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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION
Complaint Resolution Report
West Las Vegas Public Schools
Case No. C2425-18
December 20, 2024

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

On October 22, 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 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 District’s compliance with federal IDEA regulations and state NMAC rules;
- review of District questionnaire submitted, completed and returned by Principal on November 26, 2024;
- interview with Parent on December 5, 2024;
- interview with Principal on December 6, 2024;
- interview with Parent Advocate on December 6, 2024;
- review of District questionnaire submitted, completed, and returned by Case Manager on December 6, 2024;
- interview with Case Manager on December 10, 2024; 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 properly implemented the Student’s individualized education program(s) (IEP) and/or behavior intervention plan (BIP), pursuant to 34 C.F.R. § 300.323 and 6.31.2.11(B) NMAC.
2. Whether the District properly conducted a manifestation determination review(s) (MDR) and continued to provide the Student educational services after the Student was removed from their then-current placement for more than 10 days, pursuant to 34 C.F.R. §§ 300.530 and 300.536; and 6.31.2.11(F) NMAC.
3. Whether the Student’s IEP is tailored to their unique needs and reasonably calculated to enable the Student to make progress appropriate in light of their circumstances, pursuant to 34 C.F.R. §§ 300.320 and 300.324; and 6.31.2.11 NMAC.

4. Whether the decision to shorten the Student's school day was appropriate and made in conformity with 34 C.F.R. §§ 300.116; 300.321; 300.327; 300.501(c)(1); and 300.530; and 6.3.2.11(B)(2) and 6.3.2.11(F) NMAC.
5. Whether the Student's placement was properly determined and provided in the least restrictive environment (LRE) appropriate for the Student's needs, pursuant to 34 C.F.R. §§ 300.114 through 300.118; 300.327; 300.501; and 6.31.2.11(C) NMAC.
6. Whether the District provided prior written notice(s) (PWN) that accurately reflect what was discussed and agreed upon at the IEP meeting(s), pursuant to 34 C.F.R. § 300.503.
7. Whether the District's actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE), in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

General Findings of Fact

1. Student is classified as a student with a disability under the primary classification of Autism, pursuant to a reevaluation that took place in September 2022.
2. For years, Student has struggled to use technology appropriately. Sometime during the 2022-23 school year, the IEP Team decided that Student would not be issued a computer and the majority of assignments were to be provided via hardcopy.
3. An annual IEP was developed for Student at the beginning of Student's seventh grade year (2023-24 school year). Student was 12 years old at the time of development. The IEP is dated September 25, 2023. Relevant portions of the IEP include:
 - a. Student has communication needs.
 - b. Student's behaviors impede their learning or the learning of others. Student requires a behavior intervention plan (BIP).
 - c. Instructional Accommodations and Modifications include, in part:
 - i. Student is on a modified schedule. Student attends school from 8:00 a.m. to 12:30 p.m. Monday through Thursday. Student attends Applied Behavior Analysis (ABA) services in the home settings on Friday.
 - d. The IEP contains four goals to address communication, behavior, social/emotional skills, and occupational therapy (OT).
 - e. The following special education and related services were to be provided:
 - i. Behavior Support: 250 minutes/week (regular classroom)
 - ii. Speech: 30 minutes/week (special education setting)
 - iii. Psychological Services: 15 minutes/month (special education setting)
 - iv. OT: 30 minutes/week (special education setting)
 - v. Social Work: 30 minutes/week (special education setting)

4. The IEP does not say anything about Student not being permitted to use a computer or that all assignments need to be provided via hardcopy.
5. The BIP referenced in the IEP is dated September 19, 2022. Relevant portions of the BIP include:
 - a. The “problem behaviors” are physical aggression and inappropriate sexual behavior in an apparent attempt to make others uncomfortable or provoke a response.
 - b. Intervention strategies include, in part:
 - i. Visual schedule/prompts
 - ii. Allow Student to use a laptop (once, and only if, proxy site is blocked).
 - c. Rewards and motivators include positive praise and messages to parents.
 - d. Consequences for problem behaviors include two verbal warnings and loss of privileges.
 - e. The BIP indicates staff are not to “power struggle” with Student and leave Student alone to avoid a meltdown.
6. The prior written notice (PWN) regarding the newly developed IEP is dated September 25, 2023. The PWN indicates, in part:
 - a. An evaluation was conducted over the summer by University of New Mexico Health (UNMH). Once the report is finalized and provided to District, the IEP team will reconvene to discuss the findings and implement appropriate recommendations.
 - b. Parents are to obtain written documentation from Student’s medical provider regarding the need for Student’s modified schedule.
7. In November 2023, Parent requested a functional behavior assessment (FBA). The IEP Team reconvened on November 6, 2023 to discuss Parent’s request. At the meeting, a review of existing evaluation data (REED) was conducted. The REED documentation is dated November 9, 2023 and indicates additional data was needed. Specifically, an FBA was to be conducted to gather more background, social/emotional/behavioral, and functional performance and adaptive behavior information. The September 25, 2023 IEP was also amended to indicate an FBA was needed. The PWN regarding the meeting states the following, in part:
 - a. Student was no longer seeing an ABA therapist on Friday. As a result, Student was to begin attending school on Fridays until an ABA therapist was found.
 - b. A Google sheet is to be used in each class period to monitor Student’s behaviors. The case manager was to report to Parents at the end of each school day.
 - c. District was still waiting for medical documentation regarding Student’s need for an abbreviated schedule.

