music program. During her interview, Parent indicated her concern in this section of her complaint addressed Term 3 and Term 4 of the 2023-2024 school year.

The IEP dated January 4, 2023, detailed the level of service to implement the IEP. These levels included 3.25 hours per week of special education services within 28.5 hours per week for a typical school week. This special education services accounted for 11% of the typical school week.

The source of Student's academic engagement (whether an elective class or not) was in the general education classroom. When Student was not attending the Music elective class, the IEP team should have convened to consider what other supports and services were needed to engage Student in the Music class. Student's academic achievement was curtailed when there was no IEP meeting set to discuss how to increase Student's engagement in Music.

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

1.c. Failed to establish detailed present levels of academic achievement and functional performance (PLAAFP) in order to develop goals in the individualized education plan (IEP) to adequately address Student's needs.

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 (9th Cir. 2007).

The records reflect that the District developed and implemented an IEP addressing Student's ability to participate in the District's educational programming. The PLAAFP was comprehensive and provided baseline data that reflected all the Student's needs, both for academic achievement and functional performance. The PLAAFP also included relevant background information about needs, strengths, interests, and learning styles.

Finally, the Student's annual IEP included measurable annual goals, both academic and functional, that were designed to meet the Student's needs that resulted from the Student's disability and allowed the Student to participate in and make progress in the general education curriculum. The IEP goals addressed the Student's needs that result from the Student's disability. The District's actions reflect an appropriate placement in the least restrictive environment.

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

1.d. Failed to provide continued services during the period of suspension (over ten days).

After a student with a disability has been removed from current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to (i) Continue to receive educational services, as provided in 34 C.F.R. § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. 34 C.F.R. § 300.530(d).

Disciplinary actions are generally considered disciplinary removals unless all three of the following factors are met: (1) The child is afforded the opportunity to continue to appropriately participate in the general curriculum; (2) The child continues to receive the services specified on the child's IEP; and (3) The child continues to participate with nondisabled children to the extent they would have in their current placement.

Student was placed on ISS for a total of 7 days (from September 11, 2023, to October 25, 2023) and 10 days for OSS (from October 26, 2023, to May 23, 2024). These disciplinary removals were instituted after Student's repeated similar behaviors and, therefore, should have triggered the

IEP team to meet to consider what other options could be employed to address Student's negative behaviors—even through non-disciplinary steps.

The record reflects that Student continued to receive educational services (i.e., videos, assignments, and ancillary services) while on ISS. However, the District indicated that services were not provided during OSS "as the Student was not removed beyond the 10 days that would constitute a change of placement." Days of suspension under OSS did not exceed 10 days. Therefore, the Student was not required to have access to the general education and ancillary services during these suspensions.

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

Issue No. 2

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.

When a special education student violates the District's code of conduct, the student is subject to the same disciplinary actions as those that general education students receive until there is a change of placement. Under the IDEA, a district may discipline a student for violation of a code of conduct resulting in removal or suspension from the student's educational program for not more than 10 school days, provided that all students, including non-disabled students, would be subject to the same discipline. 34 C.F.R. § 300.530(b); 6.31.2.11(F)(2) NMAC. When the placement of a special education student is changed because of a violation of the code of conduct, a manifestation determination must be completed. 34 C.F.R. 300.530 (E). A change of placement occurs when the removal is more than 10 school days or there is a series of removals that constitute a pattern. 34 C.F.R. § 300.356 (a). Students that have not been determined eligible for special education services, but the District has a reason to suspect are eligible, are entitled to the procedural protections under IDEA. 34 C.F.R. § 300.534(a). A district does not suspect the student is disabled if the district has conducted an evaluation and determined the child was not eligible for services. 34 C.F.R. § 300.534(c)(2).

When a student with a disability is removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to allow the Student to make educational progress. 34 C.F.R. § 300.530(d) and 34 C.F.R. § 300.530(b)(2). When a student is removed from the educational program, including extra-curricular and co-curricular activities, for disciplinary reasons, that would be a disciplinary removal that is included as part of the ten days. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSERS 2022). The

length of the removal is not definitive, any portion of the day would count as a full day of removal. 34 C.F.R. § 300.11.

When a student is regularly removed from school for behavior reasons, that may result in a change of placement that can trigger the District's responsibility to conduct a manifestation determination review (MDR). The classification of the removal from the school is not the deciding factor; shortening the school day(s) for a student is a repeated, daily exclusion from school (e.g., parents are asked to pick up early or student leaves school early because of behaviors) and qualifies as disciplinary removal(s) that count toward the ten days. *School District of Flint*, 66 IDELR 192 (SEA MI 2015); *Letter to Mason*, 72 IDELR 192 (July 27, 2018); see also 34 C.F.R. § 300.530(a)(2). Whether removals constitute a pattern of behavior depends on the length of the removal, the total amount of time, and the proximity of the removals. 34 C.F.R. § 300.536(a)(2). When a change of placement occurs, then the District must convene an MDR meeting. 34 C.F.R. § 300.530. 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.

