

## NEW MEXICO PRIMER ON SPECIAL EDUCATION IN CHARTER SCHOOLS: BACKGROUND SECTION

This section is divided into two parts:

- a discussion of the legal status of charter schools and their linkage to other local education agencies (LEAs) and
- a synopsis of federal laws that are most relevant to special education in charter schools.

The content of this section is intended for those readers who may not fully understand the critical importance of a charter school's legal status within a state's public education system, or may not have a working knowledge of, or need a brief update on, federal and state special education laws and regulations.

### CHARTER SCHOOL LEGAL STATUS AND LINKAGE TO AN LEA

#### Introduction

Charter schools must abide by state and federal special education laws and regulations because they are part of the public education system. However, the way this gets carried out in practice differs widely due to many factors, the most important of which are a charter school's legal identity as a school within an LEA or an LEA in its own right and its linkage to a traditional LEA (school district) for purposes of special education. Familiarity with these concepts is critical to understanding a charter school's level of responsibility for special education.

#### How is the public education system structured and how do charter schools fit into it?

The elements of the public education system are:

- the state education agency (SEA). In New Mexico, the SEA is called the New Mexico Public Education Department (NMPED);
- school districts (LEAs);
- schools that are part of an LEA (including locally-chartered charter schools); and
- schools that are their own LEA (including state-chartered charter schools).<sup>1</sup>

An LEA is usually defined as an entity that has responsibility for the education of all children who reside within a designated geographical area of a state. Charter schools do not completely fit into this definition since they are schools of choice and have responsibility only for students who are enrolled in the school. The Individuals with Disabilities Education Act (IDEA) and its regulations specifically include charter schools in the definition of an LEA: "Any other public institution or agency having administrative control and direction of a public elementary school or secondary school, including a public nonprofit charter school that is established as an LEA under State law." [34 CFR §300.28(b)(2)].

The place a charter school occupies in the public education system depends on the charter school's legal identity, usually referred to as a charter school's LEA status. LEA status is assigned by the state charter school law or other state policy that is legally binding. However, status is not always clearly delineated and a charter school's legal status for special education

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<sup>1</sup> Effective July 1, 2007

may be different from its legal status for all other matters. Depending on the state in which it is located, an individual charter school may be classified as:

- a separate LEA, or
- part of another LEA.

In New Mexico, a charter school is either:

- a) an LEA if chartered by the state under state law [NMSA 1978 22-8B-4 T. (Effective July 1, 2007)]<sup>2</sup> or
- b) a school within the LEA if chartered by an LEA.

### **Why is charter school legal identity for special education important?**

The exact nature of a charter school's identity for purposes of special education is important because, under federal requirements, an LEA has many more programmatic and financial responsibilities than a school that is only a part of an LEA. While the state is ultimately responsible for the education of all its resident children, states delegate responsibility to LEAs, e.g., states typically assign the responsibility to their LEAs for providing a free appropriate public education (FAPE). In addition, LEA status determines how funds for special education will flow to the charter school.

In New Mexico, the law all charter schools are responsible for "identifying, evaluating and offering" a FAPE to "all eligible children who are accepted for enrollment" in their respective schools. [NMSA 1978 22-8B-4 T]. In New Mexico, the school district, which is the LEA of the locally chartered charter school, is responsible for identifying and evaluating eligible children accepted for enrollment and for providing them with FAPE. State-chartered charter schools, as their own LEAs, are charged with "assum[ing] responsibility for determining students' needs for special education and related services."

### **How does a charter school's LEA status impact its operations?**

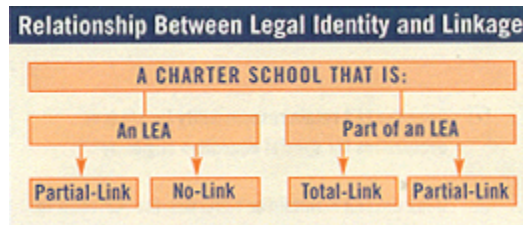
The major effect of a charter school's LEA status is the type of linkage that is mandated or voluntarily established between that charter school and a traditional LEA. In other words, a charter school's legal status is reflected in the way it relates to other LEAs. There are three types of linkage:

- **NO LINK**—a charter school that is its own LEA has full responsibility for special education and usually has No-Link to another LEA, although a charter could negotiate some working relationship with an LEA if it chooses to do so. For example, a New Mexico state-chartered charter school that chose not to negotiate a working relationship with an LEA would be No Link.
- **TOTAL LINK**—the charter is considered a part of an LEA and the LEA is responsible for the students with disabilities. All New Mexico locally chartered charter schools are Total Link - they are schools within LEAs; and
- **PARTIAL LINK**—the connection between a charter school and an LEA when there is a required or negotiated connection, e.g., the charter school has responsibility for services, but the child's home LEA carries out evaluation team tasks, or the charter school is

