

The Honorable Gary E. Johnson
Governor of New Mexico
State Capitol Building
Sante Fe, NM 87503

Re: Findings of Investigation of the New Mexico School for the Visually Handicapped

Dear Governor Johnson:

I am writing to report our findings with respect to our investigation of the New Mexico School for the Visually Handicapped ("NMSVH" or "School") in Alamogordo, New Mexico. We notified you on February 26, 1997, that we were initiating an investigation of the facility pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997 *et seq.* We conducted our investigation by touring the School with two consultants from April 23-26, 1997; reviewing documents; and meeting with current and former staff, students and their families, and other interested persons. Our review of documents included numerous School and State documents and individual students' records.

During our tour and throughout our investigation, we received the cooperation of the staff at NMSVH. We appreciate the unimpeded access to the School that State officials afforded us.

NMSVH is a residential facility, established in 1903 for the purpose of educating students with visual impairments. The census of students at the School, which once numbered two hundred or more, has dropped in recent years to between sixty-five and seventy students. The number of students in attendance fluctuates during the school year primarily as a result of expulsions and removal of students by their parents. The School educates some of its students year-round, while other students return home for the summer term. The School's summer program is open to young people who do not attend the School during the regular school year.

Approximately half of the students at NMSVH have one or more disabilities in addition to their visual impairment; some of these children are nonverbal. Many of the students have behavior problems and some have significant medical needs. At least half of the students at the School are considered to be of average or above average intelligence.

NMSVH students range in age from five to eighteen years old. Although the students' length of stay at the School varies, many students are enrolled at NMSVH for most of the years during which they are eligible for public education. Students reportedly are placed at the School after local public school districts have determined that they cannot offer the students a free, appropriate education in their home communities.

The School's substantial endowment contributes to an annual operating budget of approximately \$7.25 million, or approximately \$105,000 per student. At the time of our tour in April 1997, the School had approximately 160 full-time and part-time employees, of whom only 21 provided education and habilitation services directly to students. There were fourteen and one half teachers, two and one half

orientation and mobility instructors, two occupational therapists, one physical therapist, and one speech therapist.

I. FINDINGS

Our investigation focused on whether current conditions at the School meet federal constitutional and statutory standards.

Under the Fourteenth Amendment, students at NMSVH have the right to adequate medical care, reasonable safety, and training to promote their liberty interests. See Youngberg v. Romeo, 457 U.S. 307, 324-25 (1982). Under the Individuals with Disabilities Education Act ("IDEA"), each student with a disability has a right to receive a free, appropriate public education in the least restrictive environment appropriate to his or her needs. See 20 U.S.C. § 1400 et seq., 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.533, 300.550, 300.551, 300.552, 300.553, 300.554, and 34 C.F.R. Part 300, App. C. Under Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("Section 504"), NMSVH students have a right to be free of discrimination in public education and to be served in the most integrated setting appropriate to their needs. See 42 U.S.C. § 12131 et seq.; 28 C.F.R. § 35.130; 29 U.S.C. § 794.

Although our evaluation revealed that the School has significant strengths on which to build, it revealed violations of students' constitutional and federal statutory rights, detailed below.

A. Mental Health Care

The School lacks appropriate mental health services for the significant percentage of students who have serious behavioral or mental health problems. The dearth of appropriate services presents a significant threat of harm. For example, during our tour, we identified a number of cases in which suicide risks were evident, including suicide threats to which the School did not respond adequately. In one recent case, an apparent suicide attempt is documented in School records, without any indication of appropriate interventions before or after the incident. In another case, a student's self-mutilation behavior was not addressed through treatment. Instead, the student was warned that he would be punished if he persisted. And in yet another recent case, a boy with a long history of suicidal gestures and threats requested that his counseling sessions at the School be increased from once a month. His request was denied.

The School's failure to respond appropriately to students' mental health needs can be traced to several factors. First, almost all of the limited mental health counseling services offered to students are provided by unlicensed and unqualified staff. Second, the School fails to document and share critical information about students' mental health needs with key personnel. The nursing staff, in particular, is not kept informed of knowledge that other staff may have concerning students' mental health status. For example, nurses lack key background information about why students to whom they administer psychotropic medication are receiving such medication. In addition, on numerous occasions, disturbed or intoxicated students have been brought to the health center by other staff, who have asked the nurses to "keep watch" closely over the students for unspecified but potentially serious reasons. We were told that the reason for this division of knowledge is that the School wants to protect students' privacy. This underlying concern is legitimate but is not being dealt with appropriately. Nurses should not be excluded from access to information they require in order properly to discharge their own duties to care for the

health of students. In any case, nursing staff would be bound to protect the confidentiality of any information they learned. Third, the School fails to train staff adequately on how to recognize the warning signs or overt manifestations of serious emotional and behavioral illness. Fourth, the School fails to incorporate the behavioral and mental health needs of students into their individualized education plans, as required by federal law. See 20 U.S.C. § 1414(b)(2). Fifth, behavioral issues directly related to the students' vision impairments, such as their reluctance and embarrassment about using mobility canes in public, are addressed -- if at all -- only as disciplinary infractions with little attention to the underlying emotional issues involved.