The Office of Special Education and Rehabilitative Services (OSERS) has opined that disciplinary removals, even during a suspension, do not relieve the District of its obligation to address whether students need additional or new supports and services to receive FAPE in the least restrictive environment (LRE). A disciplinary removal after repeated similar behaviors should trigger the IEP team to meet to consider what other options to address negative behaviors even through non-disciplinary steps. *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016).

Parent's September 5, 2024, State Complaint states that Student "has been suspended for 16 days this school year. No compensatory services have been offered by the school district as of the date of this Complaint."

Student's behaviors during Term 1 of the 2023-2024 school turned severe (as coded by the District) due to a total of six assaults (students and staff) between September 11, 2023, and November 2, 2023. These disciplinary matters resulted in 7 days of In-School Suspension and 9 days of Out-of-School Suspension.

The Student's January 13, 2023, IEP indicated that Student struggled with self-regulating when over stimulated. The IEP contained information related to Student's ability to identify and demonstrate the use of a coping technique or skill when confronted with a situation that triggers an emotionally frustrating response. A diagnosis of ADHD, ODD, and IED was noted.

On May 17, 2023, the IEP team removed Student from eligibility for special education services under the IDEA. Student remained on a Gifted IEP. The May 17, 2023, IEP indicated that Student was subject to the District's school-wide disciplinary plan.

The PWN dated May 17, 2023, indicated the IEP team agreed that Student would continue to receive mental health counseling services as part of the general education program rather than through special education. The mental health counseling was connected to a January 13, 2023, IEP annual goal related to Student “identifying and demonstrating the ability to use a coping technique or skill—whether real or role play in sessions—that assist after a trigger from an emotionally frustrating response.”

When a student was placed on ISS, it may well count towards the 10-day suspension count regarding a change of placement. In each instance leading to ISS, Student exhibited a behavior pattern based on the Student’s inability to recognize personal triggers in the Student’s environment and to employ effective coping strategies. The resulting behavior resulted in a violent act. Further, it has been the U.S. Department of Education’s longstanding interpretation that an in-school suspension would be considered part of the days of suspension unless the child: (1) is afforded the opportunity to continue to appropriately participate in the general curriculum; (2) continues to receive the services specified on the child’s IEP; and (3) continues to participate with nondisabled children to the extent they would have in the child’s current placement. There is thus evidence that the District continued to provide access to the general curriculum and ancillary services during ISS. Given the amount days for OSS, no change of placement occurred. 71 Fed. Reg. 46715 (Aug. 14, 2006).

Because student was not subject to removals constituting a change of placement of over 10 days, an MDR was not required to be held. Despite the fact that an MDR was not required, an IEP team meeting should have been held when the District became aware that Student was engaged in these behaviors (including fighting, assaults, and threats). While an FBA, and ultimately a BIP, were developed in December 2023, the District should have completed this assessment and plan much sooner, especially when considering the total days of ISS and OSS that Student served for similar behaviors. IEP team meetings likewise were not scheduled at a pace that kept current with Student’s ongoing behaviors and progress (or lack of progress) with academic and functional performance goals.

As to Issue No. 2, the District is cited and Corrective Action is required.

Issue No. 3

Whether the District’s actions and/or omissions in developing and implementing the IEP 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).

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). There is ample evidence in the records indicating that the IEP team failed to convene regularly to review, revise, and monitor Student’s progress towards annual goals listed in the IEP leading to both procedural and substantive denial of FAPE. Student’s refusal and control behaviors interfere with Student’s learning and, as such, Student’s IEP is not reasonably calculated to provide educational benefit.

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

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC	The District failed to provide regular direct counseling services; failed to implement additional supports and/or services after student exhibited behaviors that impeded Student’s ability to learn and access the general curriculum; and failed to develop and implement an IEP that allowed Student to make progress toward identified goals.
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.
34 C.F.R. § 300.101 and 6.31.2.8 NMAC	The District’s actions and/or omissions in developing and implementing the IEP resulted in a denial of a free appropriate public education (FAPE).

