

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2021-03
November 6, 2020**

This report requires corrective action. See Corrective Action
Plan pages 22-25

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on September 10, 2020, 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

Scope of PED Review and Authority

The PED SED administers the Federal regulations and State rules and regulations governing special education programming requirements for children with disabilities. The implementing regulations to the Individuals with Disabilities Education Act (IDEA) and the corresponding State rules require investigations into complaints regarding violations of these provisions. The PED has investigated the complaint and issues this report pursuant to 34 CFR Sec. 300.152(a)(5) and Subparagraph (b) of Paragraph (5) of Subsection H of 6.31.2.13 NMAC.

Facts discussed that occurred prior to September 10, 2019 or after September 10, 2020 are for background information only. Federal regulations and State rules limit the investigation of State complaints to violations that occurred not more than one year prior to the date of the complaint received. 34 CFR 300.153(c) and 6.31.2.13(H)(2)(d) NMAC.

Conduct of the Complaint Investigation

The PED's complaint investigation in this matter included the following:

- Review of the Parents' complaint and supporting documentation;
- Review of the Charter School's documents and responses to the allegations in the complaint;
- Telephone interview with Parents and Parents' attorneys;
- Telephone interviews with the special education director and eight general education teachers;
- Review of the PED COVID-19 guidance;

¹ The federal IDEA regulations are published at Title 34 of the Code of Federal Regulations (CFR), Part 300. The New Mexico Public Education Department's special education rules are published at Title 6, Chapter 31, Part 2 of the New Mexico Administrative Code (6.31.2 NMAC). The state-level complaint procedures are set forth in the federal regulations at 34 CFR Secs. 151 to 153 and in the state rules at Subsection H of 6.31.2.13 NMAC.

- Research of applicable federal regulations, state rules and case law; and
- Review of the Charter School's compliance with the IDEA, its implementing regulations and state rules.
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Complaint Issues

The Parents raised the following issues regarding alleged violations of the IDEA, its implementing regulations and State rules:

1. Whether the Charter School failed to implement the Student's Individualized Education Program (IEP) from April 6, 2020 until present in violation of 34 CFR §300.323 and 6.31.2.11.B(1) NMAC.
2. Whether the Charter School failed to ensure that the Parents were members of any group that makes decisions on the educational placement of the Student, in violation of 34 CFR §300.501(c) and 6.31.2.13.C NMAC.
3. Whether the Charter School failed to revise the Student's IEP as appropriate, to address a change in program and placement, in violation of 34 CFR §300.324(b) and 6.31.2.11.B(1) NMAC.
4. Whether the Charter School failed to review the Student's IEP not less than annually to determine whether the annual goals for the Student are being achieved, in violation of 34 CFR §300.324(b) and 6.31.2.11.B(1) NMAC.
5. Whether the Charter School failed to provide prior written notice to the Parents within a reasonable time before the Charter School proposed or refused to initiate a change in the educational placement or provision of FAPE to the Student, in violation of 34 CFR §300.503 and 6.31.2.11.B(3) NMAC
6. Whether the Charter School's actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE) to the Student in violation of 34 CFR §300.101 and 6.31.2.8 NMAC.

Findings of Fact

1. The Student is 14 years old, is in the 9th grade, and has continuously attended the Charter School since the 2017-18 school year.
2. The Student's teachers describe the Student as intelligent, polite, shy, and a pleasure to have in class.

3. For the relevant time period, the Student attended a state supported Charter School which had school enrollment of approximately 373 including 4 students with disabilities in 2019-2020 and approximately 382 including 5 students with disabilities in 2020-2021.
4. At the time the Student began attending the Charter School, the Student did not have an IEP in place, although the Student had an IEP previously in elementary school.
5. On May 9, 2019, an Eligibility Determination Team Meeting occurred, during which the Student was determined to need specially designed instruction in order to be educated and participate with other students with and without disabilities. The Student was found eligible for special education services under the disability category of Autism.
6. An initial IEP dated May 9, 2019 was developed for the Student.
7. An IEP dated September 4, 2019 was developed for the Student and provided the following:
 - a. The Student's area of need was identified as communication, including self-advocacy and pragmatics of social language. The annual measurable goal provided that the Student would "[p]ropel conversations by posing and responding to questions that relate the current discussion to broader themes or larger ideas; actively incorporate others into the discussion; and clarify, verify, or challenge ideas and conclusions." The objective provided that "[Student] will engage in more discussions during classes and socially by posing and responding to questions."
 - b. The following instructional accommodations and/or modifications are identified: preferential seating, text for home when available, additional time as negotiated, quiet space, extended time as needed, structure projects in chunks, develop schema, organization, check for understanding, reduce number of problems to prove mastery, and weekly/periodic check-ins and grade checks with counselor or special education director.
 - c. Three hours of special education a week would be provided by the special education and general education teachers in the general education setting, commencing on May 9, 2019, and ending on May 9, 2020.
 - i. The Charter School recognizes that an oversight occurred and the dates for special education should have stated a start date of September 4, 2019 and an ending date of September 4, 2020.
 - d. The Student is in the regular classroom for 100% of the school day.

