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**NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
OFFICE OF SPECIAL EDUCATION  
Complaint Resolution Report  
New Mexico School for the Deaf  
Case No. 2425-33  
February 28, 2025**

**This Report does require corrective action. See pages 8-9**

On December 20, 2024, a complaint was filed with the New Mexico Public Education Department's (PED) Office of Special Education (OSE) under the federal Individuals with Disabilities Education Act (IDEA) and the implementing Federal Regulations and State Rules governing publicly funded special education programs for children with disabilities in New Mexico.<sup>1</sup> The OSE has investigated the complaint and issues this report pursuant to 34 C.F.R. § 300.152(a)(5) and 6.31.2.13(H)(5)(b) NMAC.

**Conduct of the Complaint Investigation**

The PED's complaint investigator's investigation process in this matter involved the following:

- review of the complaint and supporting documentation from Complainant;
- review of LEA's responses to the allegations, together with documentation;
- review of LEA's compliance with federal IDEA regulations and state NMAC rules;
- interview with Complainant and LEA's Special Education Director;
- research of applicable legal authority.

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<sup>1</sup> The state-level complaint procedures are set forth in the federal regulations at 34 C.F.R. §§ 300.151 to 153 and in the state rules at Subsection H of 6.31.2.13 NMAC.

### **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 Local Education Agency (“LEA”) developed and implemented an IEP reasonably calculated to allow Student to make progress and receive a free appropriate public education (FAPE), to include appropriate behavioral interventions, in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC, to include but not be limited to whether LEA:
  - a) Implemented Student’s Safety Plan;
  - b) Provided all services in Student’s IEP;
  - c) Evaluated and implemented appropriate behavioral interventions; and
  - d) Followed proper procedures when making changes to Student’s IEP
2. Whether LEA ensured that personnel providing special education and/or related services to Student were qualified and appropriately licensed, pursuant to 34 C.F.R. § 300.156 and 6.31.2.9(B)(9) NMAC;
3. Whether LEA’s actions and/or omissions towards the named Students 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. Complainant is Parent of Student.
2. Student has attended LEA since beginning her education in preschool and is currently a 3<sup>rd</sup> grader.
3. In the State complaint, Parent asserts the following:

- a) LEA is not providing behavioral support services;
  - b) Student does not have a certified teacher providing direct care/education;
  - c) Student's teacher is not trained/certified in special education;
  - d) Safety plan developed from previous year IEP is not being followed or implemented;
  - e) Lack of behavioral support documented in previous year's IEP has presented occasional issues;
  - f) Parents were requested to sign/agree to back dated IEP amendment removing services [behavior support services].
4. Student's current IEP is dated October 8, 2024. The most recent evaluation date for Student was September 4, 2024. Student's primary eligibility category is Hearing Impairment with a secondary category of Autism.
  5. Student's IEP lists services as follows:
    - a) Occupational therapy (60 minutes weekly in special education setting);
    - b) Speech, Language Pathology therapy (60 minutes weekly in special education setting);
    - c) Special education services (1680 minutes per week in special education setting);
    - d) Physical therapy (30 minutes monthly in special education setting).
  6. Parents were present and participated in IEP Team meeting that resulted in current IEP.
  7. The 2024 IEP had several changes from the 2023 IEP to include increased time for occupational and speech and language therapy, and the addition of physical therapy.
  8. Another change that occurred in October 2024, was changing language describing behavioral services and moving behavioral services out of the IEP and listing it in the PWN.
  9. The 2023 IEP Schedule of Services section used the following language:
    - a) Behavior Analytic; 30 (no time reference provided for consultation with the ABA agency for coordination of services up to 30 hours per week); and
    - b) Behavior Analytic; 30 minutes 2 times per week.
  10. The 2024 IEP took this language out of the Schedule of Services section. Instead, the PWN corresponding with this IEP stated: "[LEA] will collaborate with medically approved ABA agency for Registered Behavior Technician (RBT) services."
  11. Parents were present when the IEP changed in all aspects and parents agreed to the current IEP and received the PWN wherein the RBT services were documented.
  12. The change of language and move of services from Student's IEP to PWN did not change provision of such services. The ABA agency confirmed provision of services Student throughout the 2024-2025 school year. Provision of these services has always been via the ABA agency. These services are paid for via Medicaid funding.
  13. LEA provided appropriate licenses for all teachers who taught Student during the past year. Beyond Parent's statement in State complaint, no other statements or evidence has been provided that contradicts the current and appropriate licenses for Student's teachers and LEA's affirmation that Student was taught by qualified personnel.
  14. This investigator reached out to Parent multiple times and in different ways and received no further contact or information beyond the filed State complaint.

