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**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION
Complaint Resolution Report
Horizon Academy West
Case No. 2324-25
February 16, 2024**

This Report does not require corrective action.

On November 16, 2023, there was a complaint filed with the New Mexico Public Education Department's (NMPED) Office of Special Education (OSE) under the federal Individuals with Disabilities Education Act (IDEA) and the implementing Federal Regulations and State Rules governing publicly funded special education programs for children with disabilities in New Mexico.¹ The OSE has investigated the complaint and issues this report pursuant to 34 C.F.R. § 300.152 (a)(5) and 6.31.2.13(H)(5)(b) NMAC.

Conduct of the Complaint Investigation

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

- review of the complaint and supporting documentation from complainant;
- review of the District's responses to the allegations, together with documentation submitted by the District 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 District’s compliance with federal IDEA regulations and state NMAC rules;
- interviews with the Executive Director and Parent;
- information from Special Education Director and 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. This complaint was based on Student’s enrollment in the Charter School on October 3, 2022 through December 6, 2022. The complaint was filed on November 21, 2023. Therefore, the investigation concerned events that happened between November 21, 2022 and December 6, 2023.

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. For this reason, the Complaint investigator did not investigate issues pertaining to discrimination based on race and ethnic background.

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 meet its Child Find Obligation when it did not refer for evaluation or evaluate Student in violation of 34 C.F.R. § 300.111(a)(1)(i) and 6.31.2.10 (A) and (D);
2. Whether the Charter School failed to follow the disciplinary provisions of IDEA when they, having reason to suspect Student may be special education eligible subjected Student to a disciplinary removal in violation of 34 C.F.R. 300.534(a) and 6.31.2.10(F);
3. 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. After Student was selected in a lottery for enrollment at the Charter School, Parent enrolled Student in Charter School on October 3, 2023.
2. Student was six years old and in kindergarten at the time of enrollment in the Charter School.
3. The enrollment form was completed by Parent with the assistance of the Charter School staff.
4. On the enrollment form, Parent indicated that Student had never attended school nor had an IEP or 504 plan.
5. Parent stated she informed the Charter School at the time of enrollment that Student had been in an ABA school prior to Student's enrollment.
6. In an October 20, 2022 telephone call with Parent, Teacher was told that Student did not have autism.
7. In a telephone conversation with Teacher on October 26, 2022, Parent reiterated that Student had never attended school before nor was Parent aware that Student was on an IEP.
8. According to Parent's report, Student had participated in four different ABA programs prior to Student's enrollment in the Charter School.
9. On October 26, 2022, the Special Education Director attempted to obtain records of Student's diagnosis, previous special education and ABA services.
10. Parent reported she received daily emails about Student's behavior issues and was told Student had needs the Charter School could not address.
11. Those emails were requested but not provided to investigator.
12. The Charter School reported Student had some issues, particularly social and behavioral but those were common for a child of the same age when they first attend school.
13. Student was struggling in reading and math and the Charter School was providing intervention services to Student.
14. Parent requested an ABA provider come to Charter School to work with Student.
15. Parent reported that ABA services were never provided to Student at the Charter School.
16. The Charter School said they were never received information about Student's previous educational experiences, IEP or other reports or information about Student's needs while Student attended the Charter School.
17. Parent never requested an evaluation for special education verbally or in writing.
18. Parent was not provided a copy of her procedural safeguards nor did she request a copy.

19. A meeting was scheduled for December 6, 2022.
20. Parent believed it was an IEP meeting even though no notice of meeting was provided.
21. The Charter School reported the purpose of the meeting was to discuss Student's needs and how to best meet Student's needs.
22. At the meeting, there was discussion about Student's needs.
23. The Charter School was seeking more information about Student's special education needs, services, previous ABA services and educational history.
24. At the meeting, Parent requested a withdrawal form and completed it that day. The form indicated that Student was withdrawn because "school cant meet needs."
25. Parent reported that Student was kicked out of school on December 6, 2022.
26. The Charter School imposed no disciplinary action while Student attended the Charter School.
27. Pursuant to the withdrawal form, Parent withdrew Student on December 6, 2022.

Discussion and Conclusions of Law

Issue No. 1

Whether the Charter School failed meet its Child Find Obligation when it did not refer for evaluation or evaluate Student in violation of 34 C.F.R. § 300.111(a)(1)(i) and 6.31.2.10 (A) and (D);

Public agencies or school districts are responsible to seek out and evaluate students that are suspected of having a disability and in need of special education services. 34 C.F.R. § 300.111(a)(1)(i). They cannot rely on referrals from parents but must seek out those students. *Robertson County School System v. King*, 24 IDELR 1036 (6th Cir. 1996, unpublished). Procedural safeguards must be provided to parents when there has been a referral or request for an evaluation, or parents request their procedural safeguards. 34 C.F.R. § 300. 504 (a).

