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

Case No. 2324-61

June 26, 2024

This Report requires corrective action. See pages 9-12.

On April 23, 2024, a complaint was filed with the New Mexico Public Education Department's (PED) 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 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;
- interviews with Parent on June 8, 2024;
- Charter School Questionnaire completed and returned on June 17, 2024; 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. For this reason, the Complaint Investigator did not investigate allegations that occurred prior to April 23, 2023, allegations regarding professional conduct of staff, or allegations regarding discrimination.

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 District properly implemented the Student’s Individualized Educational Program (IEP), pursuant to 34 C.F.R. § 300.323 and 6.31.2.11(B) NMAC, specifically by:
 - a. Providing the services required by their IEP; and
 - b. Educating the Student consistent with the educational placement required by their IEP.
2. Whether the District has used fully certified staff, pursuant to 34 C.F.R. § 300.156 and 6.31.2.9(B)(9) NMAC.
3. Whether the District’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. In July 2022, Student enrolled at the Charter School with an IEP developed by a neighboring school district. Student was classified as a student with a disability under

the primary disability classification of specific learning disability, per an evaluation that took place in September 2021.

2. Upon Student's enrollment, an IEP meeting was held on August 8, 2022 to develop a new IEP for Student. Relevant portions of the IEP include:
 - a. The IEP contains four IEP goals to support postsecondary transition and academics.
 - b. Special education and related services to be provided through the end of the 2022-23 school year include:
 - i. Math: 60 mins/week (regular classroom from special education teacher)
 - ii. English: 30 mins/week (regular classroom from special education teacher)
 - iii. Social Work Services: 30 mins/week (special education setting from social worker)
 - c. Student was to be in the regular classroom 80% of the school day, or more.
3. The Prior Written Notice (PWN) attached to the IEP indicates, in part, that the school did not then have a mental health provider and that the IEP Team agreed that Student would receive services from a social worker/psychologist once someone was hired. The PWN further states Parent was not interested in receiving compensatory services because Student was seeing an outside therapist. Parent now asserts that was not true.
4. An IEP meeting was held on January 30, 2023 to discuss a change of placement for Student. The IEP was amended. The addendum documentation indicates the Parent requested that Student's schedule change to reflect a virtual schedule for the remainder of the school year to which the IEP Team agreed even though it was not Student's least restrictive environment. Other than the language regarding Student moving to a virtual schedule, no other changes were made to the IEP.
5. The PWN dated January 30, 2023 indicates the following, in part:
 - a. The school does not have a social work provider. Parent is not interested in Student receiving compensatory services at this time. Social work services will resume once a social worker is hired.
 - b. A class schedule that reflects virtual classes will be provided.
 - c. The IEP Team agrees Student will either attend school once a week in person or attend a virtual meeting with special education staff to receive educational support. Special education staff, Parent, and Student will prearrange the time and day for services.
6. A note from Parent regarding the contents of the PWN was attached to the IEP Addendum and accompanying PWN. The note is dated February 8, 2023 and indicates, in part, that the Parent does want compensatory services for the missed social work services. There is no indication Charter School responded to the note.

7. Charter School asserts a “teacher” and an educational assistant (EA) were both assigned to provide special education and related services to Student, following the Student’s change to virtual classes. Charter School indicated a special education coordinator/teacher oversaw specially designed instruction was provided to students with disabilities during the 2022-23 school year. The Teacher assigned to provide services to Student holds a 7-12 Secondary Vocational Technical certification. The EA assigned to Student had a Pre K-12 substitute teacher certification in the spring of 2023. The Special Education Coordinator/Teacher had a special education certification during the 2022-23 school year.
8. On May 22, 2023, Charter School requested to schedule a meeting with Parent and Student to “check in” with Student. On May 23, 2023, Charter School then said it needed to schedule a “reentry IEP” and asked for Parent’s availability. For unknown reasons, a meeting was never held.
9. On June 1, 2023, Student finished all assignments required to complete the 2022-23 school year.
10. Between April 23, 2023 and the end of the school year on June 2, 2023, Student did not receive any special education services. There is no indication special education staff attempted to meet with Student either in person or virtually to provide special education services.
11. Charter School asserts, during the 2023-24 school year, mental health services were provided by an outside provider on behalf of Charter School. In addition, the Special Education Director oversaw the instruction of special education services. The Special Education Director holds a “Level One Alternative” special education certification as of July 1, 2023.

Discussion and Conclusions of Law

Issue No. 1

Whether the District properly implemented the Student’s IEP, pursuant to 34 C.F.R. § 300.323 and 6.31.2.11(B) NMAC, specifically by: (a) providing the services required by their IEP; and (b) educating the Student consistent with the educational placement required by their IEP.

