



STATE OF NEW MEXICO
PUBLIC EDUCATION DEPARTMENT
300 DON GASPAR
SANTA FE, NEW MEXICO 87501-2786
Telephone (505) 827-5800
www.ped.state.nm.us

KURT STEINHAUS, Ed.D.
SECRETARY OF EDUCATION

MICHELLE LUJAN GRISHAM
GOVERNOR

NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2223-14
November 7, 2022

This Report requires corrective action. See pages 10–14.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on September 8, 2022, under the federal Individuals with Disabilities Education Act (IDEA) and the implementing Federal Regulations and State Rules governing publicly funded special education programs for children with disabilities in New Mexico.¹ The SED has investigated the complaint and issues this report pursuant to 34 C.F.R. § 300.152 (a)(5) and 6.31.2.13(H)(5)(b) NMAC.

Conduct of the Complaint Investigation

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

- review of the complaint and supporting documentation from complainant;
- review of the Charter School's responses to the allegations, together with documentation submitted by the Charter at the request of the PED's independent complaint investigator;
- review of the Charter School's compliance with federal IDEA regulations and state NMAC rules;

¹ The state-level complaint procedures are set forth in the federal regulations at 34 C.F.R. §§ 151 to 153 and in the state rules at Subsection H of 6.31.2.13 NMAC.

- interviews with the Complainant, Special Education Director, Special Education Math Teacher, Special Education English Teacher, and Substitute Teacher; and
- research of applicable legal authority.

Limits to the Investigation

Federal regulations and state rules limit the investigation of state complaints to violations that occurred not more than one year prior to the date the complaint is received. 34 C.F.R. § 300.153(c); 6.31.2.13(H)(2)(d) NMAC. Any educator ethics issues, or any alleged ADA or Section 504 disability discrimination issues, are not within the jurisdiction of this complaint investigation and, as a result, were not investigated.

Issues for Investigation

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

1. Whether the Charter School failed to implement students' Individualized Education Programs (IEPs) by not providing specialized instruction, in violation of 34 C.F.R. § 300.39, 34 C.F.R. §§ 300.320–300.328, 6.31.2.7(B)(20) NMAC, and 6.31.2.11(B) NMAC; and
2. Whether the Charter School's actions and/or omissions towards the students resulted in a denial of a free appropriate public education (FAPE), in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

General Findings of Fact

1. This was a systematic state complaint investigation into allegations that special education students attending a charter school ("Charter School") were not receiving specialized instruction.
2. The Charter School is a State-authorized charter school consisting of an elementary school for grades first-fifth and a secondary school for grades sixth-twelfth.
3. There are 152 special education students attending the Charter School.
4. PED reviewed sample records of 15 special education students who attended the Charter School during the 2021-2022 school year. The sample students were in various grades and had disability classifications that ranged from specific learning disability, autism, intellectual disability, other health impairment, developmental delay, and speech impairment.

