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NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
OFFICE OF SPECIAL EDUCATION  
Complaint Resolution Report



Case No. C2324-53

May 10, 2024

This Report does not require corrective action.

On March 25, 2024, a complaint was 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.<sup>1</sup> 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 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;

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<sup>1</sup> 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;
- interviews with the Complainant, Special Education Teacher, and 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 began implementing special education programming, related services, or accommodations for Student prior to the completion of their initial IEP, in violation of 34 C.F.R. § 300.323(c) and 6.31.2.11 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**

#### **Introduction**

1. Student is a 16-year-old in 9<sup>th</sup> grade who, as of the date of this report, is eligible for special education under the classification of Autism.
2. Parent enrolled Student with the Charter School this school year.
3. Upon enrollment, Parent informed the Charter School that Student had been homeschooled for several years prior to enrollment with the Charter School. This educational history led Parent to express concerns that Student may have difficulty transitioning back to a conventional school setting.

4. Parent had previously evaluated Student in 2015 and the evaluation report found that Student met diagnostic criteria for Autism Spectrum Disorder and may also be qualified for special education under the classification of Specific Learning Disability.

### **Multi-Layered System of Supports**

5. The Charter School responded to Parent concerns by referring Student for supports through the Multi-Layered System of Supports (“MLSS”). The MLSS model has three layers of support to address a student’s need.
6. Special Education Director clarified in an email that Parent was satisfied with Student in a general education setting before commencing an evaluation to assess Student’s eligibility for special education.
7. The Student in this case was first subject to Layer 1 supports in a general education setting. Layer 1 supports consist of Responsive Instruction, Positive Behavioral Interventions and Supports, and Universal Screening.
8. Charter School then moved Student to Layer 2 supports due to a lack of expected progress with Layer 1 supports. The interventions in Layer 2 involve more individualized and targeted interventions to support student’s acquisition of knowledge and skills.
9. In their response to the complaint, Charter School asserted that as Student underwent MLSS interventions they also received modifications or accommodations associated with MLSS.

### **Best Practices List**

10. At the beginning of the school year, Special Education Teacher worked with Parent to design a list of best practices for working with students with autism so that teachers could employ classroom strategies with Student. Parent said that these strategies were written down so that teachers could assist Student with their needs such as redirecting their attention in class.
11. The best practices list, on its face, is somewhat confusing because the Special Education Teacher chose to compile the list in PowerSchool which produced two documents: (1) an IEP Student Demographics Cover Page; and (2) the Best Practices List which was entitled “Instructional Accommodations and/or Modifications.”
12. The list, dated September 1, 2023, includes an accommodation to the Charter School’s grading policy.
13. Under normal circumstances, the grading policy of the Charter School is that students in the high school must receive an average score of 80% or higher to earn a passing grade in that course.

14. However, the list created by Special Education Teacher and Parent included an accommodation entitled “Adjusted Grading Scale” which, upon plain reading, meant that Student could obtain an average score of anywhere between 70%-79% and still receive a passing grade.
15. Complainant reported that Student received a passing grade in their math course during the fifth term of the 2023-2024 school year due to this grading policy accommodation. Aside from that grade adjustment, Student has shown proficiency in their classes and receiving passing grades (2 A’s and three B’s) during the most recent term.
16. Special Education Director refutes Complainant’s claim that Student’s grades were modified pursuant to the accommodation listed under the best practices list and that the grade adjustments for Student only occurred after Student was determined eligible for special education.
17. Similarly, the Director explained that only a Charter School Administrator can modify passing criteria in their system and that the modification for Student only took place after their IEP was developed.
18. The best practices list did not call for either modifying Student’s instruction or providing related services.

## **Evaluation**

19. Following the collection of MLSS intervention data regarding the Student’s educational needs, the Charter School referred the Student for an initial special education evaluation in November 2023.
20. Records show the Charter School initially created the parent consent form on November 13, 2024.
21. Special Education Teacher and Parent agreed that Parent would sign the consent to evaluate form before Thanksgiving Break. However, Parent changed their mind and asked to hold off on the evaluation process until after Winter Break.
22. Around the same time, the Charter School located a school psychologist who could conduct an in-person evaluation of Student (there was only a virtual school psychologist on staff at the time).
23. Parent signed a consent to evaluate form on January 18, 2024.
24. A psychoeducational evaluation report was completed on March 5, 2024. The evaluator concluded that Student presented with several characteristics associated with Autism Spectrum Disorder.
25. That same day, Complainant became aware of a binder containing Student’s best practices list as they prepared for developing Student’s draft initial IEP. Complainant said that other staff had believed that the best practices list was functioning as an IEP.