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<sup>2</sup> Under a new law, effective July 1, 2007 the NM Public Education commission (PEC) receives applications for chartering and renewals of charter schools that want to be chartered by the state and the PEC may approve, deny, suspend or revoke a state-chartered charter school in accordance with the Charter Schools Act.

responsible for only those services that can be delivered in the school and the LEA resumes responsibility when the child needs more specialized day or residential placement. A New Mexico state-chartered charter school that negotiates a working relationship with an LEA is Partial Link.



### What are the indicators of linkage?

Since there may be a considerable amount of variability in the way linkage is enacted in a specific charter school, the types of linkage can be said to fall along a continuum. Often, the specifics of how linkage will work is described in a contract between a charter school and an LEA.

### Why is linkage important?

Linkage is important because it determines the way that responsibilities for special education evaluation and services will be carried out. While the widest degree of variability occurs in partial-link situations, assignment of responsibility can also vary in total-link and no-link states. Usually, state law is not completely clear about all the details of accountability for special education in charter schools, so the specifics have to be negotiated between the charter school and the LEA. Often, some responsibilities are assigned while other operational elements are not. It is critical for a charter school to arrange in advance and commit to writing as clearly as possible an understanding with the LEA(s) to avoid future problems.

As stated above, in New Mexico, all charter schools are responsible for "identifying, evaluating and offering" a FAPE to "all eligible children who are accepted for enrollment" in their respective schools. State-chartered charter schools, as their own LEAs, are also charged with "assum[ing] responsibility for determining students' needs for special education and related services." Both locally-chartered and state-chartered charter schools may contract with a school district or other party for the provision of special education and related services. However, the school district in which the charter school is located retains responsibility for providing special education and related services to eligible children who live within the geographical boundaries of the LEA and who are expelled<sup>3</sup> from a charter school as well as child find responsibilities for eligible children before and after they are prior to enrollment enrolled in the state-chartered charter school.

A state-chartered charter school is responsible for child find for students currently enrolled in the charter school. The district is responsible for all other child find responsibilities for children within the district's educational jurisdiction. If the charter school expels a student from the charter school, the charter school will be the responsible party and must follow disciplinary procedures in accordance with 34 CFR §§300.530-538. In addition, if a dispute arises between the parents

<sup>3</sup> New Mexico defines "expulsion" as "the removal of a student from school either permanently or for an indefinite time exceeding ten (10) school days or a locally established lesser period." [NMAC 6.11.2.7 G.]

of an eligible student and the charter school in which the child is enrolled, the NM Public Education Department (NMPED) provides a spectrum of alternative dispute resolution (ADR) options which includes, informal dispute resolution options between the public agency and the parents, third party assisted interventions, and formal dispute resolution options in the form of a formal state complaint or a due process hearing. (6.31.2.13 NMAC).

## **FEDERAL LAWS RELEVANT TO SPECIAL ED IN CHARTER SCHOOLS**

### **Introduction**

The following brief overview of federal education laws as they pertain to special education is intended to be an orientation for those who are not very familiar with this legislation. Links are included for locating the full text of these laws and/or their regulations where they are available.

### **Which federal laws are most relevant to special education in charter schools?**

For charter schools, the federal laws (and their regulations) that have most relevance for implementing special education are the Individuals with Disabilities Education Act (IDEA); the Elementary and Secondary Education Act (ESEA), recently reauthorized as the No Child Left Behind Act (NCLB); Section 504 of the Rehabilitation Act of 1973 (504); the Americans with Disabilities Act (ADA) and the Family Education Rights and Privacy Act (FERPA).