8. Following the IEP meeting, Parent provided two medical letters regarding Student's need for a modified schedule. The first letter is dated September 25, 2023 and states Student was in need of ABA therapy. The second letter is dated November 7, 2023 and states that Student may benefit from only attending classes in the mornings.
9. The UNMH evaluation report is dated December 14, 2023. It was provided to District sometime in mid-December 2023. Relevant portions of the report include:
 - a. Student was diagnosed with Autism Spectrum Disorder, Oppositional Defiant Disorder (ODD), and Selective Mutism.
 - b. Recommendations included, in part, ABA services and a new FBA/BIP with focus on increasing participation and length of school day.
10. The FBA was completed and the report of the findings is dated February 21, 2024. Relevant portions of the FBA include:
 - a. The "problem behaviors" include inappropriate comments, threatening gestures, cell phone use to get a reaction from staff, work refusal, off-task behaviors, and refusal to participate in special education services (i.e., social work and OT).
 - b. Incentives that were deemed to be effective included computer access and gaming devices at home.
 - c. Consequences that were deemed effective included calling Parents and presence of case manager when problem behavior is occurring.
 - d. A BIP is warranted.
11. An IEP meeting was held on February 21, 2024 to discuss the UNMH evaluation report and FBA report and amend the IEP and BIP. The IEP was amended in the following ways:
 - a. The following Instructional Accommodations and Modifications were added:
 - i. Student was to have one additional day to complete assignments.
 - ii. Student is to be prompted daily to turn in work and late assignments.
 - iii. Student is only required to complete 75% of any given assignment. Student is not to know of this exception.
 - iv. The use of the Google Sheet first referenced in the November 6, 2023 PWN was included in the IEP.
 - v. Student is to be rewarded when homework is returned.
 - b. The behavior-related IEP goal was changed.
12. The original September 19, 2022 BIP was updated. The only substantive changes to the BIP include the following:
 - a. The "problem behavior" is inappropriate behavior or comments in an apparent attempt to make others uncomfortable or provoke a response.
 - b. The incentives were changed in the following ways:
 - i. The use of a computer was allowed if Student completed 75% or more of the classwork assigned.

- ii. Student was to be provided options where to complete their work.
 - iii. Staff were to provide Student time to cool down when upset.
 - iv. Staff were to minimize reactions to Student's aggressive physical gestures.
 - c. Rewards/motivators were updated to includes rewards at home and school.
 - d. Consequences no longer included two verbal warnings. Instead, if unwanted behaviors continued after redirections, Student was no longer eligible for a reward.
13. The PWN regarding the February 21, 2024 meeting indicates the IEP and BIP were updated based on the recommendations of the UNMH evaluation report and findings of the FBA. In addition, the PWN states Student's academic day was to increase so that Student was attending a full school day by the end of the school year.
14. On March 10, 2024, Parent was invited to an IEP meeting scheduled for April 16, 2024 to review Student's IEP and BIP.
15. An IEP meeting was held on April 16, 2024. The IEP accommodations were amended to state that if Student earns detention, Student can attend an alternate location.
16. The PWN regarding the April 16, 2024 meeting indicates the IEP team discussed adding another class to Student's schedule. The IEP Team decided to leave Student's schedule as is with the expectation that Student will attend a full day during the 2024-25 school year. The PWN also indicates the BIP was reviewed but no changes were made.
17. The 2024-25 school year began on August 7, 2024. Student was in the eighth grade and was to attend a full day. The September 25, 2023 IEP, with the three subsequent amendments, was implemented.
18. A behavior incident occurred on August 8, 2024. Specifically, at the beginning of class Student flipped off a staff member and was on their cell phone. Case Manager repeatedly asked Student to put the cell phone away. After Student continued to refuse, Case Manager grabbed the phone out of Student's hands and saw that Student had been viewing assault rifles online. Student then became upset and tried to take the phone back. At that point, an educational assistant (EA) unfamiliar with Student got involved. It is unclear what exactly the EA did. After failed attempts to get the phone, Student tried to "stab" staff with an open paper clip. At that point, staff retreated and Student eloped from campus. As a result of the behavior infractions, Student was suspended for ten school days (i.e., August 9, 2024 through August 22, 2024). The discipline referral indicates an evaluation was required for Student to be able to return to school.
19. On August 16, 2024, a manifestation determination review (MDR) meeting was held to discuss the August 8, 2024 incident. The MDR documentation indicates the following, in part:

- a. The team considered, in part, information provided by parents, staff, and administrators; evaluations, Student's IEP and BIP; and Student's disability, school performance, behavior history, and behaviors outside of school.
 - b. The conduct was not caused by, or in direct and substantial relationship to, Student's disability. Specifically, the team determined the behavior was not a manifestation of autism, the exceptionality in the school setting. However, Student's ODD diagnosis may have contributed to the cell phone incident. "The team is concerned that some of the other behaviors may be related to unknown external factors."
 - c. The conduct was not a result of District's failure to implement the IEP and BIP. Specifically, District stated it implemented the IEP and BIP. However, there was a staff member (i.e., the EA) who was unfamiliar with the BIP but the Student and Parents knew of the cell phone policy.
 - d. The Student's behavior is not a manifestation of Student's disability.
 - e. Upon Student's return to school, Student will be assigned a one-on-one EA.
20. A PWN dated August 16, 2024, indicates Student's behaviors were not a manifestation of Student's disability, a one-on-one EA would be implemented upon Student's return to school, and the FBA and BIP need to be updated and reviewed.
21. Following the MDR meeting, the school psychologist and social worker updated the BIP on August 20, 2024, based on the discussions held at the MDR. The only change made to the BIP was the removal of the incentive which allowed Student to use a computer if they completed their work. The IEP was not amended to include a one-on-one EA.
22. Student was permitted to return to school on August 23, 2024.
23. Pages from Student's September 25, 2023 IEP, with the February 21, 2024 amendments incorporated, and the newly updated August 20, 2024 BIP were provided to all of Student's teachers on August 28, 2024.
24. A behavior incident occurred on September 4, 2024. Specifically, Student flipped off staff and formed a gun with their fingers and pointed at staff. The School Psychologist spoke with Student and no further disciplinary action was taken.
25. A behavior incident occurred on September 5, 2024. Specifically, Student used a book to act like they were shooting a gun, cursed in class, and stated a recent school shooting was not a tragedy. As a result of the behavior infractions, Student was suspended for five school days (i.e., remainder of the day September 5, 2024 through September 11, 2024).
26. On September 10, 2024, Parent was invited to an IEP meeting scheduled for September 27, 2024 to develop a new annual IEP for Student.
27. Student was permitted to return to school on September 12, 2024.
28. A behavior incident occurred on September 19, 2024. Specifically, while at school, Student posted inappropriate content in the Google classroom that purportedly caused fear to

Student's peers. Case Manager reports Student posted pictures of people in bullet proof vests. District indicated Student somehow gained access to another student's computer during English class and that is when the posts were made. However, at the beginning of the year, Student was "enrolled" in the Google classroom to access assignments, if need be. Because Student was enrolled in the class, Student was able to access the classroom. As a result of the behavior infractions, Student was suspended for seven school days (i.e., remainder of the day September 19, 2024 through September 27, 2024).

29. Student was to be permitted to return to school on September 30, 2024. However, a behavior incident occurred outside of school on September 26, 2024 and was documented on September 27, 2024. Specifically, while at home, Student emailed several school email addresses indicating Student had hacked a school server. As a result, the police were notified and Student was suspended for ten school days (i.e., September 30, 2024 through October 11, 2024).
30. An MDR meeting was held during the previously scheduled September 27, 2024 meeting. At the meeting, the behavior incident that occurred on September 26, 2024 was discussed. The MDR documentation indicates the following, in part:
 - a. The team considered, in part, information provided by Student, Parents, staff, and administrators; evaluations, Student's IEP and BIP; Student's disability, school performance, behavior history, and behaviors outside of school; and information about Student's cognitive and emotional status.
 - b. The conduct was not caused by, or in direct and substantial relationship to, Student's disability. Specifically, the conduct was unlawful and goes beyond the academic/school setting.
 - c. The conduct was not a result of District's failure to implement the IEP and BIP.
 - d. The Student's behavior is not a manifestation of Student's disability.
 - e. Student will be placed on a long-term suspension pending the criminal investigation.
31. A PWN dated September 27, 2024 states the following in part:
 - a. Based on new information that was provided at the meeting (i.e., the behavior incident documented on September 27, 2024), the team decided to reconvene at a later time to develop Student's annual IEP.
 - b. Student will be on a modified schedule "to meet the long-term suspension." All school work is to be provided in paper form.
32. On October 7, 2024, Parents were notified of an expulsion hearing scheduled for October 9, 2024. The letter states, due to the level of infractions, administration was recommending expulsion for the remainder of the 2024-25 school year. The infractions consisted of the behavior incidents that occurred on August 8, 2024; September 4, 2024; September 5, 2024; September 19, 2024; and September 27, 2024.