8. The Student's IEP provides no explanation of what special education will be provided to the Student for three hours a week by the special education teachers and general education teachers.
 - a. The Parent believed the special education services would consist of the counselor working with the Student on executive functioning skills to help with organization. If the counselor was not available, the special education director would work with the Student. Further, the counselor or special education director would check in with the Student regularly to see how the Student was doing emotionally, see that the Student was turning in school work and whether the Student needed additional help. The counselor or special education director would work with the Student on social skills, such as practicing having conversations.
 - b. The special education director stated the special education services for the Student consisted of addressing the Student's social interactions, including working on conversational skills with peers and presenting in class. The teachers would call on the Student, or pair the Student up with other students for group presentations. Teachers provided the Student with specialized assistance as needed during presentation practices and provided information and interventions.
9. On January 22, 2020, the Parents filed a Request for Due Process with the PED, identified as DPH No. 1920-05, at which time stay-put commenced.
10. On Friday, March 13, 2020, the Governor of New Mexico ordered all public schools to close due to the coronavirus (COVID-19) pandemic.
11. On March 27, 2020, the New Mexico Public Education Department (PED) announced the continued closure of New Mexico public schools through the end of the 2019-2020 school year due to the COVID-19 pandemic and the governor's Stay-At-Home Orders.
12. Due to the extended school closure through the end of the 2019-2020 school year, all school districts² and charter schools were required to provide continuous learning to students, submit assurances about the provision of learning and the provision of special education services (to the greatest extent possible), and submit and obtain approval by the PED of a Continuous Learning Plan (CLP).
13. By April 6, 2020, the Student, along with all other students in the Charter School, was participating in continuous learning, consisting of on-line learning, for the remainder of the 2019-2020 school year due to the COVID-19 pandemic.

² References to schools districts in this document include schools districts and state-supported charter schools which, under New Mexico and federal law, are considered Local Educational Agencies for IDEA purposes.

14. On April 7, 2020, the Charter School signed its Continuous Learning Assurances Document & Local Plan (CLP) required by the PED. The Charter School's CLP provided the following:
 - a. On-line learning would be utilized through a use of various modalities.
 - b. An audit of student with disabilities occurred, and the special education director made contact. No students had disabilities that would limit their participation in on-line lessons.
 - c. Teachers would check in on students daily via computer and/or phone.
 - d. The special education director, counselor or school psychologist would contact each student twice by the end of the school year and check on how each student was doing. Students could also be referred by parents and teachers.
15. The audit of students with disabilities was to consist of the special education director conducting a review of each student's IEP to determine whether those students' needs could be met through continuous learning. According to the special education director, none of the students' IEPs were determined to require services that could not be provided in a virtual learning environment.
16. Contrary to the CLP assurances made by the Charter School to the PED, the special education director did **not** contact the parents of students with IEPs as part of the audit.
17. The teachers communicated with their students, including the Student, by email during school closure from April 6, 2020 through May 10, 2020 and provided students with directions for accessing resources, assignments to be completed, and due dates. The Student's teachers provided instruction and resources on-line through a variety of internet platforms to all students.
18. All students and parents could check their grades on the school's grading platform.
19. Because of the different platforms used by different teachers from April 6, 2020 through May 10, 2020, Student had a difficult time staying organized. Student's mother assisted the Student with organization.
20. On May 5, 2020, the Student's mother sent an email to the Student's teachers and the special education director to inform them regarding how schooling was going in their home:
 - a. During the first week the Student had incomplete assignments.

- b. During the second week the Parent intervened and learned that the Student was feeling overwhelmed with the volume of assignments.
 - c. The Student had difficulty with managing multiple platforms for the different classes.
 - d. The Student had difficulty organizing assignments in a manageable way, which lead to anxiety and shutting down completely.
 - e. The Parent helped the Student with organization while at home by:
 - i. Organizing the Student's computer desktop and creating a school folder with shortcuts to each platform;
 - ii. Every morning the Student went through each school website and told the Parent what the assignments were, which the Parent wrote down for the Student in the agenda;
 - iii. Every evening the Student went through each school site and showed the Parent what assignments were completed, which were recorded in the agenda;
 - iv. If work was not completed, a plan was developed to get it finished;
 - v. The Parent helped the Student read through instructions and break them down, as details were missed if this did not occur;
 - vi. The Parent helped the Student if there were questions about assignments or problems, but the work was solely the Student's;
 - vii. Assignments were checked for completeness;
 - viii. The Parent checked in with the Student periodically, as the Student's concentration tended to wane;
 - ix. When it was apparent that the Student was having difficulty concentrating, he was given frequent breaks;
 - x. The Parent ordered hard copies of books because the Student became distracted when reading digital copies on the laptop; and
 - xi. The Parent assigned each subject a color in the Student's agenda.
21. In the May 5, 2020 email, the Parent asked the teachers if there were any further suggestions they might have to help the Student finish the year strong. The Student's English teacher responded to the Parent's email on May 7, 2020 and indicated there were no specific texts or assignments and did not offer any assistance, but advised the Parent that the Student could investigate the common core strands for English at the Student's grade level.
22. All of the Student's teachers were provided with a copy of Student's IEP.
23. The Student's teachers provided the IEP accommodations to the Student from April 6, 2020 through May 10, 2020 as follows:

- a. Preferential seating: This accommodation was not applicable as the Student was in the home setting.
 - b. Text for home when available: All materials were provided on-line.
 - c. Additional time as negotiated: Teachers provided additional time when requested by the Student, which seldom occurred.
 - d. Quiet space: This accommodation was not applicable as the Student was in the home setting.
 - e. Extended time as needed: Teachers provided additional time but this was seldom necessary.
 - f. Structure projects in chunks: Work was chunked for all students in various ways, including through assignments.
 - g. Develop schema: Teachers provided weekly work assignments that built upon prior assignments and was intended to assist with organizing learning and knowledge.
 - h. Organization: Teachers and various computer platforms provide all students with information on a weekly and daily basis. The Student and Parent could access grades and assignments on the Charter School's parent portal.
 - i. Check for understanding: All of the Student's teachers were available by email in the event the Student was having difficulties with understanding concepts. The teachers did not affirmatively reach out to the Student to check for his understanding.
 - j. Reduce number of problems to prove mastery: In algebra the computer program automatically reduced the number of problems when the Student showed mastery of a concept.
24. The counselor and special education director provided the IEP accommodation of weekly/periodic check-ins and grade checks from April 6, 2020 through May 10, 2020 as follows:

- a. On April 20, 2020, the special education director emailed the Student to check in and see if the Student was in need of any assistance. The director stated he was monitoring the Student's grades and hoped that all of the Student's teachers had been in contact with the Student. The special education director also asked how he could help the Student finish out the school year and understood that the

Student might need to repeat the algebra class. The director did not address Student's problems in algebra or offer any additional support for Student.

- b. The special education director routinely checked in with the Student's teachers to make sure the Student was logging into the different platforms and submitting assignments. Additionally, the special education director consistently checked the Student's grades to see how the Student was doing.
 - c. No further communication was received by the Student or Parent from the counselor or special education director through the end of the school year, and the special education director acknowledged that he did not conduct weekly check-ins with the Student.
25. Neither the special education director nor the Student's general education teachers provided the Student with special education services from April 6, 2020 to May 10, 2020.
26. Between April 6, 2020 and the end of the school year in May, the Charter School did not convene Student's IEP, offer to amend Student's IEP without a meeting with consent of the Parent, or issue any Prior Written Notice.
27. During the time schools were closed and continuous learning was provided from April 6, 2020 to May 10, 2020, the Student's attendance was good.
28. At the end of the spring semester, Student passed all classes, with the exception of algebra. The Charter School did not provide Student with any additional assistance in algebra.
29. The 2020-2021 school year began on August 10, 2020. The Charter School has provided instruction to all students, including the Student, through remote learning.
- a. Classes are held through Google Meet or Google Classroom four days a week on Monday, Tuesday, Thursday and Friday.
 - b. Each class is one hour and 20 minutes in duration.
 - c. Each of Student's teachers provide direct instruction for part of each class and provide students time in class to complete classwork and remain available for students to answer questions and be of assistance.
 - d. Teachers can view all students in attendance and monitor that students, including Student, are attentive and participating in class.

- e. The teachers call on students, including the Student, while in class to check for understanding and to ensure the students are engaged in learning. Students can also use the chat box to talk with the teacher, which the Student has done on occasion.
 - f. Teachers are available on Wednesdays when no classes are held to assist any students requesting additional help.
 - g. Class materials, including textbooks for those classes that have one, are all on-line.
30. The Student's teachers provided the IEP accommodations to the Student from August 10, 2020 through September 11, 2020 as follows:
- a. Preferential seating: This accommodation was not applicable as the Student is in the home setting.
 - b. Text for home when available: All materials are provided on-line, including any textbooks.
 - c. Additional time as negotiated: Teachers provide additional time when requested by the Student, which seldom occurs.
 - d. Quiet space: This accommodation is not applicable as the Student is in the home setting.
 - e. Extended time as needed: Teachers will provide additional time to the Student but this is seldom necessary.
 - f. Structure projects in chunks: Work is chunked for all students in various ways through the materials assigned and by the individual teachers.
 - g. Develop schema: Teachers work on building blocks regarding the topics assigned to assist with organizing learning and knowledge.
 - h. Organization: Teachers and various computer platforms provide all students with information on a weekly and daily basis. The Student and Parent can access grades and assignments on the parent portal.
 - i. Check for understanding: Teachers check for understanding with all students and at times individually with the Student.

- j. Reduce number of problems to prove mastery: In algebra and biology the computer programs automatically reduce the number of problems when the Student shows mastery of a concept.
31. Since the beginning of the 2020-21 school year the Charter School has not had a school counselor. The special education director has provided the IEP accommodation of weekly/periodic check-ins and grade checks to the Student from August 10, 2020 through September 10, 2020 as follows:
- a. The special education director sent the Student an email on August 18, 2020 stating that he had developed a website that would allow the Student and special education director to connect on a routine basis. The Student has not accessed the website.
 - b. The special education director sent the Student an email on August 31, 2020 to the Student stating that he had reviewed the Student's progress and was impressed as the Student was doing remarkably well. If the Student needed anything he was invited to contact the special education director.
 - c. The special education director checks on the Student's grades on a regular basis.
 - d. The special education director acknowledged that he did not conduct weekly check-ins with the Student.
32. Neither the special education director nor the Student's general education teachers have provided the Student with special education services from April 6, 2020 to September 10, 2020.
33. The Student currently has the following grades: Honors Algebra I – B; Honors English 9 – A; NM History – B; Physical Education I – A; and Biology 1 – B.
34. The Charter School did not reconvene the Student's IEP team prior to or at the beginning of the school year, offer to amend Student's IEP without a meeting with consent of the Parent, or issue any Prior Written Notice.
35. The Student's Annual IEP was due to be developed by September 4, 2020. The Charter School acknowledged that it did not convene an IEP meeting by September 4, 2020 to conduct an annual review of the Student's September 4, 2019 IEP.
36. On September 11, 2020, the hearing officer issued the decision in DPH No. 1920-15.

Discussion and Conclusions of Law

On March 11, 2020, the Governor of New Mexico declared a public health emergency regarding the COVID-19 pandemic. After declaring the public health emergency, the Governor ordered all public schools to close from March 16, 2020 to April 6, 2020. On March 26, 2020, the Governor ordered all public schools to close for the remainder of the 2019-2020 school year because of the increase in COVID-19 cases.