### **Are copies of these laws or regulations available on the Internet?**

Yes. The links are as follows:

- The IDEA Law revisions were enacted in December 2004. A copy of the law can be accessed at the following: <http://www.nichcy.org/idealaw.htm>
- The IDEA regulations were adopted in August 2006 and can be accessed at <http://www.nichcy.org/idearegs.htm>
- State special education regulations are available on most state websites. New Mexico special education regulations, NMAC 6.31.2 can be accessed at <http://www.nmcp.state.nm.us/nmac/title06/T06C031.htm>
- NCLB: Links to the law, regulations and policy guidance are available online at <http://www.ed.gov/about/offices/list/oese/legislation.html#leg>
- 504: Regulations can be found online at <http://www.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html#D>
- ADA: Regulations and technical assistance are available online at <http://www.usdoj.gov/crt/ada/publicat.htm>
- FERPA: An explanation is available online at <http://www.ed.gov/policy/gen/guid/fpc/ferpa/index.html>

### **Which federal agency is responsible for overseeing these laws?**

In the U. S. Department of Education (ED), the Office of Special Education Programs (OSEP) is in charge of the IDEA, the Office for Civil Rights (OCR) is responsible for Section 504 and the ADA. The Office of Elementary and Secondary Education (OESE) manages the ESEA and NCLB. The Family Compliance Policy Office provides technical assistance for FERPA requirements.

## **Do students with disabilities have a federally protected right to attend charter schools?**

Yes. Section 504 specifically prohibits discrimination solely on the basis of disability to public and private programs and activities that receive federal financial assistance. Children who attend charter schools are covered by these civil rights laws in the same way as children in any other public school.

## **What is the Individuals with Disabilities Education Act (IDEA)?\**

The IDEA provides federal financial assistance to state education agencies (SEAs) and local education agencies (LEAs) to guarantee special education and related services to eligible children with disabilities. Every state receives these funds and must follow all of IDEA's specific procedures, including those for an evaluation to determine if students are eligible for special education and the additional requirements for subsequent services and re-evaluation.

## **What are the basic requirements of IDEA?**

The basic requirements, often discussed using a set of acronyms, are:

- **IEP:** A group of professionals and the child's parents constitute the team that determines the child's eligibility for special education based on evaluation procedures in accordance with IDEA [34 CFR §§300.301 through 300.309]. In New Mexico, the child must go through the Student Assistant Team (SAT) process which can lead to referral if the interventions do not meet the child's needs. The IEP team decides on the individualized special education and related services for the child and prepares an individualized education program (IEP) that contains specific content that must be reviewed at least annually. An IEP includes measurable annual goals, how the child will be included in state and district assessments and how the child will access the general education curriculum in order to meet state standards.
- **FAPE:** Students with disabilities are entitled to a free appropriate public education (FAPE) provided at no charge to parents.
- **LRE:** The least restrictive environment (LRE) refers to placement in a setting that is the closest to the regular classroom. Students with disabilities must have available to them a continuum of placements that range from full time in a regular classroom to full time in a special setting. They are entitled to be placed in the setting that will meet their individual needs while removing them as little as possible from the regular classroom. The curriculum for all placements must be based on the NM State Standards with benchmarks.

The OSEP website at <http://www.ed.gov/policy/speced/guid/idea/omip.html> provides some information concerning specific requirements of the IDEA.

## **What does the IDEA say about charter schools?**

The 2004 amendments to IDEA continued to affirm that students who attend charter schools are covered under this law. The law makes specific references to charter schools including:

- Children with disabilities who attend public charter schools and their parents retain all rights under IDEA.

- Students with disabilities in charter schools that are part of an LEA (in New Mexico, locally-chartered charter schools) must be served in the same manner as that LEA serves children with disabilities in its other schools including that the LEA must provide supplementary and related services on site at the charter school to the same extent to which the local educational agency has a policy or practice of providing such services on the site to its other public schools. The LEA must also provide funds under this part to those charter schools on the same basis as that LEA provides funds to its other public schools, including proportional distribution based on relative enrollment of children with disabilities, and at the same time as the agency distributes other federal funds to the agency's other public schools, consistent with the state's charter school law.
- A charter school that is its own LEA is responsible for ensuring that the requirements of IDEA are met unless state law assigns that responsibility to some other entity. In New Mexico, state-chartered charter schools, which are their own LEAs, are responsible for all IDEA requirements except child find for students not enrolled in the school, and special education and related services for students who have been expelled from the charter school.
- If a charter school is a school of an LEA that receives IDEA funding, the LEA is responsible for ensuring that the requirements are met. In New Mexico, the school district, which is the LEA of the locally chartered charter school, is responsible for identifying and evaluating eligible children accepted for enrollment and for providing them with FAPE.
- Certification for teachers in charter schools is subject to the provisions of the state charter school law. The New Mexico Charter Schools Act requires that teachers in charter schools be certified. [NMSA 1978 22-8B-10 A; 22-10A-3].<sup>4</sup>
- Charter schools that are their own LEAs are specifically included in eligibility to access the resources of an LEA risk pool for high need children with disabilities if the state establishes such a fund.
- Charter schools that are LEAs may not be required to join with other LEAs to establish joint eligibility for funds unless the charter school is explicitly permitted to do so under the State charter school statute. (States may require traditional LEAs to join together for funding purposes if they would not be able to establish and maintain programs of sufficient size and scope individually).
- The state special education advisory panel must include a representative of charter schools.

