

**COMPLAINT INVESTIGATION  
CLARK COUNTY SCHOOL DISTRICT  
(#CL040721)  
Report Issued on June 3, 2021**

**INTRODUCTION**

On April 7, 2021, the Nevada Superintendent of Public Instruction received a State Complaint dated March 15, 2021 from a Parent<sup>1</sup> alleging violations by Clark County School District (CCSD) in a student's special education program. The allegations in the Complaint were that CCSD failed to implement the student's Individualized Education Program (IEP) with regard to the provision of 2020 Extended School Year (ESY) services and the minutes of direct instruction and related services during the school closures in the 2019/2020 school year from March 15, 2020 to the end of the 2019/2020 school year and from the commencement of the 2020/2021 school year to the date the student's IEP was revised in October 2020; CCSD refused to consider the Parent's requested alternatives/accommodations to distance education at the October 2020 IEP meeting, such as an in-person one-to-one aide or compensatory education once schools opened, resulting in a denial of a free appropriate public education (FAPE) to the student; and the student's distance education schedule in the 2020/2021 school year interfered with the time periods for scheduled private therapists outside of the educational setting.

The Parent's proposed resolutions were for the provision of compensatory education, including related services and ESY, for hours missed due to school closures and for the distance education model that denied the student a FAPE; private therapy for the amount of time private therapists facilitated distance education; and the systemic remedies of training for district personnel and compensatory education or other services to other students who have been adversely impacted by distance education. (The NDE requested that, given the proposed resolution relative to the use of private therapists used to facilitate distance education, the Parent provide any invoices of the private therapists for these services with documentation prior to the commencement of this investigation. The Parent did not provide NDE any invoices or other documentation of the amount of time the private therapists provided services to the student to facilitate distance education.)

Given the Parent previously filed a State Complaint alleging violations by CCSD that included the implementation of the student's IEP in the 2019/2020 school year, the NDE reviewed the prior State Complaint and State Complaint Report, #CL081720, to ensure this instant Complaint did not raise allegations previously resolved. Upon review, it was determined that while the alleged violations were similar, the issues were not previously decided during the relevant time periods. However, the Parent was notified that any relevant findings of fact in State Complaint Report #CL081720 with regard to the implementation of the student's IEP after school closure due to COVID-19 would be binding in this investigation and that other relevant aspects of the Report would be considered, as appropriate.

The Parent was also notified that NDE does have jurisdiction through its special education complaint process to investigate both individual and systemic complaints alleging a violation of the requirements of Part B of the Individuals with Disabilities Education Act (IDEA) or the Nevada Administrative Code (NAC) relating to special education programs. However, under the IDEA, 34 C.F.R. §300.153, a State Complaint is required to be filed in accordance with State procedures and to include specific content, including not only the statement that there has been a specific violation, but the facts on which the statement is based as

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<sup>1</sup> This State Complaint was filed by one of the student's parents; however, both parents are actively involved in the student's education and the term "Parent" used in this Report denotes one or both of the student's parents when past events are discussed.

it relates to the problem. While the proposed resolution stated for the first time that CCSD's alleged failure to provide IEP services to the student was a systemic issue as well as a student-specific issue, there was no allegation of systemic noncompliance and, as such, NDE's jurisdiction is limited to the student-specific allegations in the Complaint.

In addition, in the absence of an alleged violation of the requirements of the IDEA or NAC relating to special education programs, NDE also notified the Parent of the absence of jurisdiction over the allegation in the State Complaint that the student's distance learning schedule interfering with the time periods of scheduled private therapists outside of the educational setting.

## **COMPLAINT ISSUES**

A State Complaint must include a violation that occurred no more than one year prior to the date of receipt. 34 C.F.R. §300.153; NAC §388.318(1)(b). In this case, the Complaint was received April 7, 2021. The allegations in the Complaint that are under the jurisdiction of NDE to investigate through the special education complaint process raise the following issues, as further clarified in the course of the investigation, commencing April 7, 2020:

### **Issue One:**

Whether CCSD complied with the IDEA and NAC, Chapter 388, with regard to implementing the student's IEP(s) in effect in the 2019/2020 school year after school closure due to COVID-19 from April 7, 2020 to the end of the school year and in the 2020/2021 school year up to the date the student's IEP was revised on October 9, 2020, specifically with regard to providing the student:

- a. The minutes of direct specially designed instruction and related services; and
- b. 2020 ESY services.

### **Issue Two:**

Whether CCSD complied with the IDEA and the NAC, Chapter 388, with respect to the Parent's participation in the student's October 9, 2020 IEP meeting, specifically with regard to considering the Parent's request for alternatives to, or accommodations for, the provision of distance education.

In the April 14, 2021 issue letter to CCSD, NDE requested additional documents and information in order to investigate the State Complaint. CCSD was notified in that same correspondence that if CCSD disputed the allegations of noncompliance in the Complaint, the submitted documents and information must include a denial of the alleged noncompliance; a brief statement of the factual basis for the denial; and specifically reference the documentation provided to NDE that factually supported the denial and that a failure to do so by April 30, 2021 or an extended timeline authorized by NDE, would be considered a concession of noncompliance for purposes of this State Complaint. CCSD did timely respond and dispute the allegations of noncompliance in the Complaint in their entirety and specifically referenced the indexed and well-organized documents relevant to that denial.

The State Complaint, CCSD's denial of all claims, and all documents submitted by the CCSD in response to the issues in the Complaint were reviewed and considered in their entirety in the investigation of this Complaint. The Findings of Fact cite the source of the information determined necessary to resolve the issues in this Complaint and the original source document, where available, was relied upon.