Elementary School Students

5. Complainant was a Special Education Coordinator and English Language Arts (ELA) teacher at the elementary school during the 2021-2022 school year.
6. At the start of the 2021-2022 school year, Complainant reported that they obtained the Specialized Program Individualizing Reading Excellence structured literacy program (S.P.I.R.E.) for the elementary school special education students with reading deficits.
7. Both Complainant and the Special Education Director stated that all special education students in the elementary school with identified reading needs were provided access to the S.P.I.R.E. program during the 2021-2022 school year.
8. Complainant said that the S.P.I.R.E. program was used with Student #3 and Student #14 and that the program was effective in addressing their gaps in reading and writing.
9. Student #3 finished the 2021-2022 school year with almost all A's, one B in Math and consistent progress in all their IEP goals. This pattern of sufficient progress in IEP goals continued into the next school year.
10. Student #14 obtained an A in their English class (which Complainant taught) and the ELA progress report showed progress in decoding, reading fluency, and sentence writing.
11. Special Education Math Teacher stated that Student #7, Student #9, and Student #11 received specialized math instruction and that ELA specialized instruction was provided by other English special education teachers. This teacher explained that the Saxon math curriculum and ALEKS adaptive learning program were used to provide a unique learning structure that advanced each student's learning of mathematics.
12. Student #7 obtained straight As for the 2021-2022 school year and showed sufficient progress in his IEP goals in the areas of math, written language, and reading. A similar level of progress was displayed at the start of the 2022-2023 school year.
13. Student #9 progressed so well in their ELA deficits that the student was taken out of special education English at the end of the 2021-2022 school year. Sufficient progress was made on math, occupational therapy (OT), and social-emotional goals by the first quarter of the 2022-2023 school year.
14. Student #11 used the S.P.I.R.E. program to improve their reading comprehension and showed gradual progress in their reading accuracy goal across both school years.
15. Student #13 started at the Charter School in January 2022 and student received 360 minutes per week in ELA specialized instruction. Student #13 made progress in their IEP goals that targeted reading accuracy, punctuation, and multiplication/division.
16. Student #8 received speech therapy services 30 minutes a week. By October 10, 2022, Student #8 completed their speech language goal.

Middle School and High School Students

17. According to the Special Education Director, special education students in the middle school and high school were also given specialized ELA instruction via the S.P.I.R.E program during the 2021-2022 school year.
18. For example, Student #1, Student #6, and Student #12 were pulled out of class to receive small group specialized ELA instruction. This instruction was provided using the S.P.I.R.E. program which Complainant had used for the special education students in the elementary school.
19. Special Education Director reported that NWEA reading scores for Student #1 showed that Student was reading at grade level by the end of the 2021-2022 school year. Student #1 also received As, Bs, and Cs in their courses. The progress report for the 2022-2023 progress report indicates that Student is making limited progress in their reading, writing, and career readiness goals.
20. Student #6 had slightly increased NWEA reading scores, obtained mostly As, Bs and, Cs in their courses, and there was a documented improvement in their IEP goal of citing textual evidence to support key ideas and details. Similarly, Student #6 has made sufficient progress towards achieving their written language goal during the 2022-2023 school year.
21. Student #12's NWEA reading scores reflect that student achieved an above grade level reading proficiency, passed all their courses with A, B, and C grades, and progressed with their IEP reading comprehension goals. In contrast, Student "did not make sufficient progress" in their 2022-2023 reading and writing goals.
22. Special Education English Teacher said that they provided specialized ELA instruction to Student #2 and Student #4. Teacher used instructional strategies such as graphic organizer, rubrics, direct assistance, and prompts to deliver specialized instruction to Student #2 and Student #4.
23. Special Education English Teacher said that Student #2 had improved their writing by using a computer to type and engaging in online writing activities through a program called Achieve 3000. Student #2 is at grade level of reading but he made insufficient progress in their 2021-2022 reading comprehension goal. Grades consisted of Bs and Cs for the 2021-2022 school year. First quarter 2022-2023 progress reporting indicates an increase in Student's reading fluency but no progress in writing goal due to Student preferring to type instead.
24. Student #4's 2021-2022 IEP goal progress report contains no progress documentation. Special Education English Teacher said that Student #4 is reading at a low level and that student is gradually progressing in their IEP goals. The progress report for the 2022-2023

school year states that Student still needs to work on developing skills to achieve writing and math goals.

25. Student #10 failed multiple courses during the 2021-2022 school year and is failing English this year. Student did not meet their IEP goal of using basic mathematical operations and there is no progress documentation for their career readiness IEP goal. Student withdrew from the Charter School on October 13, 2022 due to personal reasons.
26. Student #15 earned straight A's (besides a B in Math Honors). The Progress report is devoid of information about achieving academic IEP goals other than a self-reported entry stating that Student wants to improve reading fluency and comprehension.