These specific requirements involve a charter school's *legal status* as an LEA or part of an LEA. See Section I of this Background for a discussion of that concept.

### **What happens if a parent disagrees with the school about special education?**

The IDEA contains procedural safeguards and due process rights for parents in the identification, evaluation and placement of their child. Parents must be provided with prior written notice of these rights at least once a year and at the time they request a due process hearing. The law put various procedures in place for resolving conflicts between parents and schools. Every state must have a formal complaint system and must provide for mediation and due process hearings to settle conflicts.

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<sup>4</sup> Specific information about New Mexico certification is available from the Professional Licensure Bureau at <http://www.ped.state.nm.us/div/ais/lic/index.html>

## Are there children with disabilities who may not be covered by IDEA?

Yes. To be eligible under IDEA, children must meet the criteria of one of the specific disability categories as defined in the law and, as a result of that disability, need special education and related services. However, children who are not eligible under IDEA may qualify as students with disabilities under Section 504.

## How do Section 504 and the ADA differ from IDEA?

Section 504 and the ADA define disability much more broadly than the IDEA. They include any individual who has a physical or mental impairment that substantially limits one or more life activities, or who has a record of such an impairment, or who is regarded as having such an impairment. Reasonable accommodations are required by both of these laws and Section 504 goes further by specifically requiring the provision of educational and related aids and services that are designed to meet the individual educational needs of the child. The exact wording of the definitions in the regulations for IDEA and Section 504 are as follows:

- **IDEA LAW (as amended in 2004 but unchanged from prior law)**  
CHILD WITH A DISABILITY-  
(A) IN GENERAL- The term 'child with a disability' means a child--  
(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and  
(ii) who, by reason thereof, needs special education and related services.  
(B) CHILD AGED 3 THROUGH 9- The term 'child with a disability' for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child--  
'(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and  
'(ii) who, by reason thereof, needs special education and related services.
- **SECTION 504 OF THE REHABILITATION ACT OF 1973—REGULATIONS:**  
34 CFR 104.3  
(j) Handicapped person—(1) *Handicapped persons* means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.  
(2) As used in paragraph (j)(1) of this section, the phrase:  
(i) *Physical or mental impairment* means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, and/or genitourinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.  
(ii) *Major life activities* mean functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

### **What are some examples of disabilities that may be covered under Section 504 but not by the IDEA?**

Children who have chronic illnesses such as diabetes, or a physical impairment, such as those connected with cerebral palsy, may require specific accommodations or services, but do not meet the criteria of the IDEA definitions or additional specifications applied through state law. Such children are entitled to an evaluation and to FAPE if they are found to meet the definition of "handicapped person" as specified in the law. A 504 plan is usually written in these cases. Further details are available in the document *Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* available online at <http://www.ed.gov/about/offices/list/ocr/504faq.html?exp=0>

### **Are funds available under Section 504?**

No, there are no funds available as part of Section 504 and IDEA funds may not be used to serve children who are eligible only under Section 504.

### **What requirements about accessibility of facilities do charter schools have to follow?**

The state and federal requirements for accessibility of facilities are complex. It is important that authorizers and operators of charter schools have appropriate legal and technical assistance on this topic. Federal regulations can be found online at <http://www.usdoj.gov/crt/ada/adastd94.pdf>

### **What parts of NCLB are particularly relevant to students with disabilities?**

There are many parts of NCLB that pertain to students with disabilities in charter schools, but the most relevant ones are the accountability requirements related to assessment and highly qualified teachers.

### **What NCLB assessment requirements pertain to students with disabilities?**

Charter schools are subject to the same Title I accountability requirements as other public schools in a state and all state charter laws currently require charter schools to participate in their state's assessment system for public schools. Policy guidance for NCLB says a state's assessment system must be designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students covered under Section 504. The participation of students with disabilities in such assessments is covered in the IDEA and requires the following:

- Students with disabilities must be included in state and district-wide assessment programs with appropriate accommodations if necessary.
- Alternate assessments must be provided for those children who cannot participate in state and districtwide assessment programs even with accommodations.
- The IEP for all students with disabilities will specify how they will participate in state assessments.