## FINDINGS OF FACT

### General

1. The student is a student with a disability eligible for special education under the eligibility categories of: Multiple Impairment (primary) and Autism Spectrum Disorder (secondary) enrolled in the CCSD for the 2019/2020 and 2020/2021 school years. The student requires one-to-one assistance for safety and support throughout the school day, including hand-over-hand assistance when completing activities. The student's placement in the 2019/2020 and 2020/2021 school years was in a self-contained classroom. (IEPs)
2. The last day of school for the 2019/2020 school year was May 20, 2020. There were 27 school days from April 7, 2020 to May 20, 2020. ESY in the 2019/2020 school year was from June 24, 2020 to July 29, 2020, approximately 25 school days. (CSSD School Calendars, CCSD Website)
3. The first day of school for the 2020/2021 school year began August 24, 2020. There were 33 school days from August 24, 2020 through October 8, 2020. (CSSD School Calendars)
4. The 2020/2021 ESY is scheduled to begin for students on July 6, 2021 and end on July 27, 2021. It will be five days a week in-person and the duration for the student's grade level will be for a period of six hours. The student's March 19, 2021 IEP includes ESY services. (CSSD School Calendar, CCSD Website, March 19, 2021 IEP)
5. On March 15, 2020, Governor Sisolak announced that due to the COVID-19 pandemic school buildings statewide would be closed to students beginning March 16, 2020, at least through April 6, 2020. This Emergency Directive was extended several times and on April 28, 2020, the Governor ordered all kindergarten through 12th grade school buildings to remain closed for onsite education for the remainder of the 2019-2020 school year. On March 20, 2020, the CCSD Superintendent released guidelines for distance education and on-line web education was available for all students on March 23, 2020. (March 15, 2020 Declaration of Emergency Directive; Declaration of Emergency Directive 005; Declaration of Emergency Directive 014, Executive Order 015; CCSD Website)
6. On June 9, 2020, Governor Sisolak issued Declaration of Emergency Directive 022 requiring school districts and charter schools to develop plans for reopening school buildings, providing instruction, and related activities for the 2020/2021 school year based on the June 9, 2020 framework issued by NDE, Nevada's Path Forward: A Framework for a Safe, Efficient, and Equitable Return to School Buildings, and subsequent NDE guidance issued June 24, 2020. Recognizing that the circumstances regarding COVID-19 were fluid and social distancing protocols and other health and safety requirements were subject to change, the reopening plans were required to contemplate instruction offered through: in-person instruction following social distancing protocols; distance education; or a combination of distance education and in-person instruction (hybrid learning). (Declaration of Emergency Directive 022, *Nevada's Path Forward: A Framework for a Safe, Efficient, and Equitable Return to School Buildings*; NDE June 24, 2020 Guidance)
7. Prior to the commencement of the 2020/2021 school year, CCSD submitted its reopening plan to NDE that had been approved by the CCSD Board of School Trustees: Reopening Our Schools Implementation Guide. It was the determination of the CCSD Board of School Trustees that all of CCSD schools would open for the 2020/2021 school year in a full-time distance education

instructional model with the ability to transition to hybrid learning or face-to-face learning as public health conditions changed. (CCSD Reopening Our Schools Implementation Guide, July 27, 2020)

8. Relevant to the student, commencing March 22, 2021 Grades 6, 9, and 12 were allowed to return to face-to-face instruction under the hybrid instructional model. The hybrid instructional model assigned students to cohorts with a combination of face-to-face instruction and distance education on assigned days. (CCSD Website – February 24, 2021 Press Release)
9. The 2021/2022 school year, commencing August 9, 2021, will provide full-time in-person instruction for all grades at all schools five days a week. (Families that want to stay in distance education will need to opt-in to distance learning.) (CCSD Website – May 24, 2021 Press Release)

### **IEPs**

10. Prior to school closure in the 2019/2020 school year, the student had an October 23, 2019 annual IEP that was anticipated to be in effect until October 22, 2020, but was subsequently revised January 27, 2020. The student's Parent disagreed with all or part of the student's annual October 23, 2019 annual IEP, but agreed with the components of the January 27, 2020 revised IEP. (October 23, 2019 and January 27, 2020 IEPs)
11. The student's January 27, 2020 IEP was in effect during the end of the 2019/2020 school year after school closure due to the pandemic and was in effect at the commencement of the 2020/2021 school year up to the development of the student's October 9, 2020 annual IEP. The student's January 27, 2020 IEP had 13 annual goals and the student was determined to require ESY services to address seven of the student's goals in the areas of functional communication; functional writing; social/behavioral skills; self-help; and three goals related to the student's physical needs of walking and posture. The January 27, 2020 IEP had the following specially designed instruction and related services:
  - a. Specially designed instruction in the location of the general education of 300 minutes per month of physical education skills and 500 minutes per week of self-help/gross motor/communication (lunch, elective, transitions). Specially designed instruction in the location of the self-contained class of 185 minutes per week of functional reading; 180 minutes per week of functional math; 150 minutes per week of functional writing; 250 minutes per week of functional communication; 150 minutes per week of self-help; 125 minutes per week of gross motor skills; and 150 minutes per week of behavior/social. (Equal to 1690 per week of instruction (approximately 5.5 hours a day) plus 300 minutes per month of physical education skills.)
  - b. Direct related services to the student: speech/language therapy in the location of the special education room/speech room for 30 minutes per week reduced to 15 minutes per week during ESY; physical therapy in the location of services of the school campus for 30 minutes per week and reduced to 15 minutes per week during ESY; occupational therapy in the location of special education for 30 minutes per week and reduced to 15 minutes per week during ESY; and curb to curb transportation 10 minutes per week. (January 27, 2020 IEP)
12. The statement of special education and related services in the student's January 27, 2020 IEP does not include a one-to-one assistant. However, the student's supplementary aids and services include a one-to-one adult assistance/aide (classroom staff and related services staff) daily and across all school settings and the support of hand-over-hand assistance to complete activities throughout the school campus. (January 27, 2020 IEP)

13. The student's October 9, 2020 annual IEP was in effect in the 2020/2021 school year commencing October 9, 2020 with the anticipated duration of services to October 8, 2021. After the relevant time period of this Complaint, the October 9, 2020 IEP was revised on November 20, 2020 in part, as a result of the prior State Complaint filed by the Parent. (IEPs)