In an effort to assist school districts around the nation appropriately address school closures due to the COVID-19 pandemic, the U.S. Department of Education released several documents, including a document entitled *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*³ on March 12, 2020, a document entitled *Fact Sheet: Addressing the Risk of COVID-19 Schools While Protecting the Civil Rights of Students*,⁴ on March 16, 2020, and a document entitled *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*⁵ on March 21, 2020. These documents clarified that all provisions of the IDEA remained in force and further emphasized that when a school district provides educational services to all students, the school district “must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP.” *Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease Outbreak*, 76 IDELR 77 (OSERS 2020).

The PED also released various documents to assist and support school districts and charter schools as they dealt with the mandated school closures. In the *Implementation Guide for Your Continuous Learning Plan (Guide)*⁶, special education services were addressed. The Guide provides in part:

- “Special education teachers and related service providers will continue to work on IEP and evaluation paperwork within required timelines.” P. 20.
- “Instructional Education Plans (IEPs) may NOT be universally modified.” P. 4.
- “LEAs must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP.” P. 21.

³ <https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/>

⁴ <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf>

⁵ <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>

⁶ https://webnew.ped.state.nm.us/wp-content/uploads/2020/03/NMPED_Implementation-Guide-for-Your-Continuous-Learning-Plan_FINAL.pdf

- “The IEP team will need to discuss and document within the IEP or an addendum the agreed upon alternative plan for providing the requisite special education and related services to those students through Prior Written Notice (PWN).” P. 21.
- *“Any decisions regarding special education and related services for an individual child should be made by the child’s IEP Team, and should not be based on diagnoses, eligibility categories, or blanket policies.”* (Emphasis original). P. 21.

The PED also released documents specifically related to the provision of special education for students with disabilities during the pandemic. On April 2, 2020, the PED issued *Frequently Asked Questions (FAQ): Providing a Free Appropriate Public Education (FAPE) through a Distance Learning Platform during a Closure to Normal School Operations due to the Coronavirus (COVID-19) Pandemic 2020*,⁷ to provide guidance to schools districts on special education. The FAQ provides in part:

- **Are Schools required to provide the special education services to students with disabilities in accordance with their IEPs?** If a School is not able to provide services to a student with a disability in accordance with the student’s IEP, the IEP team must determine which services can be provided to appropriately meet the student’s needs, including whether services can be provided by alternate or additional methods. This may be done though an addendum using the Prior Written Notice (PWN). Due to the national pandemic emergency, Schools may not be able to provide all services in the same manner.

Schools are allowed flexibility in determination of how these services can be provided during the school closure including by use of technology, tele-therapy, or distance instruction. Schools are encouraged to communicate with parents to address new plans for the delivery of special education and related services due to the extended school closure.

- **Are Schools required to have teachers keep a record of the special education services that are delivered during the school closure?** Schools are required to keep a record of the special education services that are delivered during a given school year. Therefore, it is required for teachers to keep a record of services delivered during the school closure.
- **Do Schools have to convene an IEP team meeting to address change of placement and services caused by the school closure?** The closure of schools due to the public health emergency does not automatically result in a change of placement for students receiving special education and related services. However, if a School is not able to provide services to a student with a disability in accordance with the student’s IEP, the School must follow IDEA procedures to make changes to the IEP, including the change to distance learning. The School can do this either through an IEP team meeting or through

⁷ <https://webnew.ped.state.nm.us/wp-content/uploads/2020/04/Special-Education-FAQ-Final-4-1-20-ddc.pdf>

an amendment to the IEP without a meeting with parents' consent. The School should then document the changes to the IEP in a PWN and ensure that parents are provided with a copy of the IDEA Procedural Safeguards Notice.

- **What are options for how Schools provide FAPE to students with disabilities when a school goes to a distance-learning platform for all students?** Schools must ensure that students with disabilities have access to the same or equitable learning platform as their peers. To the greatest extent possible, the district must provide students with disabilities with the services required by the student's IEP. If there are services, accommodations, and modifications required by the student's IEP that cannot be provided during this time, the student's IEP team must determine which services it can provide to meet the student's needs. Changes in services and accommodations may be made through the IEP amendment process. Schools can either do this through an IEP team meeting or through an amendment to the IEP without a meeting with parents' consent. Frequently Asked Questions IDEA Part B Responsibilities and School Closures Due to COVID-19 April 1, 2020 Page 4 of 11 In many cases, instructional accommodations may be met in an online environment by providing additional supports, such as individualized telephone or video conferencing. Schools should consider how current accommodations and modifications are provided in a physical classroom setting (i.e., extra time, redirection, small group, among others) and what this would look like in a virtual environment.
- **Are Schools required to conduct Annual IEP meetings during the school closure?** At this time, there is no current ability to waive these IDEA requirements [regarding annual IEP team meetings]. A School and parent may agree to use an alternative means of conducting Annual IEP team meetings during the school closure, such as conference calls or video conferences. The PED encourages district teams and parents to work collaboratively and creatively to meet IEP timeline requirements. If parent(s) cannot attend virtual meetings or phone conference meetings due to accessibility issues, the district should document reasonable attempts to schedule meetings and document parent contact. Frequently Asked Questions IDEA Part B Responsibilities and School Closures Due to COVID-19 April 1, 2020 Page 5 of 11 IEP Team meetings should still consist of all required IEP team members. The process for IEP Attendance/Excusal should still be completed if any members are not able to attend. A PWN to Parents must be used to inform the parents of any group decision and reasons for that decision.
- **What if a student's Annual IEP date is not met due to school closures or other COVID-19 issues?** Schools should proceed with completing Annual IEPs within timelines. Missed Annual IEP meetings should be completed as soon as possible. If there are deviations from legally established timelines, Schools should document in the student's folder all reasonable efforts made to follow timelines.
- **How should Schools document the changes to a student's IEP during a school closure?** In all instances, a School should be using the PWN to document the changes to a