Student #5

27. Student #5 is a special education student who is classified with an intellectual disability.
28. This student was determined eligible for the New Mexico Alternate Assessment due to student's difficulty accessing grade-level material.
29. The Alternate Assessment Addendum listed the Student as being in the 1st Percentile for Math, Reading, Language Usage, and Science.
30. During the 2021-2022 school year, Student #5 was in seventh grade and received general ELA instruction from a teacher licensed at the time as a substitute teacher.
31. Substitute Teacher (now a licensed middle school teacher) stated that they were teaching ELA on behalf of the secondary school Special Education Coordinator by using phonics kits.
32. Special Education Director said that Special Education Coordinator would pull students out of class for small group ELA instruction using the S.P.I.R.E. curriculum. Substitute Teacher confirmed that Student #5 was pulled out of class by the coordinator.
33. Substitute Teacher described how Student #5 refused to do work or read aloud in the ELA class. Teacher was not sure why student declined to participate in class.
34. Substitute Teacher opined that the current level of special education programming for Student #5 was insufficient because student needs constant supervision and student is not progressing in a regular education class setting.
35. Student #5 failed their History, Spanish, Science, and English courses for the 2021-2022 school year.
36. Student's 2021-2022 IEP progress report showed that Student #5 has ongoing difficulties with executive functioning and language skills. Student #5 did not meet their goal of using the four basic mathematical operations to solve problems.
37. The first quarter progress report for the 2022-2023 school year marked Student #5 as making no progress in the math goal, moderate progress on the communication goal, and sufficient progress with ELA and occupational therapy goals.

Progress Reporting

38. Special Education Director said that documentation of 2021-2022 progress reporting for special education students in the secondary schools was impacted by the previous Special Education Coordinator not uploading their progress reports before leaving employment at the end of the school year.
39. Furthermore, the Charter School changed its education software progress from SEAS to PowerSchool during the 2021-2022 school year, and Special Education Director stated that not all the information in students' progress reports was included in that transfer of information.
40. As a result of these circumstances, the 2021-2022 progress reporting for the sample students in middle school and high school was partially incomplete.
41. The Charter School provided first quarter progress reports for the 2022-2023 school year.

Discussion and Conclusions of Law

Issue No. 1

Whether the Charter School failed to implement students' Individualized Education Programs (IEPs) by not providing specialized instruction, in violation of 34 C.F.R. § 300.39, 34 C.F.R. §§ 300.320–300.328, 6.31.2.7(B)(20) NMAC, and 6.31.2.11(B) NMAC.

Once an IEP is developed, the special education and related services contained in the IEP must be made available to the child as soon as possible. 34 C.F.R. §§ 300.320(a)(4), 300.323(c). This includes the specially designed instruction to meet the unique needs of a child with a disability. 34 C.F.R. § 300.39(a)(1). Therefore, specialized instruction must be in conformity with each child's IEP. *Hernandez v. Grisham*, 494 F. Supp. 3d 1044, 1149 (D.N.M. 2020). An informal or inconsistent modification of the general education curriculum may preclude staff from properly implementing an IEP. *Corvallis School District*, 73 IDELR 274 (Oregon SEA 2018).

The Charter School failed to provide Student #5 with appropriate specialized instruction that could meet Student #5's unique needs as a child with an intellectual disability. The statements by the Special Education Director and Substitute ELA teacher demonstrate that the Charter School did not have a uniform process for modifying Student #5's curriculum and instruction because the Special Education Coordinator providing ELA pull-out instruction (via S.P.I.R.E.) did not coordinate with the Substitute Teacher who was providing in-class ELA instruction (via phonics kits) to Student #5. This informal arrangement of individual teachers modifying instruction for Student #5 meant that specialized ELA instruction was provided inconsistently,

thereby impeding staff from properly implementing Student #5's IEP during the 2021-2022 school year.