#### **Distance Education -2019/2020 School Year**

14. A distance education classroom (Google Classroom) was set up for the student on March 26, 2020 after the school closure in the 2019/2020 school year. The Parent responded that the student requires one-to-one support throughout the school day and did not believe online instruction was appropriate for the student as the student requires multiple prompts to stay on task. The student's teacher responded that she understood the student really needs one-to-one support, but hoped the resources would help the student even a bit. (March 26, 2020 and April 11, 2020 Email Communications, Teacher Contact Logs)
15. The student's adaptive physical education teacher also provided the Parent exercise assignments after school closure in the 2019/2020 school year and the Parent informed the teacher that the student was active every day with swimming and walking. The teacher congratulated the Parent on the student being very active and that the swimming and walking could be done instead of the assigned exercises. The Parent responded that they would maintain the routine of the swimming/walking and provided the student's fitness log during the month of May 2020. (May 1, 2020 and May 4, 2020 Email Communications)
16. While on March 18, 2020 the student's Parent indicated the student would attend ESY that commenced June 24, 2020, the student's Parent later declined the student's participation in ESY due to the student's difficulty focusing with distant learning. (June 23, 2020 Teacher Contact Log, Support Staff Daily Report)
17. With regard to the provision of the related services in the student's IEP for the duration of the 2019/2020 school year after the closure of school buildings due to COVID-19:
  - a. After the school closure in March 2020, the student's speech/language pathologist contacted the Parent and inquired as to her interest in having the student participate in teletherapy. The Parent declined the teletherapy since the student required a lot of redirection and she did not think it would be appropriate for the student. The student's Parent again declined speech/language teletherapy at the commencement of ESY. (March 28, 2020 and June 24, 2020 Email Communications)
  - b. On March 31, 2020, the student's occupational therapist contacted the Parent and informed her of her availability via email in the event there were questions or concerns for the student or the Parent would like suggestions for activities to do at home to continue working on the student's IEP goals. (March 31, 2020 Email Communications)
  - c. On April 2, 2020, the student's physical therapist contacted the Parent to see if the Parent had any questions, concerns, or needs. The Parent of the student who is also a physical therapist, responded that there was no need for physical therapy in the school at that time because of school closure and the Parent always worked with the student at home. The physical therapist also offered ESY assistance via the current virtual model and the student's Parent responded the student would not be participating in ESY since the virtual

therapy had not worked for the student. (April 7, 2020, April 9, 2020, and April 24, 2020 Email Communications, Log Entries - Physical Therapist)

**Distance Education – Commencement of the 2020/2021 School year - October 9, 2020**

18. During distance education in the 2020/2021 school year to October 9, 2020, the student was provided reading and writing instruction targeting the student's goals on 10 occasions; math instruction targeting the student's goals on nine occasions; and instruction targeting the student's behavioral goal on nine occasions and self-help on 10 occasions from September 2, 2020 to October 7, 2020. The student's teacher and assigned one-to-one assistant were available virtually during the instructional school day to assist the student. (Goal Documentation, Confidential Status Record)
19. With regard to the provision of the related services in the student's IEP for the 2020/2021 school year:
  - a. On the first day of the 2020/2021 school year, the student's speech/language pathologist notified the Parent regarding the student's participation in speech/language teletherapy services. During the relevant time period of this Complaint, twenty minutes of direct speech/language teletherapy were provided to the student on October 7, 2020. The speech/language pathologist also attempted to provide teletherapy on September 15, 2020 and the student was not available. (SmartLogbook – SLP Service Log Report, March 28, 2020, June 24, 2020 and August 26, 2020 Email Communications)
  - b. The student's occupational therapist contacted the Parent at the commencement of the 2020/2021 school year with information on the online occupational therapy sessions and followed up multiple times in September 2020 regarding activities. During the relevant time period of the Complaint, in addition to consultation, direct one-to-one virtual occupational therapy services were provided for 40 minutes on September 8, 2020; 45 minutes on September 15, 2020; 30 minutes on September 23, 2020 and September 25, 2020; 45 minutes on September 30, 2020; and 50 minutes on October 7, 2020. The presence of an adult was necessary to assist in carrying out the virtual therapy such as prompting/positioning and an adult was present for at least part of each of these six sessions, including the presence of an outpatient occupational therapist on one occasion. (SmartLogbook -OT Service Log Report, August 24, 2020, September 4, 2020, and September 21, 2020 Email Communications)
  - c. The student's physical therapist contacted the Parent at the commencement of the 2020/2021 school year and offered online physical therapy sessions for the student. The Parent indicated the parent would contact the physical therapist if they wanted to try the online physical therapy. While no direct physical therapist services were provided by the CCSD physical therapist in the 2020/2021 school year to October 9, 2020, the physical therapist did provide or attempt to provide consultation during this time period, including offering to provide adaptive equipment. The Parent accepted two items of adaptive equipment, a Rifton chair and desk, and the physical therapist followed up after delivery regarding their effectiveness. (August 24, 2020, August 26, 2020, and September 11, 2020 Email Communications; Log Entries - Physical Therapist)
20. Despite the documented creative efforts of CCSD personnel to engage the student in virtual instruction and teletherapy, the student did not engage in the virtual instruction or teletherapy without the in-person assistance of an adult and would often leave the room during instructional sessions:

- a. Reading: The student did not engage with reading instruction without full assistance from an adult. Even when the student's at-home therapist was present to facilitate instruction, the student required maximum assistance to engage in the virtual instruction. During whole group instruction for English class, the student did not interact with the computer and did not engage with verbal or picture instructions on the screen.
- b. Written Expression: The student did not engage in any writing activity without full assistance from an adult. When the student was unassisted, the student did not show any engagement when verbally or visually prompted on an activity.
- c. Mathematics: The student did not engage in any mathematics activity without assistance from an adult. With assistance, the student was able to successfully engage in at least one activity. When the student was unassisted, the student did not show any engagement with instruction over the computer, including with verbal and visual prompts. During whole group instruction for math class, the student did not respond to instructions specifically addressed to the student or any of the group lessons.
- d. Communication: The student was not observed using the iPad for communication except when prompted by the therapist in the student's home. When unassisted, the student did not respond to any of the verbal prompts over the computer or to the picture instructions.
- e. Social/Emotional/Behavior: The Parent preferred the student be in a separate Goggle Meet breakout space during daily instruction. As a result, the student did not have many opportunities to interact socially with the student's peers and some of the behaviors that were prevalent in the school setting were not observed.
- f. Independent Living: The student was not able to perform any of the independent living skills presented to the student through the computer without full assistance from an adult. (October 9, 2020 and May 19, 2021 IEP, March 3, 2021 CCSD Email Communication, Teacher Contact Logs, CCSD Message Logs)