student's IEP. The PWN must include the requirements set out in the IDEA regulations at 34.CFR. § 300.503. These include, among other things, a description of the actions proposed or refused by the School, an explanation of why the agency proposes or refuses to take the actions, a description of each evaluation procedures, assessment, record, or report the agency used as a basis for the proposed or refused action; other options considered by the IEP team and the reason for their rejection; and a description of other factors relevant to the agency's proposal or refusal. In addition, Schools must ensure that the PWN is provided to the parent in an understandable language, including their native language if feasible, and provide sources for parents to contact for assistance in understanding the rights of parents and children under the IDEA.

In July 2020, the PED issued a *Guidance for Special Education Services Reentry Guidance*,⁸ which provided in part:

- As the schools' service delivery models change, the schools must then ensure the student's IEP remains appropriate and can be implemented as written. If the IEP cannot be implemented as written, then the schools will need to convene the IEP team and revise the IEP or amend the IEP without a meeting with permission and input from the parents. This continues the process that the school followed in the initial move from face-to-face instruction to complete virtual and/or distance learning."

Issue 1: Whether the Charter School failed to implement the Student's Individualized Education Program (IEP) from April 6, 2020 until present in violation of 34 CFR §300.323 and 6.31.2.11.B(1) NMAC.

As soon as possible following the development of an IEP, the special education and related services must be made available to the child in accordance with the child's IEP. 34 CFR § 300.323(c)(2). School districts are required to ensure that students' IEPs are implemented by each regular education teacher, special education teacher, the related services provider, and any other service provider responsible for its implementation. 34 CFR § 300.323(d).

Special education means specially designed instruction consisting of adapting, as appropriate, to the needs of an eligible child the content, methodology or delivery of instruction to address the unique needs of the child that result from the child's disability and to ensure access of the child to the general education curriculum, so that the child can meet the educational standards that apply to all students within the district. 34 CFR 300.39(a)(3).

Although school districts must strive to fully implement IEPs, the IDEA does not require perfect adherence. "A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Van Dun ex. rel. Van Dun v. Baker Sch. Dist.* 5J, 502 F. 3d 811, 821 (9th Cir. 2007). A school district can establish substantial compliance by showing that the student made progress toward achieving his goals,

⁸ https://webnew.ped.state.nm.us/wp-content/uploads/2020/07/NMPED_SupportDoc_SpecialEducation.pdf

showed improvement in his grades, and received passing scores on state assessments. *A.P. v. Woodstock Bd. of Educ.*, 55 IDELR 61 (2d Cir. 2010, unpublished).

In their complaint, Parents assert that beginning on April 6, 2020, when the Student began remote learning, as reflected in the Charter School's CLP, the instruction provided consisted exclusively of on-line assignments without any direct instruction. The Charter School asserts from April to present, the Student's program, placement, goals, accommodations and modifications have not changed.

April 6, 2020 through May 10, 2020

As the facts set forth, the Student's placement, as identified in the IEP dated September 4, 2019, consists of 100% in regular education with nondisabled peers. From April 6, 2020, to May 10, 2020, the instruction provided to all students, including the Student, comprised of emails from teachers and on-line assignments. No direct instruction occurred for any student as the Charter School attempted to work its way through the unprecedented shut down of all public schools as ordered by the Governor.

As the facts above discussed, and to the extent feasible in the remote learning environment, the Student's teachers provided the Student with the identified accommodations that were applicable in their classrooms. The Charter School did not convene the Student's IEP team to discuss the change in the method of delivery of instruction or any other accommodations or supports needed in light of that change.

Although Student's IEP did not require the Charter School to provide direct instruction in all of Student's classes, it did require the Charter School to provide the Student with three hours of special education weekly. While the special education services were not identified on the Student's IEP, the Parent and the special education director had similar expectations regarding addressing the Student's annual goal to respond to questions, as well as engage in more discussions in class and socially. However, due to the nature of the remote learning, and the means by which the Student's teachers were providing instruction through emails and on-line resources, the Student's annual goal was not implemented by the Charter School.

The Parent had further expectations that the special education services would consist of staff working with the Student on executive functioning skills to assist with organization, and for staff to check in with the Student regularly to see how the Student was doing emotionally, and whether the Student was turning in school work or needed additional help. These services were not identified on the Student's IEP in the annual goal and objective. However, as identified in the facts above, the Student's IEP did contain a requirement that Student be provided with three hours of special education weekly and an accommodation consisting of weekly/periodic check-ins and grade checks with the counselor or special education director, which the Charter School failed to provide the Student from April 6, 2020 through May 10, 2020.

Since the beginning of remote learning and continuing to the present, the Parent provided considerable support to Student on a daily basis, including in organization, to ensure that he could access and participate in remote learning.