**Discussion and Conclusions of Law**

***Issue No. 1: Whether the Local Education Agency (“LEA”) developed and implemented an IEP reasonably calculated to allow Student to make progress and receive a free appropriate public education (FAPE), to include appropriate behavioral interventions, in violation of 34 C.F.R. §§ 300.320-300.328 and 6.31.2.11(B)(1) NMAC, to include but not be limited to whether LEA:***

- a) Implemented Student’s Safety Plan;***
- b) Provided all services in Student’s IEP;***
- c) Evaluated and implemented appropriate behavioral interventions; and***
- d) Followed proper procedures when making changes to Student’s IEP***

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 LEA offer an IEP reasonably calculated to enable a child to make progress appropriate in light of their circumstances. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

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.” *Endrew 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).

§ 8.320.6(13) NMAC allows for Medicaid coverage of behavioral health services when “medically necessary and rendered as part of an eligible recipient’s IEP, [Individualized Family Service Plan] IFSP, 504 plan, [Individualized Health Care Plan] IHCP or other care plan by specified providers in school settings.” Moreover, services must be both medically necessary and “must meet the needs specified in his or her IEP, IFSP, 504 plan, IHCP or other care plan.” *Id.*, at 13(B)(1).

Pursuant to 34 C.F.R. § 300.320(a)(4), an IEP must contain, among other things: A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—

- (i) To advance appropriately toward attaining the annual goals;

- (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

Pursuant to 34 C.F.R. § 300.503, a PWN must contain:

- (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, if this notice is not an initial referral for evaluation, 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.

The IEP and PWN are thus two functionally different documents. All services that an IEP Team believes are appropriate for a student must be listed in that student's IEP. This is true for compliance with federal and state law as it relates to IDEA Part B and Medicaid law mandates for coverage of eligible services.

In October 2024, the LEA removed Student's behavioral services from the IEP and listed different services – ABA services to include RBT services, instead, on Student's PWN. This change did not affect provision of services, and the ABA agency confirmed services did not change and full services have been provided to Student.

Investigation did not show that there were services listed on Student's IEP that were not provided. Likewise, investigation did not demonstrate that the LEA failed to implement Student's Safety Plan or failed to evaluate or implement appropriate behavioral interventions for Student.

Removing behavioral analytics from Student's IEP without the IEP Team making a finding that such were not needed by Student is a procedural violation of 34 C.F.R. § 300.320(a)(4).

If a student receives outside medical only services during the school day within the school, an LEA might consider creating a 504 Plan or an Individualized Health Plan to document such; a PWN is not the vehicle to document such services.

**As to Issue No. 1 (a-c), the LEA is not cited. As to Issue 1(e), the LEA is cited and corrective action is required.**

***Issue No. 2: Whether LEA ensured that personnel providing special education and/or related services to Student were qualified and appropriately licensed, pursuant to 34 C.F.R. § 300.156 and 6.31.2.9(B)(9) NMAC.***

Once the IEP is developed, it must be implemented with fidelity by staff that have the appropriate training, experience and credentials to assist students. 34 C.F.R. § 300.323(c). Each public agency is responsible for ensuring that personnel serving children with disabilities are qualified under state licensure requirements and are adequately prepared for their assigned responsibilities, pursuant to 34 CFR § 300.156. § 6.31.2.9(B)(9)(a) NMAC.

A local superintendent or governing body of a charter school shall give written notice to parents of those students who are being taught for longer than four consecutive weeks by a substitute teacher or by a person who is not qualified to teach the grade or subject. § 6.63.10.13 NMAC.