## **Progress**

21. Prior to school closure in March 2020, the student was making satisfactory progress toward the student's annual goals in functional communication, writing, and math and self-help. The student was making unsatisfactory progress toward the annual goals in the areas of reading and physical education, and social/behavioral skills. In the area of motor skills, the student met one of the four motor skills goals, made unsatisfactory progress on one goal and made satisfactory progress on the remaining two. All of the comments for each individual goal noted that the goal was a "work in progress." (March 6, 2020 Progress Report)
22. At the end of the 2019/2020 school year, the student's progress toward meeting the annual goals remained the same as the March 6, 2020 Progress Report. All of the comments for each individual goal noted that the goal was a "work in progress." and that from March 16, 2020 through the end of the 2019/2020 school year the student was offered or provided support via distance education because of the COVID-19 pandemic that closed all schools. (May 20, 2020 Progress Report)
23. Most of the student's goals in the October 9, 2020 IEP remained the same as the previous year's goals. The stated reason was that the student was unable to meet any of the goals "due to the closure in March of 2020 and starting the current school year off in distance education." (Confidential Status Record - October 9, 2020)
24. With regard to the 2020/2021 school year, the student's October 6, 2020 and December 18, 2020 Progress Reports reported the student made satisfactory progress toward all of the student's annual goals. However, the satisfactory rating reflected the student was "capable" to work on the goals if

the student has the assistance needed, not the student's actual progress toward the annual goals. The comment for all of the annual goals said that "Due to distance learning, [ ]<sup>2</sup> is unable to receive the full support [ ] needs to make progress on goals." (October 12, 2020 and December 18, 2020 Progress Reports, October 12, 2020 and December 18, 2020 Email Communications)

25. The student's March 13, 2021 Progress Report reported the student still was making satisfactory progress toward the annual goal. However, the comments for each of the goals said that: "During distance education, [ ] has not shown the ability to work on this goal without full assistance from an in-person adult. As such, the data collected or observed for this goal is representative of [ ]'s time with one of [ ] in-home non-CCSD therapists." (March 13, 2021 Progress Report)
26. There was no definitive data in the documentation provided in the course of the investigation to determine the total number of days that the student was provided one-to-one in-person assistance during distance education by either the student's Parent or by an in-home non-CCSD therapist during the time period of this Complaint. (Review of the Record)

### **October IEP Meeting – Parent Participation**

27. There was a significant amount of written communication between CCSD, particularly the student's special education teacher, and the Parent during the time period of this Complaint, including in advance of the October 9, 2020 IEP Team meeting. (September and October 2020 Email Communications)
28. Prior to the student's October 9, 2020 IEP Team meeting, the student's special education teacher contacted the Parent concerning new information available for consideration by the student's IEP Team and a "rough draft" of the components of the student's IEP. In addition, prior to the meeting the student's physical and occupational therapists contacted the Parent and provided the student's present levels of performance relative to the student's annual goals. The Parent acknowledged at the October 9, 2020 IEP that he/she had read through the draft IEP. (September 29, 2020, October 2, 2020, October 6, 2020 and October 8, 2020 Email Communications, Confidential Status Record – October 9, 2020)
29. The Parent did not allege a denial of the opportunity to attend the October 9, 2020 IEP meeting and participated virtually. (October 9, 2020 IEP)
30. The Parent sent a statement of educational concerns to CCSD on September 25, 2020, in advance of the October 9, 2020 IEP meeting. The Parent's primary concerns at that time were that distance education was not appropriate for the student without an in-person component and, in the absence of in-person assistance, the student did not receive benefit from distance education; and that changing some of the instruction to asynchronous minutes would further exacerbate the problem. In addition, the statement indicated:
  - a. Even if the student's IEP was implemented with fidelity, it would not provide a FAPE because it is designed in a way that makes a FAPE impossible.
  - b. CCSD was unwilling to even consider other suggestions, such as an in-person one-to-one aide or writing compensatory education into the student's IEP (for after schools resume meeting in person), "which could be predetermination."

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<sup>2</sup> Brackets denoted the deletion of personally identifiable information.



- c. The Parent wanted the discussion of compensatory education to take place once a date for the reopening of schools was announced. (September 25, 2020, October 5, 2020 Email Communications, October 9, 2020 IEP Confidential Status Record - October 9, 2020)
31. The Parent did not want their September 25, 2020 statement of concerns summarized, but rather wanted the parental concerns included verbatim in the student's IEP and requested that the statement be included in the present levels section of the student's IEP with a reference in the parent concerns section of the IEP back to the present levels section. The Parent's statement of concerns was quoted in the present levels of academic achievement and functional performance section of the student's October 9, 2020 IEP with a reference to the present levels section in the statement of parental concerns section of the IEP. (September 25, 2020 Email Communication, October 5, 2020 Email Communications, October 9, 2020 IEP Confidential Status Record - October 9, 2020)
  32. At the October 9, 2020 IEP meeting, the student's IEP Team extensively discussed the provision of the synchronous versus asynchronous minutes of special education instruction to the student and the IEP includes both synchronous and asynchronous minutes. There is documentation of the IEP Team discussing other concerns of the Parent such as their request for ESY services for the student. ESY services are included in the IEP. After the IEP meeting, CCSD provided the Parent with the IEP "with the changes and additions" discussed highlighted. (Confidential Status Record - October 9, 2020)
  33. The members of the student's IEP Team discussed and all agreed at the October 9, 2020 IEP meeting that distance education was not appropriate for the student if the student did not have an adult present to assist the student in-person. However, based on the directive of the CCSD Superintendent and School Board that all student instruction must be provided by distance education, the IEP Team told the Parent they were unable to provide such a service. (October 13, 2020 Prior Written Notice - Notice to Implement, Confidential Status Record - October 9, 2020)
  34. The Parent disagreed with the October 9, 2020 IEP because of the distance education/virtual learning and indicated that the Parent was not going to file a request for due process at that time. The student's special education teacher documented the Parent's disagreement with the October 9, 2020 IEP and indicated: "I hope [ ] can get something in the future to make up for this semester." (Confidential Status Record – October 12, 2020, October 12, 2020 Email,)