It is important to note that procedures for the inclusion of all students with disabilities in large scale assessments is a developing area of knowledge and practice. Extensive resources on this topic are available at the website of the National Center on Educational Outcomes at <http://www.education.umn.edu/nceo/>



## **Are students with disabilities included in their state's adequate yearly progress (AYP) requirements?**

Yes. As stated in NCLB, AYP applies the same high standards of academic achievement to all public elementary and secondary school students in the state. The law also requires selected subgroups, one of which is students with disabilities, to be considered separately under certain conditions in determining whether a school has met AYP targets. An important part of the NCLB regulations, known as "the one percent rule" that applies to students with significant disabilities, was added to the NCLB regulations in December 2003. The U. S. Department of Education has issued a summary of that rule that is available online at [www.usu.edu/mprrc/workgroups/ci/011404Material1.pdf](http://www.usu.edu/mprrc/workgroups/ci/011404Material1.pdf)

## **How must students with disabilities be included in NCLB accountability reports?**

Students with disabilities is one of the subgroups for which NCLB requires disaggregated reports of assessment results. However, NCLB provides that a state may not use disaggregated data for one or more subgroups to report achievement results if the number of students in those subgroups is insufficient to yield statistically reliable information or if the results would reveal personally identifiable information about an individual student.

## **Which NCLB teacher qualification requirements pertain to students with disabilities?**

It is important to note that NCLB does *not* specifically refer to the teachers who provide special education services—that issue is covered in IDEA. It is important that state laws and policies that cover certification for charter schools be carefully reviewed by everyone involved with charter schools. As mentioned above, the 2004 amendments to IDEA make specific reference to special education teacher certification requirements. The IDEA special education teacher qualification requirements are complex and are quoted in full as follows:

### ***HIGHLY QUALIFIED-***

`(A) IN GENERAL- For any special education teacher, the term `highly qualified' has the meaning given the term in section 9101 of the Elementary and Secondary Education Act of 1965, except that such term also--

`(i) includes the requirements described in subparagraph (B); and

`(ii) includes the option for teachers to meet the requirements of section 9101 of such Act by meeting the requirements of subparagraph (C) or (D).

`(B) REQUIREMENTS FOR SPECIAL EDUCATION TEACHERS- When used with respect to any public elementary school or secondary school special education teacher teaching in a State, such term means that--

`(i) the teacher has obtained full State certification as a special education teacher (including certification obtained through alternative routes to certification), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except that **when used with respect to any teacher teaching in a public charter school**, the term means that the teacher meets the requirements set forth in the State's public charter school law;

`(ii) the teacher has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

`(iii) the teacher holds at least a bachelor's degree.

`(C) SPECIAL EDUCATION TEACHERS TEACHING TO ALTERNATE ACHIEVEMENT STANDARDS- When used with respect to a special education teacher who teaches core academic subjects exclusively to children who are assessed against alternate achievement

standards established under the regulations promulgated under section 1111(b)(1) of the Elementary and Secondary Education Act of 1965, such term means the teacher, whether new or not new to the profession, may either--

`(i) meet the applicable requirements of section 9101 of such Act for any elementary, middle, or secondary school teacher who is new or not new to the profession; or

`(ii) meet the requirements of subparagraph (B) or (C) of section 9101(23) of such Act as applied to an elementary school teacher, or, in the case of instruction above the elementary level, has subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those standards.

`(D) SPECIAL EDUCATION TEACHERS TEACHING MULTIPLE SUBJECTS- When used with respect to a special education teacher who teaches 2 or more core academic subjects exclusively to children with disabilities, such term means that the teacher may either--

`(i) meet the applicable requirements of section 9101 of the Elementary and Secondary Education Act of 1965 for any elementary, middle, or secondary school teacher who is new or not new to the profession;

`(ii) in the case of a teacher who is not new to the profession, demonstrate competence in all the core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher who is not new to the profession under section 9101(23)(C)(ii) of such Act, which may include a single, high objective uniform State standard of evaluation covering multiple subjects; or

`(iii) in the case of a new special education teacher who teaches multiple subjects and who is highly qualified in mathematics, language arts, or science, demonstrate competence in the other core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher under section 9101(23)(C)(ii) of such Act, which may include a single, high objective uniform State standard of evaluation covering multiple subjects, not later than 2 years after the date of employment.

`(E) RULE OF CONSTRUCTION- Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this section or part shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular State educational agency or local educational agency employee to be highly qualified.

`(F) DEFINITION FOR PURPOSES OF THE ESEA- A teacher who is highly qualified under this paragraph shall be considered highly qualified for purposes of the Elementary and Secondary Education Act of 1965.