B. Education-Related Skills and Orientation/Mobility

The documented justification for removing most of the students from their local public schools and placing them at NMSVH is to teach them "specialized compensatory skills," such as braille and cane usage. But a large number of these students do not receive instruction in braille and do not use canes.

We observed little use of braille during our tour. The School employs only a part-time braille teacher and many of the other teachers appear to consider braille too difficult for their students, although most of the students are of average or above average intelligence. Instead, the overwhelming majority of students are taught to read print, including students who are legally blind and who were specifically referred to the School to learn braille, and students who have degenerative eye diseases that will result in the loss of all or most of their remaining sight. They will be unable to read print, and unless they receive education in braille, they will be unable to read by themselves at all.

Of the 65 to 70 children attending NMSVH during the 1996-97 school year, only 12 on the enrollment list provided to us were braille readers. Sixteen students at the School are not able to read at all. Of the 12 students at the School who reportedly do read braille, many of these students who are partially-sighted read the braille with their eyes, i.e., by looking closely at the braille code, rather than handling the code with their fingers. Two of these students are listed as able to read both print and braille. The remaining students read print. Not only do most of the NMSVH students use print, many use standard size print (as opposed to enlarged print), which is more likely to cause eye strain and in turn to discourage students from reading.

Of the two students who reportedly were able to read both print and braille, one student was uncomfortable with braille and required three minutes and numerous prompts before she recognized the braille code for the word "wise." She stated that she reads braille "with my eyes." She has a degenerative eye disease that may result in total or near total blindness. The second student who was said to be able to read both print and braille began learning braille in the Albuquerque public school system, but reported that she does not use braille at all at NMSVH. The individualized education plan of another student revealed that he had received instruction in braille in his local public school in 1992 immediately prior to matriculating at NMSVH. The student found braille difficult and stopped using it after arriving at NMSVH. His individualized education plan at NMSVH did not address the need to strengthen his braille skills. This child also has a degenerative eye disease, which may result in total or near-total blindness. In yet another case, a middle school student stated that he had been provided two weeks of braille instruction when he first enrolled at NMSVH, but the instruction was terminated. Although he wished to continue learning braille, he stated that his "print teacher" told him he would be better off working with print. He has had no instruction in braille since then and stated that he has forgotten any of the braille he learned in the few lessons provided him. Finally, a high school student informed us that

she matriculated at the School in January of the current school year thinking she would learn braille, but was told after enrolling that "they would try to get me into a braille class next year."

If a student only requires special education, related services, and adaptations that can be provided in a regular public school environment in order to obtain a free, appropriate, public education, these services must be made available in the local public schools rather than removing the student for residential education at NMSVH for an extended period of time. When these specialized services are the reason identified for placement at NMSVH, under the IDEA, these needs must be identified in the student's individualized education plan and services to meet those needs must be provided in order that the students may have a free, appropriate, public education. 20 U.S.C. §§ 1412(2)(B), 1401(a)(18); 34 C.F.R. §§ 300.8, 300.300, 300.346, 300.552(a)(2). In other words, if a student is sent to the school to receive training in braille, the student must receive that training.

The School also does not make sufficient efforts to obtain replacement eyeglasses in a timely fashion for students who need them. A number of students told us that when they lost or damaged their eyeglasses, they sometimes had to wait months to obtain replacements. In a school whose mandate is to educate visually impaired children, the failure to obtain timely replacements for lost or damaged eyeglasses is unacceptable.

Finally, although a number of students are also referred to the School by their local public school districts to receive orientation and mobility training, NMSVH fails to ensure that all students who are capable of walking are able to navigate independently in conditions outside the protected environment of NMSVH's campus. Moreover, some students told us that they do not use canes because they prefer, as one student put it, "to bump around rather than be laughed at." The School should address such emotional and social concerns directly, rather than permitting students literally to "bump around" in a misplaced effort to conceal their disability.

The School's failure to require all students who are capable of walking to become fully proficient in cane usage also results in a hierarchy of sightedness on campus. Children who are more sighted routinely lead children with less or no vision around the campus. This practice fails to teach children to navigate independently. According to our expert, it suggests that sight is synonymous with travel ability and ability in general. This suggestion is unwarranted.