33. An expulsion hearing was held on October 9, 2024. At the hearing, it was determined by the Associate Superintendent that Student should be placed on a modified schedule. Specifically, Student was to attend school for three hours each day, receiving instruction in English, math, and science while placed in a small classroom with an EA. Student was no longer permitted to use electronics at school or bring a cell phone. An FBA was to be conducted and an IEP developed within thirty days.
 - a. District was asked to provide the formal expulsion hearing order and failed to do so.
34. Student returned to school on October 14, 2024.
35. An IEP meeting was scheduled for October 25, 2024. Parent sent an email on October 22, 2024 requesting that the meeting be postponed until the state complaint was resolved.
36. At the time of this writing, Student has continued to attend school on a shortened schedule. While at school, Student works on English, math, and science assignments. The Case Manager is available to Student during the first hour Student is in attendance. The English, math, and science teachers are supposed to also go to Student's secluded classroom and check on Student to ensure Student does not have any questions. There is evidence that the math teacher makes some contact with Student but there is no indication the English or science teachers are doing such.
37. District stated its speech language pathologist (SLP) unexpectedly resigned during the 2023-24 school year. District assured that case managers at both the middle school and high school are keeping a running count of speech services for each student entitled to same. Specifically, District stated Student is owed compensatory speech services in the amount of 1,050 minutes for the 2023-24 school year and 480 minutes (and counting) for the 2024-25 school year.

Discussion and Conclusions of Law

Issue No. 1

Whether the District properly implemented the Student's individualized education program(s) (IEP) and/or behavior intervention plan (BIP), pursuant to 34 C.F.R. § 300.323 and 6.31.2.11(B) NMAC.

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17. The IEP is "the centerpiece of the statute's education delivery system for disabled children . . . [and] the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994

(2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student's IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

A school district must ensure that "as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child's IEP." *Id.* See also 6.31.2.11(B)(1) NMAC.

Staff shortages do not excuse a district's obligation to implement all of the services prescribed in a student's IEP. See e.g., *Lakeville Area Sch. 0194-01*, 123 LRP 21873 (SEA MN 06/12/23).

Parent alleged Student was assigned work online even though Student was to only receive hard copies of all assignments. In addition, Student has not received speech services.

First and foremost, Student's teachers and providers were not provided access to the IEP and BIP until three weeks after the start of the school year. On the second day of school, a behavior incident occurred. While the behavior incident involved the Case Manager, who was familiar with Student and the IEP/BIP, had an incident occurred in any other classroom or setting, the staff responsible for responding may not have known how to handle it because they lacked access to the IEP and BIP. It is a district's responsibility to implement an IEP/BIP on the first day of school for any given school year. Without providing a student's teachers and providers access to same, it is impossible to expect that the IEP/BIP would be implemented with fidelity.

Of equal concern, the September 25, 2023 IEP makes no mention of the restriction of computer access. Nonetheless, it is clear that there was an agreement and need to limit Student's access to technology. However, it is unclear whether the previous agreement to only provide assignments via hard copy was relayed to Student's teachers and providers during the 2024-25 school year. As a result, Student was invited to a Google classroom. On at least one occasion, while in class, Student was permitted to use a computer. Because Student was a member of the Google classroom, Student was able to post inappropriate content within the virtual classroom. As a result, Student was suspended. While it is unclear if the English teacher knew that Student was not to have access to a computer, other District staff did know and yet Student was still added to the Google classroom. Had the IEP indicated computer access was prohibited, had Student not been added to the Google classroom, and/or had the English teacher been more vigilant to ensure Student did not have access to a computer while in class, the incident that occurred on September 5, 2024 may not have happened. Multiple mistakes were made by District and Student suffered because of it.

In addition, the IEP required that a Google sheet be completed daily to track Student's behaviors. It is true that Student was suspended for the majority of days during the first quarter of the school year, but the days Student was in attendance the Google sheet was not completed nor has the Google sheet been completed since Student's return to school.

District admitted that Student has not received speech services since the 2023-24 school year. District asserts it has attempted to replace the SLP, but that does not change the finding that District’s failure to offer speech services results in an implementation failure of the IEP.

Finally, since Student’s return to school in October 2024, Student has been placed on a shortened school day. There is no indication Student is receiving psychological services, OT, or social work services. While Student routinely refuses services, District still has an obligation to offer same but it has failed to do so.

All in all, District has failed to implement the IEP as written for the reasons noted above.

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

Issue No. 2

Whether the District properly conducted a manifestation determination review(s) (MDR) and continued to provide the Student educational services after the Student was removed from their then-current placement for more than 10 days, pursuant to 34 C.F.R. §§ 300.530 and 300.536; and 6.31.2.11(F) NMAC.

An MDR examines whether a student’s conduct was directly and substantially related to the student’s disability. 34 C.F.R. § 300.530(e)(1). An MDR must be held within ten school days of “any decision to change the placement of a child with a disability because of a violation of a code of student conduct” *Id.* A change in placement occurs if a disciplinary removal is for more than ten consecutive school days or if the child has been subjected to a series of disciplinary removals that constitute a pattern. 34 C.F.R. § 300.536.