## CONCLUSIONS OF LAW

### Issue One:

Whether CCSD complied with the IDEA and NAC, Chapter 388, with regard to implementing the student's IEP(s) in effect in the 2019/2020 school year after school closure due to COVID-19 from April 7, 2020 to the end of the school year and in the 2020/2021 school year up to the date the student's IEP was revised on October 9, 2020, specifically with regard to providing the student:

- a. The minutes of direct specially designed instruction and related services; and
- b. 2020 ESY services.

COVID-19 has caused an unprecedented national health and safety crisis of enormous proportions that has impacted on-site instruction at school for all students for an extended period of time and caused inestimable stress to all involved. However, this recognition and the fact that the circumstances were caused by unavoidable external events does not alter each student with a disability's right to a FAPE, including the requirement that the provision of a FAPE necessitates that special education and related services and

supplemental aids and services are provided in conformity with an IEP. 34 C.F.R. §§300.17(d), 300.101; NAC §388.281(6)(e). (*Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, (March 21, 2020); *COVID-19 Questions & Answers: Implementation of IDEA Part B Provision of Services*, (OSEP September 28, 2020); NDE March 2020 Guidance<sup>3</sup> - *COVID-19 and Students with Disabilities*; NDE November 10, 2020 Guidance - *COVID-19 and Students with Disabilities*)<sup>4</sup>

On March 15, 2020, Governor Sisolak announced that due to the COVID-19 pandemic school buildings statewide would be closed to students beginning March 16, 2020, at least through April 6, 2020. This Emergency Directive was extended several times and on April 28, 2020, the Governor ordered all kindergarten through 12th grade school buildings to remain closed for onsite education for the remainder of the 2019/2020 school year. (FOF #5)

CCSD opened all CCSD schools for the 2020/2021 school year in a full-time distance education instructional model with the ability to transition to hybrid learning or face-to-face learning as public health conditions changed. (FOF #7) Relevant to the student, commencing March 22, 2021, Grades 6, 9, and 12 were allowed to return to face-to-face instruction under a hybrid instructional model. The hybrid instructional model assigned students to cohorts with a combination of face-to-face instruction and distance education on assigned days. (FOF #8) The 2021/2022 school year, commencing August 9, 2021, will provide full-time in-person instruction for all grades at all schools five days a week. (FOF #9)

IEPs are binding under the IDEA and a school is obligated to provide services "in conformity with" student's IEPs. *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884 (9th Cir. <sup>5</sup> 1995); *Van Duyn v. Baker School Dist.*, 502 F. 3d 811 (9th Cir. 2007); 34 C.F.R. §§300.17(d), 300.101; NAC §388.281(6)(e). Accordingly, notwithstanding the health and safety concerns that caused school building closures for all students in CCSD and the inability to provide in-person instruction in the 2019/2020 and 2020/2021 school years during the time period of this Complaint, CCSD was not relieved of the obligation to provide FAPE to this student under the IDEA and Nevada law and regulations, even if by alternate methods of delivery. (*COVID-19 Questions & Answers: Implementation of IDEA Part B Provision of Services*, (OSEP September 28, 2020 Memorandum, NDE November 10, 2020 *COVID-19 and Students with Disabilities*)

Does the fact that the closure of school buildings was systemwide and affected all students' access to in-person instruction, diminish the impact of a failure to provide the services in a student's IEP? Addressing a claim for "stay put" under the IDEA, 34 C.F.R. §300.518, in the context of the State of Hawaii's systemwide furloughs, the Ninth Circuit Court of Appeals determined: "When Congress enacted the IDEA, Congress did not intend for the IDEA to apply to system wide administrative decisions. Hawaii's furloughs affect all public schools and all students, disabled and non-disabled alike. An across the board reduction of school days such as the one here does not conflict with Congress's intent of protecting disabled children from being singled out. In comparison to cases in which a child is singled out in relation to her peers, the furlough days do not remove the plaintiffs from the regular classroom setting any more than they do the other children. Disabled children are not singled out for furlough days." The Court clarified, however, that

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<sup>3</sup> Policy rulings by the United States Department of Education or NDE interpreting IDEA are informal guidance only and are merely persuasive authority. It should be noted that although courts are not bound by agency interpretations of statutes and regulations, they generally give them deferential consideration.

<sup>4</sup> The OSEP memoranda cited in this Report are publicly available at: <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>

See also: <https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/>

NDE Guidance cited in this Report is available at: [http://www.doe.nv.gov/home/COVID\\_Resources/](http://www.doe.nv.gov/home/COVID_Resources/)

<sup>5</sup> The State of Nevada is in the United States Court of Appeals, Ninth Circuit.

the conclusion did not “. . . leave the parents of disabled children with no means of redress. N.D.'s claim is more properly characterized as a "material failure to implement the IEP." (*Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2007)) A school district's failure to provide the number of minutes and type of instruction guaranteed in an IEP could support a claim of material failure to implement an IEP.” *N.D. v. Hawaii Dept. of Education*, (9th Cir. 2010) 600 F.3d 1104.<sup>6</sup>

Likewise, in this case, the delivery of the student’s special education and related services and supplemental aides and services through distance education in the face of COVID-19, rather than an in-person setting, was caused by a systemwide determination. (FOFs #5-7) The focus in this State Complaint is to determine whether CCSD provided the services determined by the student's IEP Team as necessary to provide the student educational benefit and if not, whether a student-specific corrective action is required to address the needs of the student. 34 C.F.R. §300.151(b).