C. Safety and Protection from Harm

Our investigation of the School's ability to protect students from harm revealed that: (1) the School has not taken sufficient steps to ensure adequate investigation and response to allegations of abuse and neglect, including tracking relevant trends; and (2) student behavior and discipline problems are uncontrolled or inconsistently controlled.

1. Abuse detection and response

Allegations of physical and sexual abuse of students have been lodged against the School for some time. In May 1996, 15 individuals who have attended the School since the mid-1970s (at least four of whom attended the School during the period 1992-1996) filed suit in State court alleging sexual and physical assault by staff and fellow students. Switzer-Hensley et al. v. Board of Trustees of the New Mexico School for the Visually Handicapped et al., No. CV-96-04918 (2d Dist. Court, Bernalillo County, N.M.). In January 1998, the case was dismissed after the parties entered into a confidential settlement agreement.

Despite the School's history of abuse allegations, the School's Board apparently did not enact an abuse reporting and investigation policy until late 1996 and, despite the policy, the School still lacks an adequate system for abuse reporting and investigation that would permit the School not only to respond to particular allegations of abuse, but also to identify potential trends and needed systemic remedial actions. Moreover, while the policy enacted by the Board in 1996 explicitly requires employees to report suspected cases of abuse and neglect, it did not provide mechanisms for students and parents to report abuse and neglect.

When untoward incidents at the School are reported, they are not uniformly recorded in a formal or standardized manner. Rather, they are routinely shared in informal electronic mail messages among staff members. Although we were told that such messages receive follow-up by appropriate staff, often there was no documentation of this follow-up. For example, there was a case in which staff exchanged electronic messages containing observations consistent with the possibility that a young female student had experienced or currently was experiencing sexual abuse; yet there was no indication that steps were taken to assess or investigate this possibility.

2. Other safety issues

We found that NMSVH students frequently violate School rules, with harmful or potentially harmful consequences. Rule-breaking by students includes instances of student-on-student violence; truancy; use of alcohol and illegal drugs; and illicit sexual activity. Rule-breaking at the School is clearly related to the relative dearth of mental health and substance abuse services for the students who need them. In one recent case, a boy with a long history of documented behavioral problems came to the School's infirmary for treatment, having consumed an entire bottle of liquor with concomitant use of marijuana and, possibly, cocaine. School records indicate that soon after the boy was transported to the emergency room of a local hospital, he became nonresponsive and required treatment for life-threatening hypothermia, a result of his extreme inebriation.

The frequency of alcohol and drug use, sexual activity, violence, and truancy in a residential school like NMSVH raises particular concerns. Parents and guardians of NMSVH students cede a significant amount of control to the School, and students are separated by great distances from the people to whom they might otherwise look for protection and guidance.

D. Placement Issues

New Mexico fails to make appropriate determinations about the necessity for residential placement in

violation of the IDEA, ADA, and Section 504. In order to be eligible for IDEA funding, the State must have established:

. . . procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(5)(B). See also 20 U.S.C. § 1412(a)(5). The regulations promulgated under IDEA specifically require states receiving IDEA funding to ensure:

[T]hat special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.550(b)(2) (Authority: 20 U.S.C. 1412(5)(B); 1414(a)(1)(C)(iv)). See also 34 C.F.R. §§ 300.551, 300.552, 300.553, 300.554. Finally, the IDEA regulations provide that students should be educated as close to home as possible and in the school they would attend if not disabled, unless their individualized education plans require some other arrangement. E.g., 34 C.F.R. § 300.552; 34 C.F.R. Pt. 300, App. C. Title II of the ADA and regulations promulgated thereunder, including 28 C.F.R. § 35.130 (d) and 28 C.F.R. Pt. 35, App. A, and Section 504 provide additional limitations on State segregation of students on the basis of disability or perceived disability.

The documented determinations to substantiate removal of NMSVH students from their home school districts that the State provided during the course of our investigation do not reflect a judgment that placement in a residential setting is necessary to provide a free, appropriate public education. The determinations are cursory and rote. In some cases, no specific reason for removal is provided. Our finding is consistent with an earlier review by the United States Department of Education in August 1994, that found a number of students were placed at NMSVH prior to the formulation of an individualized education plan. In other cases, NMSVH does not provide the services to meet the stated reason for removal from the local public school district. For example, as noted earlier, a number of students have been removed from their home school districts to receive braille training, yet they do not receive this training upon matriculation at NMSVH. In other situations, which are not fully documented, students are removed from their home school districts because they are perceived as behavior problems. However, as also noted earlier, NMSVH does not provide the basic mental health services necessary to respond to these children's behavioral and emotional problems and protect them from harm.