Aside from Student #5, the evidence, in this case, supports a finding that specially designed instruction was provided to the other Charter School students in the sample set. No trends were identified that would suggest that the failure to provide specialized instruction was systemic. Complainant acknowledges that the S.P.I.R.E. phonics program they obtained was provided to elementary school special education students with reading deficits during the 2021-2022 school year. This information was corroborated by the Special Education Director who also confirmed that S.P.I.R.E. was implemented with students at the secondary school level via pull-out small group instruction. Likewise, the Special Education English teacher at the high school explained they utilized specific strategies for adapting instruction to meet the needs of their students. Aside from ELA specialized instruction, the Special Education Math Teacher described how both their math curriculum and adaptive learning program were used to deliver specially designed math instruction to elementary school students. This evidence establishes that the other sample set students at the Charter School received specially designed instruction in accordance with their IEPs.

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

Issue No. 2

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

A student eligible for special education is entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. School districts are obligated to provide FAPE for each student eligible in their district. 6.31.2.9(A), 6.31.2.11(l)(2) NMAC. If an IDEA procedural violation occurs, that violation will constitute a denial of FAPE only if it: (1) resulted in a substantive harm to the child or their parents; (2) deprived an eligible student of an IEP; or (3) resulted in the loss of an educational opportunity. *Boutelle v. Bd. of Educ. of Las Cruces Pub. Sch.*, No. CV 17-1232 GJF/SMV, 2019 WL 2061086, at *7 (D.N.M. May 9, 2019). The substantive legal standard for determining whether a District has offered a student FAPE is whether an IEP is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017).

In general, the IEPs among the sample students were properly implemented and substantively adequate. Statements from multiple Charter School staff demonstrate that special education programming was provided as outlined in the IEPs. Specialized instruction was directed at addressing each students' identified areas of learning needs such as reading, writing, and

mathematics. Many of the students showed academic progress in grades, NWEA scores, and IEP goals. This evidence supports a finding that most students among the sample set received FAPE.

However, Student #5 stands out among the other students in the sample set. Student #5’s pattern of refusing to do class assignments or read aloud during instruction posed a significant barrier to their learning. At no point during the 2021-2022 school did the Charter School seek to review Student’s IEP, assess whether student’s task refusal was related to their intellectual disability, or ascertain whether student’s reluctance to read aloud was due to a lack of understanding the course material. The specialized instruction provided to Student #5 during the 2021-2022 school year was ineffective as evinced by Student’s failing grades in four core academic classes and minimal progress in achieving their IEP goals. Additionally, the Substitute Teacher’s statement about the inadequacy of Student #5’s special education, taken together with the other evidence, supports a finding that the level of special education programming and services was not reasonably calculated to meet Student #5’s disability-related learning needs. For these reasons, Student #5 was denied FAPE during the 2021-2022 school year.

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

Summary of Citations

IDEA/State Rule Provisions Violated	Description of Violation
34 C.F.R. § 300.39, 34 C.F.R. §§ 300.320–300.328, 6.31.2.7(B)(20) NMAC, and 6.31.2.11(B) NMAC	Failure to implement students’ Individualized Education Programs (IEPs) by not providing specialized instruction
34 C.F.R. § 300.101 and 6.31.2.8 NMAC	Denial of a free appropriate public education (FAPE)

Required Actions and Deadlines

By **November 14, 2022**, the Charter School’s Special Education Director must assure the SED in writing that the Charter School will implement the provisions of this Corrective Action Plan (CAP). The SED 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 to be its point of contact about this complaint from here forward:

Dr. Elizabeth Cassel
Corrective Action Plan Monitor

Special Education Division
New Mexico Public Education Department
300 Don Gaspar Avenue
Santa Fe, NM 87501
Telephone: (505) 490-3918
Elizabeth.Cassel@ped.nm.gov

The file on this complaint will remain open pending the PED's satisfaction that the required elements of this Corrective Action Plan are accomplished within the deadlines stated. The Charter School is advised that the SED 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 SED.