August 10, 2020 through September 10, 2020

Beginning with the 2020-21 school year, which began on August 10, 2020, the Charter School provided all students, including the Student, with regular class hours four times a week, for an hour and 20 minutes each class. The classes are conducted remotely through Google Meet and Google Classroom. Each of the Student's teachers can see the Student, along with the other students in the class remotely and can monitor whether the Student is engaged in the learning process. Each teacher takes attendance, provides direction instruction, calls on various students during class, including the Student, to check for understanding, and allows time for the students to work in class with the teacher remaining present to answer any questions students might have. There are inherent limitations with remote learning, which required changes in how teacher could set up opportunities for the Student to work in a team on projects with other students. The Charter School teachers, however, did not make any effort to set up any opportunities for Student to work in a team on projects with other students. Student has been required to present orally in English class on two different occasions, and the Student met all of the teacher's expectations. Additionally, the current remote classroom setting does not provide an opportunity for students, including the Student, to socialize with other students. The Charter School did not make this opportunity available to Student through other means, including creating opportunities for group work or socialization through the remote platform.

As the facts above discussed, the Student's teachers have been providing the Student with the identified accommodations to the extent they apply to their classrooms, while providing remote learning. The Charter School also did not convene the IEP team for the current school year to address whether other accommodations were needed in the remote learning environment. The existing accommodation consisting of weekly/periodic check-ins and grade checks with the counselor or special education director has not been occurring.

With regard to special education services, the Student's September 4, 2019 IEP provides for three hours a week of special education services with a start date of May 9, 2019 and an ending date of May 9, 2020, with services to be provided by the special education and general education teachers. Although the ending date of the Student's special education services was May 9, 2020, the Charter School acknowledges that an oversight occurred, and the starting and ending dates for special education services should have stated September 4, 2019 to September 4, 2020. The Charter School has not provided Student with special education services required by his IEP in the fall of 2020.

Although class is being held on a regular basis, it is being held remotely, and the opportunity for the Student to engage in more discussions during classes and socially by posing and responding to questions as identified in the goal and objective was not implemented. Although the Charter School said that these opportunities are not currently available due to the remote learning

environment, the teachers did not make any effort to design or provide these opportunities to Student in the remote environment.

Student's annual goal and the accommodation requiring weekly/periodic check-ins and grade checks with the counselor or special education director and the provision of weekly special education services have not been implemented by the Charter School from April 6, 2020 to September 10, 2020, resulting in a material failure to implement the Student's IEP.

As to Issue No. 1, the Charter School is cited. Corrective Action is required.

Issue 2: Whether the Charter School failed to ensure that the Parents were members of any group that makes decisions on the educational placement of the Student, in violation of 34 CFR §300.501(c) and 6.31.2.13.C NMAC.

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, educational placement and provision of FAPE to their child. 34 CFR §300.324(b) and 6.31.2.11.B(1) NMAC. A change in an educational placement occurs if a change in location substantially alters the student's educational program. 71 Fed. Reg. 46,588 (2008).

The Parents argue that the Student's program and placement was predetermined as of April 6, 2020 by withholding special education during the time of continuous learning, and that this decision was made and implemented without parental participation.

As discussed above in the facts, as part of the response to the COVID-19 pandemic and the Governor's order that all public schools be closed, the Charter School's special education director conducted an audit of IEPs to determine whether the needs of the students with disabilities in attendance in the Charter School could be met through continuous learning, which consisted of on-line learning through the use of various modalities.

While the Charter School's CLP dated April 7, 2020 stated that the special education director conducted an audit of students with disabilities and "made contact," no contact with the Parent occurred regarding the Student's IEP and special education services. The failure of the special education director to make contact with the parents of children with disabilities regarding their IEPs may be at odds with the assurances provided to the PED in the Charter School's CLP and at odds with the guidance provided by the PED. The Charter School eliminated the weekly special education services for Student without convening an IEP team meeting, amending the IEP with Parent's consent, or issuing a Prior Written Notice, and did not even discuss the discontinuation of those special education services with the Parent. The special education director made unilateral changes to the Student's IEP.

The Student's placement as set forth in the IEP provides that the Student will be in the general education setting 100% of the time. Due to the COVID-19 pandemic, all students in the Charter School began attending remotely. In this case, a significant change to Student's IEP occurred by

the decision to not provide Student with three hours per week of special education services. Although the shift to remote learning was a change in setting and not placement, the unilateral decision to not provide required weekly special education services was a change in placement. *See Gore v. D.C.*, 67 F. Supp. 3d 147, 152 n.4 (D.D.C. 2014) (“Generally, a change in educational placement occurs where there has been ‘a fundamental change in, or elimination of[,] a basic element of the [child's] education program.’”) (quoting *Lunceford v. D.C. Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C. Cir. 1984); see also *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (noting that “[e]ducational placement” refers to . . . classes, individualized attention and additional services a child will receive”).

As to Issue No. 2, the Charter School is cited. Corrective Action is required.

Issue 3: Whether the Charter School failed to revise the Student’s IEP as appropriate, to address a change in program and placement, in violation of 34 CFR §300.324(b) and 6.31.2.11.B(1) NMAC.

A student’s IEP must be revised, as appropriate, to address any lack of expected progress toward the annual goals and in the general education curriculum, to review the results of a reevaluation, to review any information about the child provided to or by the parents, to address a child’s anticipated needs, or to address other matters. 34 CFR §300.324(b) and 6.31.2.11.B(1) NMAC.

Due to the COVID-19 pandemic, all public schools in New Mexico were ordered closed in March 2020 through the end of the 2019-2020 school year, and all public school students throughout the state received their educational services remotely through their Charter School’s CLP. New Mexico schools were also required to continue to provide students with disabilities with FAPE and with the services required by their IEPs, although the method of delivery of those services would differ.