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17. The IEP is “the centerpiece of the statute’s education delivery system for disabled children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student’s IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

A school district must ensure that “as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child’s IEP.” *Id.* See also 6.31.2.11(B)(1) NMAC.

Staff shortages do not excuse a district's obligation to implement all of the services prescribed in a student’s IEP. See e.g., *Lakeville Area Sch. 0194-01*, 123 LRP 21873 (SEA MN 06/12/23).

Parents complaint is in regard to the entirety of the 2022-23 school year. However, the Department is limited to events that occurred within one year of the filing of the complaint. Therefore, the Investigator was only able to investigate alleged violations that occurred on or after April 23, 2023.

Specially Designed Instruction

As of April 23, 2023, Student was attending virtual classes. The IEP Addendum regarding the change is very vague and only indicates Student’s “instructional setting” was changed but the PWN accompanying the IEP Addendum provides a little more detail. Specifically, the PWN indicated Student was required to attend school or participate in a virtual meeting with special education staff once a week to receive specially designed instruction. Based on Student’s IEP, Student should have received 60 minutes of math and 30 minutes of English specially designed instruction, and 30 minutes of social work services, for a total of 120 minutes a week.

First and foremost, the IEP Addendum should have been more specific regarding the changes to Student’s schedule so that it was clear what the Charter School was to provide. See *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1197 (9th Cir. 2017) (an IEP “embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP”). The IEP itself makes no mention of Student attending school or participating in a virtual meeting once a week to receive services, which, at a minimum, should have been included.

Secondly, Student did not receive social work services the entirety of the 2022-23 school year due to a lack of providers employed by the school. The August 2022 and January 2023 PWNs indicate Parent waived social work compensatory services. However, Parent asserts that was not true. In support of Parent’s assertion, Parent wrote on the January 2023 PWN, within nine days after the meeting regarding same, at the direction of Charter School, indicating they disagreed with the conclusion that Parent waived services. There appears to have been no follow-up by the Charter School even though Parent disagreed with the PWN summary. Nonetheless, while Charter School indicated it was actively working to hire a replacement, Charter School still had an obligation to seek alternative solutions, such as contract with a private provider, to provide social work services to Student. Therefore, between April 23, 2023 and the end of the 2022-23

school year, or June 2, 2023, Student was entitled to 180 minutes of social work services but was denied same.

Finally, Student was entitled to 360 minutes of math and 180 minutes of English specially designed instruction between April 23, 2023 and June 2, 2023. There is no evidence that Student received any specially designed instruction when they transitioned to online classes. The Charter School's failure to provide special education services, according to the IEP, results in an implementation failure of same.

Educated in LRE Identified by IEP

The Parent's allegation regarding Student being educated in the classroom identified in the Student's IEP occurred prior to April 23, 2023 when Student was attending school in-person. Because the alleged implementation failure occurred prior to April 23, 2023, this allegation was not investigated. Thus, no findings regarding same are included hereto.

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

Issue No. 2

Whether the District has used fully certified staff, pursuant to 34 C.F.R. § 300.156 and 6.31.2.9(B)(9) NMAC.

State educational agencies (SEAs) are required to establish and maintain qualifications of special education teachers. 34 C.F.R. § 300.156.

In New Mexico, each local education agency (LEA) is bound by the rules enumerated at 6.31.2 NMAC. Specifically, 6.31.2.9(B)(9) requires LEAs to ensure personnel serving children with disabilities be qualified under state licensure requirements.

The state licensure requirements regarding special education teachers can be found at 6.61.6.8 NMAC. The licensure requirements for a special education teacher require that the person seeking licensure (1) hold a bachelor's degree from a regionally accredited college or university; completion of specific credits, courses, and teaching hours; and satisfy the requirements of "a highly qualified beginning pre K-12 special education teacher" or (2) possess a valid certificate for the appropriate grade level and type. See 6.61.6.8 NMAC.

Neither of the staff members assigned to provide special education services to Student held the licensure required by NMAC. While the Special Education Coordinator did have the required special education license, there was not substantial evidence which indicated that the Special Education Coordinator was providing direct supervision of either staff member assigned to Student. Because Student did not receive any special education services, there was no harm to

Student directly resulting from the failure to employ appropriately licensed staff. Nevertheless, Charter School is required to employ staff that hold the appropriate licenses so that they may provide appropriate special education services to students with disabilities at the Charter School.

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

Issue No. 3

Whether the District’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.