Parents have a right to invite additional participants to an MDR. *See* 34 C.F.R. § 300.530(e)(1). School districts must notify parents early enough to ensure that parents and their invited attendees have an opportunity to participate. *Id.*; 34 C.F.R. § 300.322(a)(1). Districts must provide advance written notice for “any other meetings in which the parents have a right to participate pursuant to 34 C.F.R. § 300.501(b).” 6.31.2.13(D)(1) NMAC. *See also Boulder RE-1J, St. Vrain, 82 IDELR 47 (CO SEA 2022) (finding that less than 24 hours’ notice before an MDR meeting is untimely notice under the IDEA).*

When conducting an MDR, the team must review all relevant information in the student’s file. 34 C.F.R. § 300.530(e)(1). The list of relevant information that may be reviewed at an MDR is not exhaustive. *71 Fed. Reg. 156, 467190 (August 14, 2006)*. “All the statute requires is that, before reaching a manifestation determination, the team must review the information pertinent to that decision” *Fitzgerald v. Fairfax Cnty. Sch. Bd.*, 556 F. Supp. 2d 543, 559 (E.D. Va. 2008). Also, there is nothing “in the statute or the regulations . . . that limits a manifestation determination

review only to the disability that served as the basis for the eligibility determination.” *Letter to Yudian*, 103 LRP 37911 (OSEP August 1, 2023).

When a student with a disability has been removed from their current placement for more than 10 school days, special education and other services must continue to be provided. 34 C.F.R § 300.530 (b)(2).

As an initial matter, District was not required to conduct an MDR following Student’s ten-day suspension stemming from the August 8, 2024 incident, as the suspension did not result in a change in placement. However, the IDEA does not preclude a district from convening an MDR meeting before a change in placement occurs. Problematically, the manifestation determination team (MDT) did not review all relevant information in Student’s file as the MDT incorrectly focused on Student’s disability category rather than on Student’s underlying disability. Specifically, the MDT determined that Student’s ODD may have contributed to Student’s behaviors but because Student’s special education eligibility classification is “autism” Student’s behaviors were not a manifestation. The MDT should have considered student-specific data in Student’s file to properly consider whether Student’s conduct on August 8, 2024 was directly and substantially related to Student’s disability.

In addition, the MDT determined that the conduct in question was not a direct result of District’s failure to implement the IEP/BIP. While the initial problematic behavior was the use of a cell phone, Student’s behaviors escalated when Case Manager grabbed the phone out of Student’s hands. The BIP specifically states that staff are not to “power struggle” with Student and, when escalated, staff are to give Student time to cool down. Per the District discipline matrix, Student’s long-term suspension was a result of the use of a weapon (e.g., a paper clip), but for District’s actions of grabbing the phone out of Student’s hands and the intervention of an EA instead of disengaging with Student, Student may not have resorted to physical aggression towards staff. Therefore, it is concluded that the MDT did not properly conclude that Student’s behaviors were not a manifestation of Student’s disability.

Although the previous disciplinary actions may not have constituted a pattern resulting in a change of placement, by September 26, 2024, Student had been suspended for 21 school days, stemming from three different behavior incidents. While suspended, the fourth behavior incident occurred. On September 27, 2024, District decided that it would utilize the previously scheduled annual IEP meeting to conduct an MDR. Problematically, Parents were provided no notice regarding District’s decision. Even if District had informed Parents the morning of September 27, 2024 that it planned to conduct an MDR, such notice is inadequate to allow Parents to prepare for, or invite additional attendees to, the meeting. Accordingly, District’s failure to provide adequate notice of the MDR meeting results in a procedural violation and denied Parents the opportunity to meaningfully participate in the meeting.

In addition, like the August 16, 2024 MDR meeting, the MDT failed to review all relevant information in Student's file when determining whether Student's conduct was a manifestation of Student's disability. Most striking is that the MDT found that Student's behaviors went beyond the parameters of the MDR because it was an, alleged, criminal offense. However, Student has engaged in inappropriate use of technology for years. So much so that Student was no longer allowed access to a computer. The MDT ignored Student's history as they were unable to see past the criminality of same. Therefore, it is concluded that the MDT did not properly consider all information prior to determining Student's conduct was not a manifestation of Student's disability.

Administration decided at the expulsion hearing that Student would be permitted to return to school but only for three hours each day. Administratively shortened school days in response to a child's behavior are considered a disciplinary removal and the disciplinary procedures apply. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSERS 2022). Therefore, prior to Student returning to school under the new parameters District was required to either convene an IEP meeting to discuss the shortened school day ordered by the administrator to ensure Student was still provided FAPE or conduct an MDR before October 28, 2024 (Student's eleventh day of removal).

Finally, despite Student having received, and served, 17 consecutive school days of suspension, District did not continue to provide educational services following the tenth day of removal. While District may have, for a period of time, sent assignments for Student to complete, there is no evidence that teachers were in any sort of communication with Student or that any instruction whatsoever was provided. In fact, District asserts Student did not turn in many, if any, assignments, yet no follow-up occurred.

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

Issue No. 3

Whether the Student's IEP is tailored to their unique needs and reasonably calculated to enable the Student to make progress appropriate in light of their circumstances, pursuant to 34 C.F.R. §§ 300.320 and 300.324; and 6.31.2.11 NMAC.