When the Charter School began implementing its CLP, it unilaterally changed the Student’s placement by determining not to provide three hours of weekly special education services. The Charter School did not convene the IEP meeting to make this significant change to Student’s IEP or the provision of services. Nor did the Charter School provide the required weekly special education services to Student through another method of delivery. The Charter School acted without any involvement of Student’s IEP team or Parent. An IEP team meeting was necessary, as a change in the Student’s educational program or placement did occur.

As to Issue No. 3, the Charter School is cited. Corrective Action is required.

Issue 4: Whether the Charter School failed to review the Student’s IEP not less than annually to determine whether the annual goals for the Student are being achieved, in violation of 34 CFR §300.324(b) and 6.31.2.11.B(1) NMAC.

School districts are required to review a child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved, and revise the IEP as appropriate. 34 CFR §300.324(b) and 6.31.2.11.B(1) NMAC.

The Charter School acknowledged in its response that the annual IEP meeting was not held on or before September 4, 2020, but reasoned that "it is generally understood by attorneys and administrators that if a due process decision is imminent, then conducting an IEP meeting before such a decision would not be effective, efficient, wise, best practice, and prudent."

The Charter School had an obligation to conduct an annual review of the Student's September 4, 2019 IEP by September 4, 2020 but failed to do so. Although the Charter School indicated that conducting an IEP meeting while waiting for a due process hearing decision was not effective, efficient, wise, best practice, or prudent, case law and OSEP guidance provides otherwise. A school district must conduct an annual review in a timely manner regardless of whether the IEP is being challenged in an administrative or judicial proceeding. Although the IDEA's stay-put provision precludes a district from changing a student's placement or services during the pendency of a FAPE dispute, it does not relieve the district of its duty to convene an IEP team "not less than annually" and to revise a child's IEP as needed. *Letter to Watson*, 48 IDELR 284 (OSEP 2007); *Anchorage Sch. Dist. v. M.P.*, 59 IDELR 91 (9th Cir. 2012) ("It would be antithetical to the IDEA's purposes to penalize parents -- and consequently children with disabilities -- for exercising the very rights afforded to them under the IDEA.").

As to Issue No. 4, the Charter School is cited. Corrective Action is required.

Issue 5: Whether the Charter School failed to provide prior written notice to the Parents within a reasonable time before the Charter School proposed or refused to initiate a change in the educational placement or provision of FAPE to the Student, in violation of 34 CFR §300.503 and 6.31.2.11.B(3) NMAC.

Prior Written Notice is required to be provided to a parent when a school district proposes, or refuses, to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. 34 CFR §300.503 and 6.31.2.11.B(3) NMAC. The purpose of the prior written notice requirement is to ensure that "parents of a child with a disability are both notified of decisions affecting their child and given the opportunity to object to these decisions." *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 70 (3rd. Cir. 2010).

In this case, the Charter School materially deviated from the Student's IEP and unilaterally decided not to provide Student with required weekly special education services. Consistent with the requirements of the IDEA, the PED had advised through its Guidance that in situations where the shift to remote learning resulted in changes to a student's IEP, a school should be using the PWN to document those changes. The Charter School should have convened an IEP team meeting or sought to amend the IEP without a meeting with Parent's consent and issued a Prior Written Notice, but did none of these things.

As to Issue No. 5, the Charter School is cited. Corrective Action is required.

Issue 6: Whether the Charter School's actions and/or omissions resulted in the denial of a free appropriate public education (FAPE) to the Student, in violation of 34 CFR §300.101 and 6.31.2.8 NMAC.

"A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school. ..." The U.S. Supreme Court construed the meaning of FAPE in *Bd. of Education of Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176, 198, 207 (1982). The *Rowley* court stated: "The statutory definition of 'free appropriate public education,' in addition to requiring that States provide each child with 'specially designed instruction,' expressly requires the provision of 'such ... supportive services ... as may be required to assist a handicapped child to benefit from special education.' § 1401(17). ..." The U.S. Supreme Court further clarified the standard for a free appropriate public education in *Endrew F. v. Douglas County School District. RE-1*, 137 S. Ct. 988 (2017), holding that the educational program for a child with a disability must be one that is "... reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

As discussed above in Issue 1, the Charter School failed to provide the Student with three hours of special education services weekly from April 6, 2020 through May 10, 2020, and from August 10, 2020 to September 10, 2020. Further, the Charter School failed to provide the Student with the accommodation of weekly/periodic check-ins and grade checks with the counselor or special education director during that same time period. The failure to provide the Student with the special education services and weekly/periodic check-ins and grade checks was material and resulted in a denial of FAPE. Furthermore, the Charter School failed to convene an IEP meeting to address alterations to Student's IEP before unilaterally determining changes to the special education to be provided to Student and did not include Parent or provide Prior Written Notice to the Parent about this change. This too resulted in procedural violations that denied FAPE.

As to Issue No. 6, the Charter School is cited. Corrective Action is required.

RELIEF

The Charter School has been cited. A corrective action plan (CAP) is included in this report. Due to the fact that the Charter School admittedly made assurances to the PED regarding its CLP that the special education director had made contact with parents of students with disabilities concerning the shift to remote learning, the PED considers this CAP to have a systemic component and the CAP includes steps to address those concerns.