Each step in this Corrective Action Plan is subject to and must be carried out in compliance with the procedural requirements of the IDEA 2004 and the implementing federal regulations and State rules. Each step also must be carried out within the timelines in the Corrective Action Plan. If a brief extension of time for the steps in the Corrective Action Plan is needed, a request in writing should be submitted to the Corrective Action Plan Monitor. The request should include the case number, the date for the proposed extension, and the reason for the needed extension. The SED will notify the parties of any extension granted.

Please carefully read the entire CAP before beginning implementation. One or more steps may require action(s) in overlapping timeframes. All corrective action must be completed no later than November 7, 2023 and reported to the SED no later than November 21, 2023. All documentation submitted to the SED to demonstrate compliance with the CAP must be clearly labeled to indicate the state complaint case number and step number.

Corrective Action Plan

Step No.	<u>Actions Required by the Charter School</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
1.	As described above, the Charter School will submit a written assurance to the PED SED Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan.	November 14, 2022	Written Assurance Letter/Email	November 14, 2022
2.	The Charter School Special Education Director and the school principal shall meet with the PED SED Education Administrator assigned to the Charter School and the PED SED CAP Monitor to review the Complaint Resolution Report, the Corrective Action Plan, and any other measures that the Charter School plans to take to ensure that the violations are corrected and do not recur. The Charter School Director has the discretion to include other Charter School or school personnel in this meeting. The Charter School Director shall be responsible for arranging this meeting with PED SED staff members.	November 21, 2022	Notes from meeting prepared by the Charter School.	November 28, 2022
3.	The Charter School will conduct a reevaluation of Student #5 that includes (but is not limited to) testing in the areas of cognitive functioning, adaptive behavior, and academic skills.	Within 30 days of receiving parental consent	Reevaluation report	Within 7 days of completing reevaluation report

Step No.	<u>Actions Required by the Charter School</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
	<p>The Charter School will request parental consent prior to conducting the reevaluation. If the Parents refuse to provide consent for the reevaluation, then the Charter School will provide a written record of the refusal.</p> <p>The Diagnostician conducting the reevaluation must have experience in evaluating students with the most significant cognitive disabilities. This person must be approved by NMPED.</p>	November 21, 2022	<p>Signed parental consent form or written record of Parents refusing to provide consent.</p> <p>Submission of proposed Diagnostician's qualifications, including their resume, for NMPED approval.</p>	<p>Within 7 days of receiving written decision on consent</p> <p>Within 7 days of receiving parental consent</p>
4.	<p>The Diagnostician required in Step 3 shall also review the most recent evaluations of all other alternately assessed students to determine if the evaluations were appropriate and if additional evaluations are necessary. The Diagnostician shall create a report to forward to PED SED CAP Monitor listing all students' recent evaluations as to status of appropriateness and whether additional evaluations are necessary.</p> <p>If the Diagnostician identifies a need for additional evaluations, the Charter School shall promptly seek parental consent prior to conducting the reevaluation. If the Parents refuse to provide consent for the reevaluation, then the</p>	<p>December 9, 2022</p> <p>Within 15 days of the completion of the review report</p>	<p>Review Report from Diagnostician</p> <p>Signed parental consent form or written record of Parents refusing to provide consent.</p> <p>All additional Reevaluation reports</p>	<p>December 16, 2022</p> <p>Within 7 days of receiving written decision on consent</p> <p>Within 7 days of completing reevaluation report</p>