The primary vehicle for providing FAPE is through an appropriately developed IEP that is based on the individual needs of the child. *Dear Colleague Letter*, 115 LRP 53903 (OSERS 2015). The IDEA requires a district offer an IEP reasonably calculated to enable a child to make progress appropriate in light of their circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

In developing an IEP, the IEP Team must consider the strengths of the child, the parent's concerns, evaluation results, and "the academic, developmental, and functional needs of the child." 34 C.F.R. § 300.324(a)(1). An IEP must include a statement of the child's present levels of academic achievement and functional performance. *Id.* at 300.320(a)(1)(i). An IEP must also contain measurable annual goals designed to: (1) meet the needs that result from the student's disability to enable him or her to be involved in and make progress in the general education curriculum, and (2) meet each of the student's other educational needs that result from his or her disability. *Id.* at 300.320(a)(2). Also, an IEP must include the special education and related services and supplementary aids and services that will be provided to allow the child to (1) attain the annual goals, (2) be involved and make progress in the general education curriculum and (3) participate in nonacademic activities. *Id.* at 300.320(a)(4). The IEP must indicate the anticipated frequency, location, and duration of services. *Id.* at 300.320(a)(7). There must be enough specificity about the services and modifications that will be provided "so that the level of the [district]'s commitment of resources will be clear to the parents and other IEP team members." *See* 71 Fed. Reg. at 46667. Failing to provide needed supports and services can be a denial of FAPE. *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016).

The IEP must pass the "stranger test," meaning that the IEP must not be vague and can be understood and implemented by someone unfamiliar with the student. *Mason City Community School District*, 46 IDELR 148 (SEA IA 2006).

"[A] court should determine the appropriateness of an IEP as of the time it was made and should use evidence acquired subsequently to the creation of an IEP only to evaluate the reasonableness of the school district's decisions at the time that they were made." *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564-65 (3d Cir. 2010).

Parent alleged the BIP was not adequate to address Student's needs. Parent's allegation is founded. The BIP implemented has had very few changes since its development in September 2022, and even after the FBA was completed in February 2024. Moreover, following the August 8, 2024 behavior incident, no changes were made to the BIP other than the removal of access to a computer, which was found to be an effective incentive, and no further amendments were made during the 2024-25 school year, despite an obvious need for same. It is clear Student's behavior has been a challenge for many years. One would expect to see a district attempt to use other positive behavioral interventions and supports to address challenging behaviors, but, here, District has not done so.

In addition, the September 25, 2023 IEP (with subsequent amendments) is no longer an accurate representation of Student's educational programming. For example, the IEP indicates Student is on a modified schedule but the modified schedule described has not been implemented since the 2023-24 school year. The number of special education and related services minutes are

unable to be provided now that Student is on new shortened schedule. Finally, Student's current placement is not accurately reflected.

As discussed below, the IEP Team should have convened following the expulsion hearing to develop a new IEP for Student and discuss placement. It is true that an IEP meeting was scheduled for October 25, 2024 and Parent requested to postpone it until the complaint investigation was finalized, but Parent's request does not excuse District from ensuring Student receives FAPE. The IEP as written does not offer FAPE and Student's educational programming provided was not determined by Student's IEP Team, as required.

Finally, there were at least two instances in which amendments should have been made to the IEP but were not. Specifically, in February 2024, the IEP Team decided to implement the daily behavior Google sheets but the IEP was not amended to reflect same until April 2024. Similarly, in August 2024, the IEP Team decided Student was in need of a one-on-one EA. The IEP still has not been updated to reflect same.

All in all, Student's IEP and BIP are not reasonably calculated to enable Student to make progress.

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

Issue No. 4

Whether the decision to shorten the Student's school day was appropriate and made in conformity with 34 C.F.R. §§ 300.116; 300.321; 300.327; 300.501(c)(1); and 300.530; and 6.3.2.11(B)(2) and 6.3.2.11(F) NMAC.

The IEP team, including the parents, are to determine a child's placement. 34 C.F.R. §§ 300.116; 300.327; 300.501(c)(1).

When a student with a disability engages in conduct that would warrant expulsion under the district's student code of conduct, the student may be subjected to the same disciplinary sanctions that a nondisabled student would receive, so long as the behavior that gave rise to the violation is determined not to be a manifestation of the student's disability. 34 C.F.R. § 300.530(c).

When a school administrator unilaterally decides a student may only remain at school on a shortened school day or is not allowed to attend the general education classroom because of behavior issues, it is generally considered a disciplinary removal unless the three 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.” *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions*, 81 IDELR 138 (OSERS 2022).

As discussed above under Issue No. 2, District did not properly conduct an MDR following the August 8, 2024 or the September 27, 2024 behavior incidents. As the two MDRs conducted were faulty, the administrative decision to shorten Student’s school day runs afoul of the IDEA and constitutes a disciplinary change in placement. Moreover, the IEP Team never met to discuss the shortened school day and placement ordered by the administrator. The IEP team, not a school administrator, is to determine the appropriate placement for a child with a disability. This is true even when the student is appropriately removed to alternate interim education setting as a result of a valid long-term suspension or expulsion.

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

Issue No. 5

Whether the Student’s placement was properly determined and provided in the least restrictive environment (LRE) appropriate for the Student’s needs, pursuant to 34 C.F.R. §§ 300.114 through 300.118; 300.327; 300.501; and 6.31.2.11(C) NMAC.