The student’s January 27, 2020 IEP was in effect during the end of the 2019/2020 school year after school closure due to the pandemic and at the commencement of the 2020/2021 school year up to the development of the student’s October 9, 2020 annual IEP. (FOF #11) The student’s Parent agreed with the components of this IEP. (FOF #10)

The student’s January 27, 2020 IEP had 13 annual goals and the student was determined to require ESY services to address seven of the student’s goals in the areas of functional communication; functional writing; social/behavioral skills; self-help; and three goals related to the student’s physical needs of walking and posture. Specially designed instruction was to be provided in the areas of physical education and self-help/gross motor/communication in the general education setting and functional reading, math, writing and communication, self-help, gross motor skills and behavior/social in the self-contained class setting. In total, the student was to be provided 1690 minutes per week of instruction (338 minutes a day) and 300 minutes per month of physical education skill instruction. (FOF #11)

The January 27, 2020 IEP also included the following direct related services to the student: speech/language therapy in the location of the special education room/speech room for 30 minutes per week reduced to 15 minutes per week during ESY; physical therapy in the location of services of the school campus for 30 minutes per week and reduced to 15 minutes per week during ESY; occupational therapy in the location of special education for 30 minutes per week and reduced to 15 minutes per week during ESY; and curb to curb transportation 10 minutes per week. (FOF #11) (While the Complaint included all related services, given the closure of school buildings, the student did not require transportation to and from school during the time period of this Complaint and the Parent did not provide any contrary allegation, supporting facts, including with regard to any impact on the student.)

The statement of special education and related services in the student’s January 27, 2020 IEP does not include a one-to-one assistant. However, the student’s supplementary aids and services include a one-to-one adult assistance/aide (classroom staff and related services staff) daily and across all school settings and the support of hand-over-hand assistance to complete activities throughout the school campus. (FOF #12) While CCSD did not provide an in-person one-to-one assistant during the time period of this Complaint,

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<sup>6</sup> The United States District Court, District of Nevada, recently cited the *N.D.* case in an order denying a Motion for Preliminary Injunction based on the CCSD’s decision to reopen public schools only “in a digital format.”: “It is true that the scenarios are not perfectly analogous: the length of the student’s deprivation of services is much longer here. . . . Hawaii presents a clearly applicable point of law to CCSD’s current policy: the existing system-wide changes apply to both “disabled and nondisabled children alike.” *Id.* at 1108. In fact, the school district’s response to a pandemic is arguably greater reason for the Ninth Circuit’s rule than a school district’s response to financial difficulties. *C.M., individually and as parent to D.M., et al., v. Jesus Jara, et al.*, Case No. 2:20-CV-1562 JCM -BNW, (U.S.D.C. NV (November 19, 2020).

the student was, on some occasions, provided in-person one-to-one assistance during distance education by either the student's Parent or an in-home non-CCSD therapist. (FOFs #17, #19-20)

The Parent framed the allegation in this Complaint as the failure of CCSD to provide the student 2020 ESY services and the minutes of direct instruction and related services in the student's IEP. It was, therefore, puzzling at the commencement of this investigation to find that the Parent declined the provision of all of the available distance education and teletherapy for the student in the 2019/2020 school year after school closure, including ESY 2020 services, and, at least, the available direct physical teletherapy in the 2020/2021 school year. (FOFs #14-17, #19) However, in the course of the investigation it became apparent that the essence of this Complaint was not CCSD's fidelity to the provision of the designated minutes of the special education and related services in the student's IEP. Rather, given the student's supplementary aides and services required the student be provided a one-to-one adult assistance/aide daily and across all school settings and hand-over-hand assistance (FOF #12), it was about the appropriateness of those available and/or provided minutes of special education and related services in the absence of permitted in-person assistance during the COVID-19 pandemic.

It is important to recognize that after school closure in the 2019/2020 school year, CCSD did make repeated efforts to provide the student distance education and teletherapy. (FOFs #14-17) In the 2020/2021 school year, CCSD provided the student a one-to-one assistant through distance education (FOF #18) and CCSD school personnel persistently employed varied and creative efforts to engage the student in the available virtual instruction and teletherapy in an effort to meet the student's needs to the extent possible within the confines of the mandatory delivery method of instruction, distance education. (FOF #20) However: "If State and local decisions require schools to limit or not provide in-person instruction due to health and safety concerns, SEAs, LEAs, and IEP Teams are not relieved of their obligation to provide FAPE to each child with a disability under IDEA." (COVID-19 *Questions & Answers: Implementation of IDEA Part B Provision of Services*, (OSEP September 28, 2020), cited in NDE November 10, 2020 Guidance)

In this case, the record is replete with the agreement of CCSD personnel and the Parent that the student requires one-to-one assistance throughout the school day and that distance education was not appropriate for the student unless the student had an adult present to assist the student in-person. (FOFs #14, #20-25, #33) As of October 9, 2020, the student was unable to meet any of the student's IEP goals "due to the closure in March of 2020 and starting the current school year off in distance education." (FOFs #23-25, #33)

As such, notwithstanding the CCSD-wide mandatory delivery method of instruction and CCSD's efforts to implement the student's distance education and teletherapy, CCSD was not relieved of the obligation to provide services "in conformity with" the student's IEP, specifically the in-person assistance required by the student's IEP to access and meaningfully benefit from the minutes of the student's special education and related services.

*Therefore, from April 7, 2020 to the end of the school year, including ESY 2020, and in the 2020/2021 school year up to the date the student's IEP was revised on October 9, 2020, CCSD failed to comply with the IDEA and NAC, Chapter 388, with regard to implementing the minutes of direct in-person specially designed instruction and the related services of speech/language therapy, occupational therapy, and physical therapy in the student's IEP after school closure due to COVID-19.*

## **Issue Two:**

Whether CCSD complied with the IDEA and the NAC, Chapter 388, with respect to the Parent's participation in the student's October 9, 2020 IEP meeting, specifically with regard to considering

the Parent's request for alternatives to, or accommodations for, the provision of distance education.

