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NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. C2223-16
November 16, 2022

This Report does not require corrective action.

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on September 19, 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 School at the request of the PED's independent complaint investigator;

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

- review of the Charter School’s compliance with federal IDEA regulations and state NMAC rules;
- interview with the Special Education Director; 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 consider an evaluation provided by the parent and conduct an initial special education evaluation, in violation of 34 C.F.R. §§ 300.301, 300.304 and 6.31.2.10 NMAC;
2. Whether the Charter School failed to determine the student’s eligibility for special education, in violation of 34 C.F.R. § 300.306 and 6.31.2.10(F);
3. Whether the Charter School failed to develop an IEP for the student, in violation of 34 C.F.R. § 300.324 and 6.31.2.11(B) NMAC; and
4. Whether the Charter School’s actions and/or omissions towards the Student resulted in a denial of a free appropriate public education (FAPE), in violation of 34 C.F.R. § 300.101 and 6.31.2.8 NMAC.

General Findings of Fact

1. Student began attending kindergarten at the Charter School at the start of the 2022-2023 school year.
2. Parents obtained an independent diagnostic evaluation to assess the Student for developmental delays prior to attending Charter School.

3. The evaluation report, dated February 17, 2022, included testing in the areas of intelligence, adaptive behavior, behavioral needs, social communication, and symptoms associated with Autism Spectrum Disorder (“ASD”).
4. The evaluating psychologist concluded that the Student met DSM V diagnostic criteria for ASD due to repetitive behaviors and deficits in social communication. Additionally, the evaluator stated that the Student qualified for special education under the classification of Autism and recommended small group or one-to-one instruction in school.
5. Evaluator also listed Applied Behavior Analysis (“ABA”) services as medically necessary.
6. On August 5, 2022, Parent provided a copy of the evaluation report to the Charter School.
7. On August 29, 2022, there was a meeting to review the evaluation report. Participants included the Parents, Special Education Director, Diagnostician, Counselor, Kindergarten Teacher, Special Education Teacher, and the Dean of Students.
8. The meeting was primarily devoted to discussing the independent evaluation, potentially doing other evaluations (in the areas of speech and occupational therapy), as well as placement options at the Charter School and local public school district.
9. Due to the extensive nature of the evaluation report, the parties agreed to conduct another meeting on August 31, 2022, to finish reviewing the report.
10. The following day, August 30, 2022, the Student’s father wrote to the Kindergarten Teacher that he was withdrawing the Student from the Charter School.
11. Father sent a separate correspondence to the Dean of Students alleging that the Charter School, during the August 29 meeting, had encouraged Parents to take Student to another school due to Student’s disability.
12. Charter School disputes this characterization of the August 29 meeting.
13. Student ceased attending the Charter School on August 30, 2022.
14. On September 6, the Special Education Director spoke with the Mother and they agreed to convene an IEP meeting on September 22, 2022.
15. Student continued to not attend the Charter School.
16. On September 8th, 2022, the Dean of Students sent the Mother an email containing a Tier II Individual Prevention Letter. This letter indicated that Student had 11 absences and requested that Parents contact the Charter School to schedule an attendance meeting.
17. There is no evidence in the record that the Parents replied to the attendance correspondence.
18. The follow-up meeting scheduled for September 22 did not occur.
19. Student was eventually dropped from enrollment at the Charter School due to excessive absences.
20. Attempts by the PED complaint investigator to communicate and arrange for an interview with the Complainant (Student’s mother) were unsuccessful.

21. On October 27, 2022, the complaint investigator emailed the Complainant requesting an interview. On October 28, 2022, the complaint investigator called the Complainant to schedule an interview. Complainant did not respond to the initial email or call.
22. On October 31, 2022, the PED complaint investigator followed up via email with Complainant to schedule an interview. Complainant responded to this email stating that she was available for an interview the next day at 10:00 AM.
23. On November 1, 2022, the complaint investigator called Complainant at 10:00 AM and there was no response from Complainant.
24. On November 4, 2022, a final email was sent to Complainant in which the complaint investigator explained the importance of Complainant's participation in the investigation process. Complainant did not respond to this email.

Discussion and Conclusions of Law

Issue No. 1

Whether the Charter School failed to consider an evaluation provided by the parent and conduct an initial special education evaluation, in violation of 34 C.F.R. §§ 300.301, 300.304 and 6.31.2.10 NMAC.