In the complaint, Parent indicated Student was placed in an inclusion setting. Upon reviewing Student’s file, it became clear that Student was placed in an inclusion setting via an administrative decision made at the expulsion hearing.

As stated above under Issue No. 4, District did not properly conduct the two MDRs nor was Student’s shortened school day or change to a more restrictive placement determined by the IEP Team. Therefore, Student’s current, secluded placement is a disciplinary removal and not in conformity with the regulations cited above.

As to Issue No. 5, the District is cited, and Corrective Action is required.

Issue No. 6

Whether the District provided prior written notice(s) (PWN) that accurately reflect what was discussed and agreed upon at the IEP meeting(s), pursuant to 34 C.F.R. § 300.503.

A district must provide prior written notice prior to proposing or refusing to initiate or change the identification, evaluation, educational placement, or provision of FAPE to a child. 34 C.F.R. § 300.503.

The content of the notice must include: (1) A description of the action proposed or refused by the agency; (2) An explanation of why the agency proposes or refuses to take the action; (3) A

description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and the means by which a copy of a description of the procedural safeguards can be obtained; (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part; (6) A description of other options that the IEP team considered and the reasons why those options were rejected; and (7) A description of other factors that are relevant to the agency's proposal or refusal. *Id.*

Parent alleged they have requested Student be placed in a smaller classroom for years. Despite the requests, the PWN(s) has never addressed Parent's requests.

It is unclear when precisely Parent has requested a smaller classroom setting for Student. Thus, Parent's allegation could not be substantiated. District is reminded that all proposals discussed at IEP meetings, whether accepted or rejected, should be included in PWNs going forward.

As to Issue No. 6, the District is not cited.

Issue No. 7

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

FAPE must be made available to all children with disabilities. 34 C.F.R. § 300.101; 6.31.2.8 NMAC. School districts must provide FAPE for each student who resides within the school district's educational jurisdiction. 6.31.2.9(A) NMAC. Violations of the IDEA may be based on either substantive or procedural violations. A procedural violation constitutes a denial of FAPE if it: (1) impedes the child's right to FAPE; (2) significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of FAPE; or (3) causes a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2). A substantive legal standard for determining whether a district offered a student FAPE is whether the IEP was reasonably calculated to enable the child to make progress appropriate in light of their circumstances. *Endrew F.*, 137 S. Ct. 988 (2017).

IEP Implementation

The failure to implement an IEP can result in a denial of a FAPE. 34 C.F.R. § 300.17. However, not every deviation from the IEP results in a denial of FAPE. *See I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Schs.*, 70 IDELR 86 (8th Cir. 2017). Only material implementation failures qualify as a denial of FAPE. *See e.g., Van Duyn v. Baker Sch. Dist. 5J*, 47 IDELR 182 (9th Cir. 2007), *reprinted as amended*, 107 LRP 51958, 502 F.3d 811 (9th Cir. 2007). "A material failure occurs when there

is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Id.*

District's failure to provide services alone renders a material implementation failure resulting in a denial of FAPE. In addition, District's failure to provide Student's teachers and providers access to the IEP/BIP for over three weeks also is a material implementation failure resulting in a denial of FAPE.

MDR

District's failure to consider all relevant information when determining whether Student's behaviors were a manifestation of the disability and District's failure to provide educational services when Student was suspended for more than ten school days all denied Student meaningful educational benefit that resulted in a denial of FAPE.

Reasonably Calculated IEP

As stated above under Issue No. 3, Student's IEP is not reasonably calculated to enable Student to receive an educational benefit resulting in a denial of FAPE.

Shortened School Day/Change of Placement

Student's school day and change in placement to a secluded classroom was not a decision of the IEP Team but a decision of an administrator. The IEP Team failed to discuss, or affirm, the administrator's decision to ensure Student was still offered FAPE resulting in a denial of same.

As to Issue No. 7, the District is cited, and Corrective Action is required.

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. § 300.323 6.31.2.11(B) NMAC	District failed to implement Student's IEP.
34 C.F.R. §§ 300.530 and 300.536 6.31.2.11(F) NMAC.	District did not properly conduct MDRs. District did not conduct all required MDRs. District did not continue to provide educational services to Student while Student was removed from their then-current placement.
34 C.F.R. § 300.322(a)(1) 6.31.2.13(D)(1) NMAC	District failed to provide Parent adequate notice of the MDR meeting.
34 C.F.R. §§ 300.320 and 300.324 6.31.2.11 NMAC	District failed to develop an IEP/BIP reasonably calculated to meet Student's unique needs.

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. § 300.530 6.31.2.11(F) NMAC	District inappropriately shortened Student’s school day and changed Student’s placement to a more restrictive setting.
34 C.F.R. § 300.101 6.31.2.8 NMAC	District’s actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE) to the Student.

Required Actions and Deadlines

By January 8, 2025, 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 implementing federal regulations and State rules. Each step also must be carried out within the timelines in the Corrective Action Plan. If a brief extension of time for the steps in the Corrective Action Plan is needed, a request in writing should be submitted to the Corrective Action Plan Monitor. The request should include the case number, the date for the proposed extension, and the reason for the needed extension. The OSE will notify the parties of any extension granted.