Pursuant to the IDEA, 34 C.F.R. §§300.501(b) 322(a)(2), and NAC §388.302(1), the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. The Parent does not allege a denial of the opportunity to participate<sup>7</sup> in the scheduled IEP meeting and, in fact, was an active participant in the October 9, 2020 IEP meeting. This Complaint is about the content of the student's October 9, 2020 IEP. The Parent asserts that CCSD was unwilling to even consider other suggestions, such as an in-person one-to-one aide or writing compensatory education into the student's IEP (for after schools resume meeting in person), "which could be predetermination."

With regard to the content of an IEP, the determination of the specific special education and related services and supplementary aids and services a student requires must be made on an individual basis by the IEP Team. NAC §388.284(1)(c); 34 C.F.R. §300.320(a)(4). Further, in accordance with the IDEA, 34 C.F.R. 300.324(a)(i), the IEP Team is required to consider the concerns of the parent for enhancing the education of the student.

The October 9, 2020 IEP Team meeting took place when the timeline for resumption of in-person instruction to students was unknown and the systemwide COVID-19 health and safety directive of the CCSD required instruction to all students with and without disabilities to be provided through distance education. (FOFs #7-8) The student's IEP Team did consider the concerns of the Parent at the October 9, 2020 IEP meeting as demonstrated by the inclusion of the Parent's concerns and proposed alternatives verbatim in the student's IEP and the IEP Team's discussion and even ultimate agreement with the Parent's position that distance education was not appropriate for the student without an adult present in-person to assist the student. (FOF #30-31, #33) (Since the Parent's request for a discussion of compensatory education was tied to when CCSD schools reopened (FOF #30) and no date was known at the time of the October 9, 2020 IEP Team meeting (FOF #9), the absence of documentation on the discussion of this prospective action does not alter this conclusion.)

The student's IEP Team did not fail to consider the concerns of the Parent. This is a case where the Parent disagreed with the outcome of the October 9, 2020 IEP Team meeting with regard to CCSD's refusal to provide the student in-person instruction since it was contrary to the CCSD COVID-19 directive in effect at the time. (FOF #33)

Since the Parent alluded to predetermination due to the IEP Team's reliance on the CCSD COVID-19 directive with regard to in-person instruction, rather than basing its decision on the student's unique needs (34 C.F.R. §300.39), some further discussion is warranted. "A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement. *W.G. v. Bd. of Tr. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir.1992) . . ."

As previously discussed, the closure of school buildings in CCSD during this pandemic was systemwide and affected all students' access to in-person instruction. As such, any "predetermination" of the sole instructional model of distance education was a systemwide administrative determination for all students with and without disabilities. As discussed previously, neither the IDEA nor the NRS/NAC Chapter 388 specifically address a situation in which elementary and secondary schools are administratively closed for an extended period of time because of exceptional external circumstances, such as the COVID 19 pandemic.

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<sup>7</sup> It is worthy of note that there is abundant documentation in this case of CCSD's ongoing and frequent communication with the Parent during the relevant time period of this investigation and, short of the requested provision of in-person assistance during the implementation of the full-time distance education instructional model, CCSD was responsive to the day-to-day requests of the Parent. (FOF #27)

The previously cited Ninth Circuit Court of Appeal’s decision, *N.D. v. Hawaii Dept. of Education*, made it clear that “[W]hen Congress enacted the IDEA, Congress did not intend for the IDEA to apply to system wide administrative decisions.”

Similarly, the closure of CCSD schools and the administrative decision to offer distance learning during the health and safety crisis of COVID-19 was a systemwide administrative determination that impacted both students with and without disabilities. (FOFs #5-7) The question posed by this issue is whether the right of parents of a student with disabilities to be afforded an opportunity to participate in meetings with respect to the educational placement of their child and the provision of FAPE to their child provides additional rights to parents of students with disabilities, notwithstanding this Ninth Circuit Court of Appeals decision on systemwide administrative decisions. 34 C.F.R. §300.501; NAC §388.302.

It is determined that the provisions in the IDEA, 34 C.F.R. §§300.116, 300.322, and 300.501, and NAC §388.302 with regard to a parent(s) right to participate in meetings with respect to the identification, evaluation, and educational placement of their child; and the provision of FAPE to their child do not alter the conclusion that the IDEA was not intended to address systemwide determinations. Consistently, the significant cases in the Ninth Circuit Court of Appeals on predetermination pointedly address fact-specific situations where the alleged predetermination involved an educational agency independently making its determination prior to the individual student’s IEP or placement meeting, resulting in the student being provided or placed in a preexisting, predetermined program. (*K.D. v. Department of Education, State of Hawaii*, 665 F.3d 1110, 58 IDELR 2 (9th Circuit 2011), *H.B. v. Las Virgenes Unified School District 239*, F. App'x 342, 48 IDELR 31, (9th Cir. 2007) Unpublished., *Deal ex rel Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109, 392 F.3d 840 (6th Cir. 2004)) That is not the situation in this case.

*Therefore, CCSD complied with the IDEA and the NAC, Chapter 388, with respect to the Parent’s participation in the student’s October 9, 2020 IEP meeting, specifically with regard to considering the Parent’s request for alternatives to, or accommodations for, the provision of distance education.*

## **CORRECTIVE ACTION**

A finding of noncompliance through the state complaint process for the failure of a local educational agency to implement a student’s IEP does not end the inquiry. The next inquiry is whether a student-specific corrective action is required to address the needs of the student. 34 C.F.R. §300.151(b). This is an individualized determination. Whether the failure to provide the services in a student’s IEP is a minor failure or a material failure (*Van Duyn*) is relevant to the determination whether a student-specific corrective action is required to address the needs of the student. 34 C.F.R. §300.151(b).

“A material failure occurs when the services a school provides to a disabled child fall significantly short of the services required by the child's IEP.” (*Van Duyn*) In this case, CCSD and the Parent agree that the student was unable to meet the student’s annual IEP goals during distance education without the presence of in-person one-to-one assistance.<sup>8</sup> (FOFs #20, #23-25, 34) Therefore, notwithstanding CCSD’s inability to implement the in-person assistance in the student’s IEP was caused by health and safety measures due to an unprecedented national emergency beyond the control of CCSD, failure to implement the student’s

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<sup>8</sup> Given the acknowledgment of CCSD that the student’s 2020/2021 school year Progress Reports do not reflect the student’s actual progress toward the annual goals in the IEP during the relevant time period of this Complaint, but rather only that the student was capable of achieving the goals if the student had the assistance needed, the documented comments of school personnel regarding the student’s lack of progress when adult assistance was unavailable during distance education were given greater weight than the satisfactory ratings in the Progress Reports. (FOFs #23-26)

IEP in this regard fell significantly short of the services required and was a material failure warranting corrective action.