26. The Charter School convened an Eligibility Determination Team (“EDT”) and IEP Team meeting on March 6, 2024. The EDT determined that Student was eligible for special education under the exceptionality of Autism. Accordingly, the IEP Team developed an IEP with 275 minutes of specialized instruction per week, various accommodations including an adjusted grading scale, and three IEP goals focused on academics (including using operations in their math course).
27. An accommodation was made to the Charter School’s grading policy for Student because the IEP Team determined that the Student could show their competency by earning a score of 70%-79% in each of their courses.
28. Afterwards, Charter School administrators upwardly revised Student’s grades pursuant to the new grading accommodation in their IEP.
29. Parent credits the assistance of Special Education Teacher, Student’s maturation in school, and the added supports from the IEP as the reasons for student’s educational progress this school year. Parent was not sure whether Student’s math grade was revised retroactively after IEP was developed.

### **Discussion and Conclusions of Law**

#### **Issue No. 1**

**Charter School began implementing special education programming, related services, or accommodations for Student prior to the completion of their initial IEP, in violation of 34 C.F.R. § 300.323(c) and 6.31.2.11 NMAC.**

IDEA requires that a school actively identify and evaluate students suspected of having disabilities. *D.T. by & through Yasiris T. v. Cherry Creek Sch. Dist. No. 5*, 55 F.4th 1268, 1273–74 (10th Cir. 2022). These prerequisite steps are necessary before a school can determine a child’s eligibility and develop an IEP within 30 days of a determination that the child needs special education and related services. 34 C.F.R. § 300.323(c)(1). However, a school does not violate its child find obligation when a student is provided immediate support and accommodations and an evaluation is sought after student’s disability-related learning difficulties persist. *Mr. P v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 751–52 (2d Cir. 2018). Furthermore, a school does not violate IDEA when it provides services to a student without first developing an IEP if the school is in contact with the parent to work out an educational program for the student. *Doe v. Alabama State Dep’t of Educ.*, 915 F.2d 651, 663–64 (11th Cir. 1990).

The Charter School did not commit an IDEA procedural violation. When the Student enrolled at the Charter School for the 2023-2024 school year, Parent informed the Charter School about Student’s prior history (including a 2015 evaluation finding Student meeting diagnostic criteria

for Autism Spectrum Disorder and a several years period of homeschooling). Due to both the Parent's preference for Student to be integrated in general education (with supports) and the Charter School's inclination to collect data on the Student, the parties delayed seeking an initial special education evaluation. Instead, the Special Education Teacher and the Parent worked on developing a list of best practices for teachers to use with Student while Charter School staff ascertained how well Student responded to MLSS interventions. The best practices list was a means of providing some immediate support to student (aside from the MLSS interventions) while the Charter School gathered more information about Student. By November 2023, the Charter School recognized that an initial special education evaluation of Student was warranted and worked with the Parent (who favored waiting to evaluate their child until after the holiday season) to have the consent form signed two months later. Once Parent signed the consent form on January 18, 2024, the Charter School completed the evaluation, determined eligibility, and developed an IEP under two months.

Furthermore, the Parent was actively involved in working with the Charter School staff (especially the Special Education Teacher) to figure out how best to serve Student in an educational setting. Parent and Special Education Teacher were in close contact about Student's educational needs and this cooperation ensured that Charter School educators had information about Student to provide them appropriate support pending the MLSS, SAT, Evaluation processes. In fact, the primary delay in evaluation of Student was due to the decision of Parent and school to attempt other interventions prior to Parent providing consent for evaluation of Student. When consent was provided, the School evaluated Student and determined eligibility within the required deadlines.

Lastly, the weight of evidence supports a finding that the Charter School did not revise Student's grades until Student was deemed eligible for special education and an IEP was developed. The verbal evidence provided by the Special Education Director and the Special Education Teacher was consistent in that despite any grading accommodation language in the best practices list, both the Charter School's expectation and actions put into practice was that Student's grades (including their previous grade in math) were revised only after Student became a special education student. Therefore, the evidence in this case supports a finding that the Charter School neither failed to fulfill their child find duty, develop an IEP before serving Student, or inappropriately provided Student with grading accommodations because the provision of immediate support to Student, the ongoing collaboration with Parent, and the refraining of grading accommodations until after special education eligibility enabled Student to receive an educational benefit.

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

**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(I)(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).

While the evaluation of Student could have happened sooner, neither Student nor Parent were substantively harmed by the delay. Student received immediate teaching strategies and supports pending the completion of the evaluation, and Student was not deprived of any educational opportunities before the evaluation was done. The interim supports provided to Student prior to IEP development generally facilitated their learning. Neither was student improperly benefiting from grading accommodations prior to their special education eligibility. Therefore, Student was not denied FAPE based on procedural grounds.

As for the substantive adequacy of Student's IEP, Student's special education programming affords him specialized instruction, appropriate accommodations, and IEP goals focused on Student's areas of academic deficits. Student has responded well since IEP implementation as evinced by the grades obtained by Student in their most recent school term. For those reasons, Student was not denied substantively denied a free appropriate public education.

**As for Issue No. 2, 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, Office of Special Education

Reviewed and approved by:

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Margaret Cage, Ed.D.

Director, Office of Special Education