Please carefully read the entire CAP before beginning implementation. One or more steps may require action(s) in overlapping timeframes. All corrective action must be completed no later than December 20, 2025 and reported to the OSE no later than January 10, 2026. 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 Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan (CAP).	January 8, 2025	Written Assurance Letter/Email	January 8, 2025
2.	The District Special Education Director and the school principal shall meet virtually with the OSE Education Administrator assigned to the District and the 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 Director has the discretion to include other District or school administrators or personnel in this meeting. The District Director shall be responsible for arranging this virtual meeting with OSE.	January 17, 2025	Notes from meeting prepared by District	January 24, 2025
3.	The District Special Education Director will meet with the case managers and Student’s special education teachers and related service providers to review the Complaint Resolution Report to ensure that those persons understand the complaint, the violations that were found, and the	January 24, 2025	Notes from meeting prepared by District	January 31, 2025

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>
	corrective action that will be taken to address the violations.			
4.	Student shall immediately be returned to their original placement and attend a standard school day, absent a different agreement from the IEP team prior to January 6, 2025.	January 6, 2025	Assurance Letter/Email	January 8, 2025
5.	<p>The District shall convene a facilitated IEP meeting for Student. The facilitated IEP meeting shall address, at minimum:</p> <ul style="list-style-type: none"> • The Student’s present levels of performance; • A transition plan; • Appropriate accommodations; • Appropriate goals, including behavioral goals and computer safety; • Appropriate positive behavioral interventions and supports, including revision of the BIP; • Schedule of services; • Placement in the least restrictive environment; • The length of Student’s school day; and • Plan for compensatory education required by Step 7. <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>	January 31, 2025	<ol style="list-style-type: none"> 1. Invitation to FIEP meeting; 2. Agenda for FIEP meeting; 3. FIEP; and 4. Prior Written Notice(s) 	7 days after the FIEP meeting is held

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>The FIEP meeting shall be held on a date and time that is convenient for the parent. The parent will be provided with a copy of the IEP and PWN at the conclusion of the FIEP meeting.</p> <p>The District Special Education Director shall participate in the IEP meeting. The District shall also ensure that the IEP team includes, but is not limited to, parents, special education teacher, general education teacher, and any potential related services providers.</p>			
6.	<p>District shall also reconvene a MDR Team meeting to determine whether Student’s conduct on September 26, 2024 was a manifestation of Student’s disability.</p> <p>The MDT(s) shall review and consider all relevant information in student’s file, including all diagnoses and previous behavior history, when making its determination.</p> <p>If Student’s behaviors are determined to be a manifestation of Student’s disability, the corresponding suspensions shall be expunged from Student’s record.</p>	January 31, 2025	<ol style="list-style-type: none"> 1. MDR Records and 2. Prior Written Notices 3. Student’s discipline record, if applicable 	7 days after the MDR meeting(s) is held
7.	<p>The District shall provide the following compensatory education:</p> <ol style="list-style-type: none"> 1) 25 hours in speech 2) 25 hours in behavior 3) 25 hours in occupational therapy 	December 20, 2025	Documentation of delivery/provision of compensatory education services, including logs of services recorded in the PED-approved Excel	Monthly from date of compensatory services plan until the compensatory

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>4) 25 hours in social work 5) 5 hours in psychological services</p> <p>The plan for compensatory services shall be documented in the PWN for the facilitated IEP meeting.</p> <p>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 Parents and can include provisions of services in the summer months.</p> <p>If the District, due to staffing or other limitations, is unable to provide the needed IEP and compensatory services as outlined in Student’s IEP and the compensatory services plan, the District is required to contract with a private provider to ensure those services are provided.</p>		<p>spreadsheet log provided by the OSE CAP monitor.</p> <p>Prior Written Notice containing plan for compensatory services</p>	<p>education hours are completed</p> <p>7 days after the FEIP meeting is held</p>
8.	<p>The District shall arrange training for school staff (including special education teachers, special education administrators, and related service personnel) to be provided by a person independent of the District with expertise in special education who was not involved in responding to this complaint and is approved by the PED.</p>	March 7, 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</p>	<p>March 14, 2025</p> <p>January 24, 2025</p> <p>March 7, 2025</p>

Step No.	<u>Actions Required by District</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED OSE</u>	<u>Document Due Date</u>
	<p>The training shall address the following special education topics:</p> <ol style="list-style-type: none"> 1. IEP development, especially when behavior impedes learning; 2. Implementing an IEP and BIP as written; 3. Disciplinary procedures, specifically: <ol style="list-style-type: none"> a. Procedures for conducting an MDR; b. Relevant information to be considered; c. Determination of whether conduct was a manifestation of a student’s disability; and d. Provision of services to be provided when a student has been removed for more than 10 days. 4. Procedures for disciplinary hearings; 5. Autism, oppositional defiant disorder, and conduct disorder and how such disabilities may intertwine or present itself. 		<p>and plan for addressing the provision of training to those staff not in attendance.</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/ Emily Adams

Emily Adams, 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