Therefore, CCSD is required to take student-specific corrective action to address the failure to implement the student's IEP in this regard. In accordance with NRS §385.175(6), NDE requests a plan of corrective action (CAP) from CCSD within 14 CCSD business days of the receipt of this Report. The CAP must be approved by NDE prior to implementation.

NDE encourages the Parent and CCSD to work together to develop a student-specific corrective action to enable the student to recoup any lost skills and expected progress that resulted from the failure to implement the student's IEP during the period of distance education. **In the event the CCSD and the Parent do not agree otherwise in writing**, the CAP must provide for the following student-specific directed action, including the timeline within which it will be implemented.

### **Two-Part Remedy**

Compensatory education is designed to provide the educational benefits that likely would have accrued to the student from special education services if they had been supplied in the first place. This is a fact-specific determination. (*Parents of Student W. ex rel. Student W. v. Puyallup School Dist. No. 3*, 31 F.3d 1489; 21 IDELR 723 (9th Cir. 1994); *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005)). In compensatory education awards, there is no obligation to provide a day-for-day compensation for time missed. *Parents of Student W. v. Puyallup*. This approach for determining compensatory education is considered 'qualitative' in nature, rather than strictly 'quantitative' and requires that a compensatory education award be made not merely by establishing the amount of services which were not provided, but that an analysis be done to provide the educational benefits that likely would have accrued if the required special education had been provided in the first place.

In this case, except with regard to the provision of some of the related services, none of the documentation provided by the Parent or CCSD in the course of this investigation provided definitive data on the total number of days that the student was provided one-to-one in-person assistance by either the student's Parent or by an in-home non-CCSD therapist during distance education and was able to engage in the provided minutes of instruction. (FOFs #20, #26 #31) (Even though this one-to-one assistance was not provided by CCSD, it is relevant to the qualitative analysis relative to educational benefit.) Another complicating factor is that prior to school closure in the 2019/2020 school year, the student's progress toward the annual goals was unsatisfactory in some regards and was still a "work in progress." (FOF #21) As such, there is insufficient qualitative data to ascertain the educational benefits that likely would have accrued to the student had the minutes of special education and related services been provided with in-person one-to-one assistance. Therefore, a qualitative determination with regard to the appropriate amount of compensatory education for this student cannot be done with fidelity.

Upon the student's return to full-time in-person instruction in the 2021/2022 school year, data can be collected to ascertain with a higher degree of accuracy whether the student has regressed and/or failed to make the expected progress toward the student's IEP goals and to what degree the student is demonstrating the ability to recoup any lost skills and/or expected progress. So, this student-directed remedy is a two-part remedy:

1. The provision of some in-person compensatory education/services for the student based on the limited data available at this time. This compensatory education is designed to support the student's progress toward the annual goals in the student's IEP and, if regression has occurred, to support the student's recoupment of any lost skills/progress prior to, and after the commencement of, the 2021/2022 school year. These compensatory education/services must provide a minimum of:

- a. 119 hours of in-person specially designed instruction.<sup>9</sup>
- b. 1 hour of in-person occupational therapy; and
- c. 1.5 hours of in-person speech/language therapy.<sup>10</sup>

Even if CCSD and the Parent are unable to agree on an alternative to the student-specific corrective action to remedy the violations found in this Complaint, CCSD must consult with the student's Parent on the appropriate means to provide this ordered compensatory education to meet the student's educational needs and must consider any concerns of the Parent(s) and/or proposals. The compensatory education/services in this CAP must be in the goal areas of the student's IEP in effect at the time of implementation and must be in addition to the services in the student's IEP.

2. A strategy to be implemented upon the student's full-time return to in-person instruction in the 2021/2022 school year that includes:
  - a. The collection of data to determine whether, and to what degree, the student regressed and/or failed to make the expected progress toward the student's IEP goals and, if so, whether the student is demonstrating the ability to recoup any lost skills and expected progress; and,
  - b. Thereafter, convening the student's IEP Team, including the student's Parent, to review the data and determine whether compensatory education or other remedy, in addition to the above ordered compensatory education/services, is appropriate to provide the student the educational benefits that the student would have likely received, but for the disruption to in-person instruction/related services at school.<sup>11</sup>

Documentation of the completion of the two-part CAP must be provided to NDE within 14 days of its completion.

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<sup>9</sup>In the absence of definitive data on the degree to which the student regressed or failed to make expected progress, this ordered compensatory education is based on approximately a quarter of the number of minutes of special education in the student's January 27, 2020 IEP for the 27 non-ESY school days from April 7, 2020 to May 20, 2020; 25 days of ESY; and 33 school days from August 24, 2020 through October 8, 2020 (85 days). (FOFs #2-4, #11)

<sup>10</sup> In the absence of definitive data on the degree to which the student regressed or failed to make expected progress, the number of minutes of the related services of occupational therapy and speech/language therapy over 12 weeks provide a reference point for this ordered compensatory education. This amount considered the 195 minutes of occupational therapy provided with a person there for all or part of the sessions during the time period of this Complaint. In the absence of data regarding the student's progress, physical therapy was not included in the compensatory education given the student's Parent, a physical therapist, declined teletherapy and provided the student physical therapy. (FOFs #17, #19)

<sup>11</sup>Nothing in this CAP shall be interpreted to constitute a limitation on the Parent's or CCSD's rights under the IDEA or NAC to access the alternative dispute resolution processes if the Parent and CCSD do not agree on the determination of the student's IEP Team whether the student regressed, lost skills or failed to make expected progress during the provision of distance learning and whether the student recouped any thereafter; or whether additional compensatory education or other remedy is appropriate for that reason.