LEA provided appropriate licenses for all teachers who taught Student during the past year. Beyond Parent's statement in State complaint, no other statements or evidence has been provided that contradicts the current and appropriate licenses for Student's teachers and LEA's affirmation that Student was taught by qualified personnel. Thus, LEA ensured that personnel providing special education and/or related services to Student were qualified and appropriately licensed, pursuant to 34 C.F.R. § 300.156 and 6.31.2.9(B)(9) NMAC.

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

***Issue No. 3: Whether LEA's actions and/or omissions towards Student resulted in a denial of a free appropriate public education (FAPE), in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.***

Students who are eligible for special education services are entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. LEAs are obliged 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 in determining 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 LEA. RE-I*, 137 S. Ct. 988 (2017). The Court in *J.L. v. Mercer Island School LEA*, 592 F3d 938, 951 (9th Cir. 2010), held that a procedural violation may be a denial of FAPE when it results in the loss of an educational opportunity, or infringes on parents' opportunity to participate in the development of the IEP or deprives the student of an educational benefit. All circumstances surrounding the implementation of the IEP must be considered to determine whether there was a denial of FAPE. *A.P. v. Woodstock Board of Education*, 370 F. Appx 202 (2d Cir. 2010). At a minimum, IEPs must be reviewed annually. 34 C.F.R. § 300.324(b).

As discussed above, LEA procedurally violated correct development of Student's IEP by removing behavioral services from the IEP document. All services, however, were provided, and personnel providing special education and/or related services to Student were qualified and appropriately licensed. The procedural violation of removing behavior services from Student's IEP did not result in a substantial violation under federal or state law as it did not result in the loss of an educational opportunity and did not infringe on parents' opportunity to participate in the development of the IEP and did not deprive Student of educational benefit.

Therefore, LEA did not deny Student FAPE.

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

#### **Summary of Citations**

<b>IDEA/State Rule Provisions Violated</b>	<b>Description of Violation</b>
34 C.F.R. §§ 300.320(a)(4)	LEA's removal of behavior analytics from Student's IEP was a procedural violation.

#### **Required Actions and Deadlines**

**By March 18, 2025**, the LEA's Special Education Director must assure the OSE in writing that the LEA will implement the provisions of this Corrective Action Plan (CAP). The OSE requests that the LEA submit all documentation of the completed corrective actions to the individual below, who is assigned to monitor the LEA 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

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 LEA 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 March 28, 2025, and reported to the OSE no later than April 4, 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**

<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED OSE</u></b>	<b><u>Document Due Date</u></b>
<b>1.</b>	As described above, LEA 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).	<b>March 18, 2025</b>	Written Assurance	<b>March 18, 2025</b>
<b>2.</b>	LEA will convene an IEP Team meeting for Student. The IEP meeting shall address behavioral supports for Student.  The IEP meeting shall be held on a date and time that is convenient for the parent. The parent will be	<b>March 28, 2025</b>	1. Invitation to IEP meeting; 2. Agenda for IEP meeting; 3. IEP; and 4. Prior Written Notice(s)	<b>7 days after the IEP meeting is held.</b>



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<b>Step No.</b>	<b><u>Actions Required by District</u></b>	<b><u>Complete Actions By</u></b>	<b><u>Documents Required to be Submitted to PED OSE</u></b>	<b><u>Document Due Date</u></b>
	<p>provided with a copy of the IEP and PWN at the conclusion of the IEP meeting.</p> <p>LEA Special Education Director shall participate in the IEP meeting. LEA shall also ensure that the IEP team includes, but is not limited to, parents, special education teacher, general education teacher, and any related services providers.</p> <p>LEA shall ensure that all teachers and service providers working with Student are provided IEP so that they are aware of their responsibilities in implementing those plans.</p>			

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

Investigated by:

/s/ *Natalie Campbell*

Natalie Campbell

Complaint Investigator

Reviewed by:

/s/ *Miguel Lozano*

Miguel Lozano, Esq.

Deputy General Counsel, Office of General Counsel

Reviewed and approved by:

DocuSigned by:

*Margaret Cage*

Margaret Cage, Ed.D.

Deputy Secretary, Office of Special Education