Parents of current and former NMSVH students stated that they were faced with a stark choice when their children reached school age: enroll them at NMSVH, where they would (at least in theory) receive braille education, or enroll them in a local public school, where they would receive no or minimal education in braille.

Finally, we note that there is a provision in New Mexico law that, absent a saving construction, would appear to violate the IDEA. The provision, entitled, "Parents and guardians required to send blind

students to [NMSVH]," states:

Every parent, guardian or person having control or custody of any child who is between the ages of five and the age of majority, and who, on account of a visual handicap[,] cannot be educated in the public schools, and [sic] shall send such child to the New Mexico school for the visually handicapped at Alamogordo during each school year for a period of seven years, unless the child is taught the subjects as are taught in the school in a private school, at home, or in a similar institution in another state, or unless the child is suffering from a physical or mental disability sufficient to incapacitate him from attending the school....

N.M. Stat. Ann. § 21-5-5. Violation of this law is punishable by imprisonment for up to thirty days or a fine up to \$25. N.M. Stat. Ann. § 21-5-8.

While this State law does not unequivocally require sending children to NMSVH on account of their disability, it may be read to require that any child sent to NMSVH attend the School for seven years, regardless of the progress made by the child or changed circumstances in the local public school district. This construction would violate the IDEA regulations, which require annual review and revision of individualized education plans and that placement decisions (which must be based on an individualized education plan) are made annually. 34 C.F.R. §§ 300.343(d), 300.552(a)(1) and (2).

II. MINIMUM REMEDIAL MEASURES

To rectify the deficiencies we have identified and to ensure that NMSVH complies with federal constitutional and statutory standards, the State should take the following minimum remedial measures:

1. Provide students with adequate mental health counseling and psychiatric care by appropriately credentialed professionals. This should include providing adequate substance abuse prevention programs, treatment and counseling to students with alcohol and drug abuse problems, and treatment and counseling for students who have behavior problems, including self-injury. Adequately train staff on how to recognize and respond to mental health and substance abuse problems of students. Ensure that nursing staff at the School have access to students' mental health records.
2. Provide each student identified as needing braille instruction with adequate braille instruction until the student is proficient in reading braille at a level commensurate with age and capability. Periodically assess the braille proficiency of students identified as braille readers. Provide additional instruction as necessary to remediate any deterioration in braille skills identified by periodic assessment. Make reasonable efforts to ensure that students read braille using their fingers, not their eyes. Eliminate delays or waiting lists for braille education. The newly reauthorized IDEA requires that, effective July 1, 1998, each blind or visually impaired student's individualized education planning team must, in developing the student's individualized education plan, "provide for instruction in braille and the use of braille unless the [individualized education planning team] determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in braille or the use of braille), that instruction in braille or the use of braille is not appropriate for the child." 20 U.S.C. § 1414(d)(3)(B)(iii).

3. Ensure that any student who misplaces, damages, or destroys his or her eyeglasses is provided with replacement eyeglasses in a timely fashion.
4. Assess each student's need to use a cane. Ensure that all students enrolled at the School receive orientation and mobility instruction as needed.
5. Ensure that the School has a system that allows School officials to respond adequately to allegations of abuse and neglect and serious incidents of children's misbehavior, track allegations and identify relevant trends, and take appropriate systemic or other corrective action.
6. Ensure that no student attends NMSVH unless there has been an individualized, documented determination that the School is the least restrictive environment in which the student's needs can be met, i.e., a determination that "the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A). Perform periodic assessments of each student's need for continuing placement at NMSVH.
7. Formally adopt a construction of N.M. Stat. Ann. § 21-5-5 and N.M. Stat. Ann. § 21-5-8, that would ensure compliance with the IDEA, or amend the law to accomplish this end.

Pursuant to CRIPA, the Attorney General may initiate a lawsuit to correct deficiencies at an institution 49 days after appropriate local officials are notified of them. 42 U.S.C. § 1997b(a)(1). However, in light of the cooperation State officials have provided us, we look forward to discussing with the State of New Mexico how we might resolve the existing systemic deficiencies in a non-adversarial manner. We hope to be able to work with you and other State officials to resolve this matter in a reasonable and expeditious manner.

Sincerely,

Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division

cc: The Honorable David McCumber
General Counsel
Office of the Governor of New Mexico

The Honorable Thomas S. Udall
Attorney General
State of New Mexico

Mr. Michael J. Davis
State Superintendent
New Mexico Department of Education

Mr. James Salas
President
Board of Regents
New Mexico School for the Visually Handicapped

Mr. J. Kirk Walter
Superintendent
New Mexico School for the Visually Handicapped

John J. Kelly, Esq.
United States Attorney
District of New Mexico

The Honorable Richard W. Riley
Secretary
United States Department of Education