The IDEA requires that SEAs make available a FAPE to all children with disabilities within the state. 34 C.F.R. §§ 300.17 and 300.101; 6.31.2.8 NMAC. The failure to implement an IEP can result in a denial of a FAPE. 34 C.F.R. § 300.17. However, not every deviation from an IEP results in a denial of FAPE. See *I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Schs.*, 70 IDELR 86 (8th Cir. 2017). Thus, only material implementation failures qualify as a denial of FAPE. See e.g., *Van Duyn v. Baker Sch. Dist. 5J*, 47 IDELR 182 (9th Cir. 2007), *reprinted as amended*, 107 LRP 51958 , 502 F.3d 811 (9th Cir. 2007). “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Id.*

Here, no specialized instruction was provided to Student for at least six weeks, and likely more. During those six weeks, Student received zero minutes of the 540 minutes of specially designed instruction or 180 minutes of related services they were entitled to which is more than a minor discrepancy from the requirements of the IEP. Therefore, the failure to implement Student’s IEP, specifically by providing specialized instruction from April 23, 2023 through June 2, 2023, was material and results in a denial of FAPE.

As to Issue No. 3, 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. § 300.323 6.31.2.11(B) NMAC	The Charter School failed to provide the required special education and related services.
34 C.F.R. § 300.156 6.31.2.9(B)(9) NMAC	The Charter School failed to use fully certified staff when providing special education services to students with disabilities.
34 C.F.R. § 300.101 6.31.2.8 NMAC	The Charter School’s actions and/or omissions towards Student resulted in a denial of a FAPE.

Required Actions and Deadlines

By July 5, 2024, the Charter School's Special Education Director must assure the OSE in writing that the Charter School will implement the provisions of this Corrective Action Plan (CAP). The OSE 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:

Ms. Yaling Hedrick
Corrective Action Plan Monitor
Office of Special Education
New Mexico Public Education Department
300 Don Gaspar Avenue
Santa Fe, NM 87501
Telephone: (505) 795-2571
Yaling.Hedrick@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 OSE 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 OSE.

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 OSE 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 1, 2024 and reported to the OSE no later than November 15, 2024. All documentation submitted to the OSE 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 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 Corrective Action Plan Monitor that it will abide by the provisions of this Corrective Action Plan (CAP).	July 5, 2024	Written Assurance Letter/Email	July 5, 2024
2.	The Charter School Special Education Director and the school principal shall meet virtually with the OSE Education Administrator assigned to the Charter School and the OSE 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 administrators or personnel in this meeting. The Charter School Director shall be responsible for arranging this virtual meeting with OSE.	July 19, 2024	Notes from meeting prepared by Charter School	July 19, 2024
3.	The Charter School shall develop a plan to ensure that all students with disabilities are provided specialized instruction and related services included in their respective IEPs. This plan shall include: <ul style="list-style-type: none"> (1) Identification of any and all needed service providers based on student IEPs; (2) Provisions to recruit and retain needed providers that are not currently employed 	August 9, 2024	Written Plan to be approved by PED	August 9, 2024

Step No.	<u>Actions Required by Charter School</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED</u> <u>SED</u>	<u>Document Due Date</u>
	<p>or contracted by the Charter School; and</p> <p>(3) Tracking system/log to monitor provided services and services that were not provided and potential need for compensatory education.</p>			
4.	<p>The Charter School shall arrange training for school staff (including special education teachers, special education administrators, and related service personnel) to be provided by a person with expertise in special education who is approved by the PED.</p> <p>The training shall address the following special education topics:</p> <ul style="list-style-type: none"> (1) IEP development, including adequate descriptions of services and placement; (2) Implementing an IEP as written, specifically, the provision of services; (3) Licensure required for staff providing special education and related services; (4) Obligation to employ or enter a contract with an appropriately qualified teacher and/or related service provider when the school does not have staff already available; and (5) Any provisions of the plan developed in Step 3 that will be implemented by special education and related services staff. 	August 30, 2024	<p>Submission of proposed trainer and trainer's resume and proposed presentation for PED approval.</p> <p>Confirmation of the date of the training.</p> <p>Confirmation of attendees at the training and plan for addressing the provision of training to those staff not in attendance.</p>	<p>July 19, 2024</p> <p>July 31, 2024</p> <p>September 6, 2024</p>


Step No.	<u>Actions Required by Charter School</u>	<u>Complete Actions By</u>	<u>Documents Required to be Submitted to PED</u> <u>SED</u>	<u>Document Due Date</u>
	<p>the Charter School does not result in a waiver of same.</p> <p>If the Charter School cannot provide compensatory education through Charter School employed providers, it shall contract with a private provider(s) to deliver the hours of compensatory education.</p> <p>If the Parent declines compensatory education, the Charter School shall get confirmation from the Parent in writing and provide the written confirmation to PED.</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/ Emily Adams
 Emily Adams, Esq.
 Complaint Investigator

Reviewed by:
/s/ Miguel Lozano
 Miguel Lozano, Esq.
 Chief Counsel, Office of Special Education

Reviewed and approved by:

DocuSigned by:

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 Margaret Cage, Ed.D.
 Director, Office of Special Education