An evaluation initiated by a parent must be considered by the school with respect to any decision concerning the provision of a free appropriate public education. 34 C.F.R. § 300.502(c)(1). This provision sets forth a relatively low bar of compliance because the school district must only consider the evaluation results, not necessarily adopt them. *Bd. of Educ. of Evanston-Skokie Cmty. Consol. Sch. Dist. 65 v. Risen*, No. 12 C 5073, 2013 WL 3224439, at *17 (N.D. Ill. June 25, 2013). An initial evaluation or reevaluation shall also consist of a review of existing information to determine what further evaluations or information is needed. 34 C.F.R. § 300.305(a); 6.31.2.10(D)(2)(d)(ii) NMAC.

Here, the Charter School appropriately considered the parent-initiated evaluation and engaged in a substantive discussion of the evaluation with the Parents. The report was made available to the Charter School on August 5, and an initial review meeting was held on August 29. Evidence shows that the staff explained the evaluation results to the Parents at the August 29 meeting and offered another meeting to complete the review.

Any failure to conduct an initial evaluation of the student was due to the Student's nonattendance, lack of communication from the Parents, and the short opportunity of time to evaluate Student before he was dropped from enrollment at the Charter School. The Charter School cannot be expected to have completed a full initial evaluation under these circumstances.

As to Issue No. 1, the Charter School is not cited.

Issue No. 2

Whether the Charter School failed to determine the student’s eligibility for special education, in violation of 34 C.F.R. § 300.306 and 6.31.2.10(F).

Once an initial evaluation is completed, a meeting consisting of qualified staff and the parents must be held to determine whether the child is a child with a disability. 34 C.F.R. § 300.306(a)(1). Once a child is identified as potentially eligible for special education, a school district must take reasonable efforts to complete the eligibility determination process. *Hawkins ex rel. D.C. v. D.C.*, 539 F. Supp. 2d 108, 112–16 (D.D.C. 2008).

Here, the Parents failed to cooperate with the Charter School in completing an eligibility determination. After reviewing the parent-initiated evaluation on August 29, the Charter School scheduled another review meeting in part because the Diagnostician needed to consider whether other evaluations were necessary before the IEP team met to determine eligibility. Parents did not attend the August 31 follow-up meeting. When the Student stopped attending the Charter School after the August 29 meeting, the Special Education Director spoke with the Mother on September 6 and proposed an EDT/IEP meeting be held on September 22. The proposed meeting did not go forward because the Student remained absent from school and Parents stopped communicating with the Charter School. For these reasons, the Charter School did not fail to determine whether the Student was eligible for special education because the Parents obstructed the Charter School from fulfilling this duty.

As to Issue No. 2, the Charter School is not cited.

Issue No. 3

Whether the Charter School failed to develop an IEP for the Student, in violation of 34 C.F.R. § 300.324 and 6.31.2.11(B) NMAC.

At the start of each school year, the local educational agency must have an IEP in effect for each special education student. 34 C.F.R. § 300.323(a). However, a school district does not violate its IDEA obligations to develop an IEP if such failure is due to the parents’ refusal to cooperate in formulating the IEP. *Tracy v. Beaufort Cnty. Bd of Ed.*, 335 F. Supp. 2d 675, 691–92 (D.S.C. 2004).

As previously described, the Charter School made repeated attempts to meet with the Parents and prepare the parties for an EDT/IEP meeting on September 22. Additionally, the Charter School sent a notice to the Parents requesting a meeting to address the Student’s lack of

attendance. Parents' unilateral decision to withdraw the Student from the Charter School after the August 29 meeting effectively denied the Charter School any ability to develop an IEP for Student.

As to Issue No. 3, the Charter School is not cited.

Issue No. 4

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

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(I)(2) NMAC.

Here, the Charter School was not provided the opportunity to offer and provide the Student FAPE. For example, the Parents stopped sending the Student to school before the Charter School could meet again to recommend special education programming and services for the Student. Additional efforts by the Charter School to communicate with the Parents about convening another meeting were unsuccessful partially due to Parents conflicting messages about whether the student would stay enrolled. Furthermore, the Parents' lack of responsiveness to communication attempts by the state complaint investigator deprived this investigation of any parental knowledge regarding the child's educational needs. Based on this information, the actions or omissions of the Charter School did not result in a denial of FAPE.

As to Issue No. 4, the Charter School is not cited.

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

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