Required Actions and Deadlines

By November 18, 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:

Ms. Yaling Hedrick
Corrective Action Plan Monitor
Office of Special Education
New Mexico Public Education Department
300 Don Gaspar Avenue
Santa Fe, NM 87501
Telephone: (505) 795-2571
Yaling.Hedrick@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 implementation of 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 extension needed. 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 July 31, 2025, and reported to the OSE no later than August 7, 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).	November 14, 2024	Written Assurance Letter/Email	November 14, 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 Corrective Action Plan, 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 has the discretion to include other District or school administrators or personnel in this meeting. The District Special Education Director shall be responsible for arranging this meeting with OSE.	November 18, 2024	Notes from meeting prepared by District	November 25, 2024
3.	District shall provide a prior written notice that it proposes to conduct a comprehensive special education evaluation of Student in all suspected areas of disability to identify additional disabilities and needs of Student.	November 14, 2024	Prior Written Notice	November 18, 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>
	The District will provide a written record of the decision to accept or decline to evaluate.		Signed parental consent to evaluate Student or parent’s signed written decision to decline the request to evaluate	Within 5 days of written decision on evaluation
4.	<p>Following receipt of parental consent to evaluate student, District shall conduct a comprehensive evaluation of Student and issue an evaluation report.</p> <p>Within 15 school days of completing the evaluation report, District shall hold a meeting with Parent to determine Student’s new or continuing eligibility for special education and related services. This meeting can be held immediately before the scheduled facilitated IEP meeting required in Step 5. The facilitator serving to facilitate the IEP meeting shall be used to facilitate this eligibility determination meeting.</p>	<p>Within 45 days of receipt of parental consent</p> <p>Within 15 days of completion of the evaluation report</p>	<p>Evaluation Report</p> <p>Written Eligibility determination</p>	<p>Within 7 days of completion of the evaluation report</p> <p>Within 7 days after the Eligibility Determination Team Meeting is held</p>
5.	<p>After completion of the evaluation, District shall convene a Facilitated IEP (FIEP) meeting.</p> <p>In addition to the minimum required components of the IEP, the IEP team shall consider the following areas of support:</p> <ol style="list-style-type: none"> 1. Interventions to address Student’s behaviors including: 	Within 15 days after completion of the evaluation	<ol style="list-style-type: none"> 1. Invitation to IEP meeting, 2. IEP, 3. Prior Written Notices, and 4. Agenda for IEP team meeting 	Within 7 days after the IEP meeting is held

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>a. Social Work Services and Supports, including counseling or therapy;</p> <p>b. Positive Behavioral Interventions and Supports;</p> <p>c. Accommodations, Modifications, and additional services needed for Student to maintain current placement; and</p> <p>2. Compensatory services for District’s failure to address Student’s behavior’s from January 2024 to the date of this new IEP.</p> <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> <p>The FIEP meetings 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 Special Education Director shall participate in the FIEP meeting. The District shall also ensure that the IEP team includes,</p>			

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED</u> <u>OSE</u>	<u>Document Due Date</u>
	but is not limited to parent, parent advocate, special education teacher, general education teacher, and any potential related services providers.			
6.	<p>The District shall develop a plan for providing compensatory services to Student based on the IEP team’s determination of the amount of compensatory services during the FIEP meeting. The plan will be documented in a Prior Written Notice (“PWN”) and sent to parents.</p> <p>If a parent declines compensatory education, the District shall get a confirmation in writing and provide the written confirmation to PED.</p> <p>The District shall maintain a PED-approved tracker that includes the total compensatory hours owed and provided to student, whether those hours were accepted by parent.</p> <p>District shall complete all compensatory education hours by July 31, 2025. These compensatory services are above and beyond the regular services required by Student’s IEP. The schedule for compensatory services should be developed in collaboration with the</p>	<p>Completed with FIEP Meeting</p> <p>July 31, 2025</p>	<p>Prior Written Notices containing plan for compensatory services</p> <p>If applicable, written decision to decline compensatory education.</p> <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>Within 7 days after the IEP meeting is held</p> <p>Forward when parent’s decision has been received and documented</p> <p>Monthly from date of compensatory services plan until the compensatory education hours are completed.</p>

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED</u> <u>OSE</u>	<u>Document Due Date</u>
	<p>parents and can include provisions for services in the summer months.</p> <p>If the District, due to staffing or other limitations, is unable to provide the compensatory services as required by this CAP, the District is required to contract with a private provider to ensure those services are provided.</p>			
7.	<p>The District shall arrange to provide training to District staff (including special education teachers, special education administrators, behavioral assistants, counselors, diagnosticians and related service providers). The training may be provided by persons independent of the District with expertise in special education who were not involved in responding to this complaint and who are approved by NMPED.</p> <ol style="list-style-type: none"> 1. Development of an IEP that provides FAPE especially when behavior impedes learning, including avoidance of school or specific activities; and 2. Reconvening of IEP Meetings when increasing behaviors impede learning or progress; 	February 3, 2025	<p>Submission of proposed trainer and trainer’s resume and proposed presentation for NMPED 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>December 9, 2024</p> <p>December 16, 2024</p> <p>February 10, 2025</p>

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/ Samuel D. Kerr

Samuel D. Kerr, 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

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Margaret Cage, Ed.D.

Deputy Secretary, Office of Special Education