Although Parent reported that she told the Charter School that Student had previously been in an ABA school at the time of the enrollment at the Charter School, the enrollment submitted by Parent did not indicate that Student had previously been in a school or had received ABA services. Student was of kindergarten age and there would have been no reason to suspect that Student had been in a school setting prior to enrollment, especially given what Parent stated on the enrollment form. Student attended the Charter School for approximately two months. During that time, the Charter School had concerns about Student's progress in reading and math and was providing intervention services. The Charter School had no records of an IEP or previous

special education services. There was no reason to suspect that Student was special education eligible. Student had some social/ behavioral issues but those were primarily related to age and first-time student. Parent reported that she repeatedly told the Charter School of Student's need for ABA services and other supports but she did not provide copy of IE, any other reports or information to indicate that child was in need of special education services and/or had previously received special education services.

At the meeting on December 6, 2022, when asked for information about previous educational services including an IEP and ABA services, the Charter School reported that Parent requested the withdrawal form. The form, which Parent filled out that day, indicated the withdrawal was because the Charter School was not meeting Student's needs. The Charter School stated they were not seeking to dismiss Student from their program but were seeking more information to determine if Student was on an IEP and what services Student needed. They were not resistant to providing appropriate services but needed to have more information to provide appropriate services. There was no Child Find Violation nor need to provide Parent a copy of the procedural safeguards since based on the Charter School's limited access to Student's records and short time in attendance, there was no reason to suspect Student was a special education child.

As to Issue #1, the Charter School is not cited.

Issue No. 2

Whether the Charter School failed to follow the disciplinary provisions of IDEA when they, having reason to suspect Student may be special education eligible subjected Student to a disciplinary removal in violation of 34 C.F.R. 300.534(a) and 6.31.2.10(F).

Students who are or suspected of being special education eligible have certain protections under IDEA. 34 C.F.R. § 300.534 (a). Schools are deemed to have knowledge that the student has a disability when 1) the parents have expressed in writing to school personnel that child is in need of special education, 2) parent has requested an evaluation and 3) the children or other staff have expressed specific concerns to School's administration about a pattern of behavior. 34 § C.F.R. 300. 534 (b)(3). When a student with a disability has engaged in behavior that warrants an expulsion under school's code of conduct and it is not a manifestation of the student's disability, then the student may be disciplined in the same way as a nondisabled student. 34 C.F.R. § 300.530 (b).

See Issue 1. The Charter School had no reason to suspect Student was a child with a disability at the time Parent completed the withdrawal form disenrolling Student. There was no information provided to the investigator that the Charter School intended to expel Student or disenroll Student from attendance at Charter School. Student had not been subject to any disciplinary

removals prior to December 6, 2022. At the meeting on December 6, 2022, the Charter School was seeking more information about Student's history and needs, it was not planning to expel Student even if that was what Parent believed. There was no IDEA violation in District's actions nor was there any disciplinary action implemented by the Charter School.

As to Issue #2, the Charter School is not cited.

Issue No. 3

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.

Students who are eligible for special education services are entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101; 6.31.2.8 NMAC. A school is obligated to provide a FAPE to students within their jurisdiction who have been determined eligible for special education services. 34 C.F.R. § 300.17. The determination of whether there has been a denial of FAPE requires consideration of two components: substantive and procedural. The question one must answer to determine the substantive standard is whether the IEP was "reasonably calculated to allow the child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas County School District. RE-I*, 137 S. Ct. 988 (2017). The Court in *J.L. v. Mercer Island School District*, 592 F.3d 938, 951 (9th Cir. 2010), held that a procedural violation may be a denial of FAPE when it resulted in the loss of an educational opportunity, infringed on parents' opportunity to participate in the development of the IEP or deprived the student of an educational benefit. All circumstances surrounding the implementation of the IEP must be considered to determine whether there was a denial of FAPE. *A.P. v. Woodstock Board of Education*, 370 F. Appx. 202 (2d Cir. 2010). Failure to meet child find obligations may be a denial of FAPE. *T.B. v. Prince George's County Board of Education*. 72 IDELR 171, 897 F.3d 566 (4th Cir. 2018). However, to be considered a Child Find violation, there must be substantive harm of Student. *J.N. V. Jefferson County Board of Education*, 79 IDELR 151, 12 F.4h 1355 (11th Cir. 2021).

As discussed above, there was no evidence that the Charter School had reason to suspect Student was a special education eligible child. While Student attended the Charter School, Student received intervention services in reading and math. The Charter School was attempting to obtain records from the previous ABA provider but had not received them at the time of the withdrawal. There was no evidence of substantive harm towards Student. Student was at the Charter School for two months. Parent did not provide records that Student had previously attended an ABA school or had an IEP. On the contrary, the enrollment form completed by Parent, indicated that Student had never attended a school before nor had an IEP or 504 plan. Student was not expelled

or “kicked out” of school as Parent alleged, rather, Parent chose to withdraw Student after the December 6, 2022 meeting because school could not meet Student’s needs. There was no denial of FAPE on this record.

As to Issue #3, the Charter School is not cited.

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/ Michele Bennett

Michele K. Bennett, Esq.

Complaint Investigator

Reviewed by:

/s/ Miguel Lozano

Miguel Lozano, Esq.

Chief Counsel, Office of Special Education

Reviewed and approved by:

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Margaret Cage

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Director, Office of Special Education