Summary of Citations

Statutory and Regulatory Provisions	Citation
34 CFR §300.323 and 6.31.2.11.B(1) NMAC	The Charter School failed to implement the Student's Individualized Education Program (IEP) from April 6, 2020 until present.
34 CFR §300.501(c) and 6.31.2.13.C NMAC	The Charter School failed to ensure that the Parents were members of any group that makes decisions on the educational placement of the Student.
34 CFR §300.324(b) and 6.31.2.11.B(1) NMAC	The Charter School failed to revise the Student's IEP as appropriate, to address a change in program and placement.
34 CFR §300.324(b) and 6.31.2.11.B(1) NMAC	The Charter School failed to review the Student's IEP not less than annually to determine whether the annual goals for the Student are being achieved.
34 CFR §300.503 and 6.31.2.11.B(3) NMAC	The Charter School failed to provide prior written notice to the Parents within a reasonable time before the Charter School proposed or refused to initiate a change in the educational placement or provision of FAPE to the Student.
34 CFR §300.101 and 6.31.2.8 NMAC	The Charter School's actions and/or omissions towards Student resulted in a denial of a free appropriate public education (FAPE) to the Student.

Required Actions and Deadlines

By **November 13, 2020**, the Charter School will assure the PED in writing that the Charter School will abide by the provisions of this Corrective Action Plan (CAP). The PED requests that the Charter School submit all documentation of the completed corrective actions to the individual below, who is assigned to monitor the Charter School's progress with the corrective action plan and is to be its point of contact at the PED about this complaint:

Dr. Elizabeth Cassel, Corrective Action Plan Monitor
Special Education Division
New Mexico Public Education Department
120 South Federal Place
Santa Fe, NM 87501
Telephone: (505) 490-3918
elizabeth.cassel@state.nm.us

Instructions Regarding Compliance Documents to Be Submitted

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 Department is advised that the PED 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 PED.

Each step in this Corrective Action Plan is subject to, and must be carried out in compliance with, the detailed procedural requirements of the IDEA 2004 and the implementing federal regulations and State rules. If the Department needs brief extensions for the steps in the Corrective Action Plan, contact Deborah Dominguez-Clark, Director of the Special Education Division.

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 November 6, 2021, and reported to the PED SED no later than November 15, 2021. All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the complaint number, **C2021-03**.

Corrective Action Plan

Step No.	Actions Required by Charter School	Complete Actions By	Documents Required to be Submitted to PED SED	Document Due Date
1.	The Charter School shall convene an IEP team meeting to be held before December 1, 2020 to conduct an annual review of the Student’s IEP and determine what changes if any, are necessary including, but not limited to: <ol style="list-style-type: none"> 1) Address Student’s need for accommodations in remote learning; 2) Clarify the weekly special education 	12/11/20	<ul style="list-style-type: none"> • Copy of IEP meeting invitation • Copy of annual IEP • Copy of Prior Written Notice 	12/14/20

	<p>services needed by Student;</p> <p>3) Determine whether an organization goal and/or other goals are needed to address the Student's needs;</p> <p>4) Determine support and services to address Student's needs in algebra;</p> <p>5) Determine how to address Student's needs related to communication in remote learning; and</p> <p>6) Determine the plan for the delivery of the compensatory education services required below.</p>			
2.	<p>The Charter School will develop a plan to provide Student with 30 hours of compensatory education services to address the lack of special education services from April 6, 2020 to September 10, 2020. The nature and type of compensatory services, as well as how and when the compensatory services are to be provided, will be determined through collaboration with the IEP team, including Parent and Student (if appropriate). Consideration should be given to providing compensatory education services in the areas of</p>	12/11/20	<ul style="list-style-type: none"> • Plan for provision of compensatory education services to Student • Documented log showing all 30 hours of education services provided with dates, times, number of hours, and types of service for each entry. 	<p>12/14/20</p> <p>11/6/21</p>

	organization, executive functioning, algebra/math, communication and opportunities with peers to socialize (including remotely if required by current guidelines).			
3.	<p>The Charter School shall provide training to all teachers, service providers, and support staff providing special education services regarding:</p> <ol style="list-style-type: none"> 1) Obligations to implement an IEP pursuant to the IDEA, including appropriate documentation; 2) Obligations to review a child’s IEP periodically, but not less than annually; 3) Obligations to provide Prior Written Notice; and 4) USDOE and PED Special Education Guidance issued on April 1, 2020 and in July 2020 concerning the pandemic. 	12/4/20	<ul style="list-style-type: none"> • Sign-in sheet of training participants. • Copies of all training materials used, including PowerPoints and handouts. • Name and qualifications of person providing training. 	12/7/20
4.	<p>The Charter School shall review its policies on:</p> <ol style="list-style-type: none"> 1) Process to ensure implementation of student IEPs and report whether any changes are necessary to its policies. 	12/4/20	<ul style="list-style-type: none"> • Documentation of policy review and any identified changes needed. 	12/7/20

	<p>2) Proper documentation of student IEP services provided.</p> <p>Any necessary changes to policies shall occur.</p>	1/15/21	<ul style="list-style-type: none"> • Written verification that necessary changes occurred. 	1/18/21
5.	<p>The Charter School shall provide copies to the PED of the IEPs for the students with disabilities attending the school from April 6, 2020 to the present, along with any Prior Written Notices, other documentation of IEP team meetings, and communications with the parents of those students. The Charter School shall also provide a written description of the special education and related services provided to those students from April 6, 2020 to the present.</p> <p>The PED will review these documents and determine whether additional corrective action is warranted. If so, the PED will amend this CAP to include further corrective action as appropriate.</p>	1/15/21	<ul style="list-style-type: none"> • Documentation requested by Step 5 	<p>12/1/20</p> <p>1/15/21</p>

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

Investigated by:



Elaine Eberharter-Maki, Esq.
Independent Complaint Investigator

Reviewed by:

/s/ Debra Poulin

Debra Poulin, Esq.
Chief Counsel, Special Education Division

Reviewed and approved by:



Deborah Dominguez-Clark
Director, Special Education Division