Step No.	<u>Actions Required by the Charter School</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
	Charter School will provide a written record of the refusal and conduct the necessary evaluations.			
5.	<p>The Charter School shall retain an independent expert who specializes in the education of children with the most significant cognitive disabilities to provide on-site training and consultation for the staff working with Student and all other alternately assessed students at the Charter School.</p> <p>This person must be approved by NMPED.</p>	January 31, 2023	<p>Confirmation of the date(s) of the on-site training and consultation</p> <p>Plan for on-site training and consultation provided by this expert.</p> <p>Submission of proposed expert and expert's resume for NMPED approval.</p>	<p>December 16, 2022</p> <p>February 10, 2023</p> <p>December 2, 2022</p>
6.	<p>Following the completion of the reevaluation require in Step 3, the Charter School shall convene an IEP meeting to review the Student #5's reevaluation and consider any necessary revisions to the IEP.</p> <p>The Charter School shall include the independent expert identified in Step 5 as a participant in the IEP meeting. The trainer shall be provided Student #5's records and new evaluation report prior to the IEP meeting in order to provide informed guidance related to Student's needs.</p>	Within 15 days of completing the reevaluation.	<ol style="list-style-type: none"> 1. Invitation to IEP meeting, 2. IEP, 3. Prior Written Notice, and 4. Agenda for IEP team meeting 	Within 15 days of completing IEP Review meeting.

Step No.	<u>Actions Required by the Charter School</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
	The IEP Team is directed to consider whether Student #5's intellectual disability necessitates different educational programming or supports.			
7.	<p>The independent expert identified in Step 5 shall review all other alternately assessed students' IEPs to determine if the current services provided are appropriate for these students.</p> <p>If the expert recommends changes to any student's IEP or special education services, the Charter school shall convene an IEP meeting to present recommended changes to the students' IEP teams.</p> <p>The independent expert shall participate in the IEP meeting for all other IEP meeting deemed necessary for the Charter School's alternately assessed students.</p>		<p>Report from expert regarding review of alternately assessed student IEPs</p> <p>1. Invitation to any IEP meetings held, 2. IEPs, 3. Prior Written Notices, and 4. Agendas for IEP team meeting held</p>	<p>February 27, 2023</p> <p>Within 15 days of completing IEP meetings.</p>
8.	<p>The Charter School shall provide training to Charter School administrators, special education leads, and special education staff and related service providers on the following topics:</p> <ul style="list-style-type: none"> • Alternate assessments based on alternate academic achievement standards; and 	January 31, 2023	<p>Confirmation of the date(s) of the training</p> <p>Confirmation of attendees at the training with submitted documentation of signed attendance sheet from all attendees and plan for addressing provision</p>	<p>December 16, 2022</p> <p>February 10, 2023</p>

Step No.	<u>Actions Required by the Charter School</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED SED</u>	<u>Document Due Date</u>
	<ul style="list-style-type: none"> Modifying curriculum for students with the most significant cognitive disabilities deemed eligible for alternate assessment. <p>The Charter School shall provide this training through an independent person who was not involved in the Charter School’s response to this state complaint and has expertise in serving students with the most significant cognitive disabilities. This person must be approved by NMPED. This person may be the same person identified in Steps 3 and/or 5 if the person’s qualifications are appropriate and if approved by NMPED.</p>		<p>of training to those staff not in attendance.</p> <p>Submission of proposed trainer and trainer’s resume and proposed presentation for NMPED approval.</p>	<p>December 2, 2022</p>
9.	<p>The Charter School shall require each teacher administering the Dynamic Learning Maps or the DLM Instructionally Embedded alternate assessments to complete the test administrator training (for first time administrators) or the refresher course.</p>	<p>December 31, 2022</p>	<p>Certificate of training or other documentary evidence of a completed training session.</p>	<p>January 16, 2023</p>

This report constitutes the New Mexico Public Education Department's final decision regarding this complaint. If you have any questions about this report, please contact the Corrective Action Plan Monitor.

Investigated by:

/s/ Michael Gadomski

Michael W. Gadomski, Esq.

Complaint Investigator

Reviewed by:

/s/ Miguel Lozano

Miguel Lozano, Esq.

Chief Counsel, Special Education Division

Reviewed and approved by:

A handwritten signature in black ink, appearing to read "Deborah Dominguez-Clark". The signature is written in a cursive style with a large, sweeping flourish at the end.

Deborah Dominguez-Clark

Director, Special Education Division