

**COMPLAINT INVESTIGATION
CLARK COUNTY SCHOOL DISTRICT
(#CL091416)
Report Issued on November 2, 2016**

INTRODUCTION

On September 14, 2016, the Nevada Superintendent of Public Instruction received a Complaint from a Parent alleging violations in the special education program of a student with a disability attending school in the Clark County School District (CCSD). The Complainant alleged violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq.; 34 C.F.R. Part 300, and Chapter 388 of the Nevada Revised Statutes (NRS) and the Nevada Administrative Code (NAC), specifically with regard to the removal of the student from the school the student would normally attend without the participation of the Parent and other persons knowledgeable about the student.

All documents submitted by the Parent and the CCSD relevant to the issues in the Complaint were reviewed in their entirety in this investigation. The Complaint Investigation Team also collected and reviewed additional information as needed during the investigation. The Findings of Fact cite the source of the information determined necessary to resolve the issues in this Complaint.

COMPLAINT ISSUES

The allegation in the Complaint under the jurisdiction of the Nevada Department of Education (NDE) to investigate through the special education complaint process raises the following issue for investigation:

Issue: Whether the CCSD complied with the IDEA and the NAC, Chapter 388, with regard to the student's removal from the home-zoned school to another school in the 2016/2017 school year, specifically:

- a) **The determination of the student's removal from the home-zoned school, if a change of placement, being made by a group of persons, including the student's Parent; and**
- b). **The placement of the student in a school other than the one the student would normally attend.**

FINDINGS OF FACT (FOF)

1. The student is a student with the eligibility category of Autism Spectrum Disorder who attended the same school from August 2014 until the commencement of the 2016/2017 school year on August 29, 2016. For the 2016/2017 school year, the student was assigned to a new school. (July 18, 2016 Notification of School Assignment, 2016/2017 School Calendar)

2. The student was assigned to a self-contained Autism Program in 2015/2016 school year in a school 3.7 miles from the student's residence (prior school). The student's residence is in a shared attendance zone with two schools. Although the student's Individualized Education Program (IEP) indicates that the prior school is not the zoned school, it is one of the named schools in the shared attendance zone and the Parent and the CCSD agree it was the zoned school for the student. (2015/2016 IEPs, Google Maps, Complaint, CCSD Zoning Search)
3. The student was assigned to another school (new school) with a self-contained Autism Program in the 2016/2017 school year. The new school is located 1.5 miles from the student's residence, but is not in the student's attendance zone. (Google Maps, Complaint, CCSD Response, CCSD Zoning Search)
4. The student had a December 10, 2015 annual IEP and a February 18, 2016 IEP in effect at the commencement of the 2016/2017 school year. The February 18, 2016 IEP meeting was for the purpose of reviewing the results of an Assistive Technology assessment and the February 18, 2016 IEP revised the student's December 10, 2015 IEP in that regard. (IEPs, Meeting Notice)
5. The student's IEPs in effect at the commencement of the 2016/2017 school year required the student's placement in a self-contained program with 22% of the time in the regular education environment. The Parent participated in the development of the student's IEPs, including the placement determination, and agreed with the IEPs. (IEPs, Prior Written Notices)
6. The appropriateness of the student's placement in an Autism Program in a self-contained class is undisputed. In addition, the Parent did not allege in this Complaint that the new school was unable to implement the student's IEP or that the placement on the continuum, a special class, was inconsistent with the student's IEP. (Complaint, Parent Response, Review of Records)
7. The Parent's concern with the assignment of the student to the new school was that the staff at the prior school had been working with the student for two years and was familiar with the student's pronunciation and non-verbal cues and that the student would not have to start all over in the new school and lose the progress made over the last two years. The student made some significant progress on the student's IEP goals at the prior school by the end of the 2015/2016 school year. (Complaint, June 2, 2015 Progress Report)
8. The student has self-injurious behavior with tantrums. The Parent asserts that the student's placement in the new school has had a harmful effect on the quality of the services the student needs. (IEP, Parent Chronology)
9. On at least September 15, 16 and 21, 2016, the student had a tantrum at the new school upon getting off the school bus. The school asked the Parent to pick the student up. The Parent requested an IEP meeting to discuss the Parent's concerns with the student being sent home. (Parent Chronology)
10. On or about September 15, 2016, after the assignment of the student to the new school, a private Board Certified Behavior Analyst who provides Applied Behavior Analysis

therapy to the student expressed concern with the change in the student's school environment since the student thrives on consistency, routine and understanding expectations. The Analyst indicated that consistency was crucial for the student's therapy progress, including safety. (September 15, 2016 Letter from a Board Certified Behavior Analyst)

11. The CCSD Autism Programs have a class size of six in a class or up to eight with an aide present, per period, and a case load of 12. (CCSD Autism Programs)
12. While the CCSD provided policies and procedures regarding school assignments, the CCSD was asked to provide documentation on two occasions on the determination of the removal of this student from the home zoned school for the 2016/2017 school year, including who and how it was decided, and did not provide the requested documentation. As such, the Complaint Investigation Team relied on the Parent's statement of facts in this regard. (CCSD Response, Complaint, Parent Responses)
13. The student's assignment to the new school was due to another student moving into the CCSD in December 2015 who required the school program and lived closer to the prior school than the student by .2 of a mile. With the addition of the new student, the self-contained program was at the class size capacity of eight students and retaining the student in the school would cause the class size to expand to nine students. The only explanation provided to the Parent on the displacement of the student was the mileage differential. (Complaint, August 19, 2016 Letter from the Principal to the Parent, Parent Chronology)
14. The Parent actively opposed the assignment of the student to the new school prior to and after the commencement of the school year. The Parent was provided information from the CCSD about due process hearings in August 2016 in response to communications with the CCSD about the Parent's concerns. The Parent later filed a Public Concern with the CCSD. (The Public Concern process is a CCSD process that allows for a formal investigation of an issue and provides the person filing the concern with a written response.) The written response to the Parent on the student's assignment to a new school and request to seek an exception to class size was: "Student placements in specialized programs are completed in accordance with IEP's and follow state and federal law, as well as local policies and regulations." The Parent's request to expand the class size in the prior school to allow the student to remain was denied. (Parent Chronology, CCSD Website)

CCSD Policies: School Assignment

15. "Not all schools have self-contained programs. Case Management works to place students in the closest program to the student's home and monitors the number of students in each self-contained program based on case load and class size according to the Nevada Administrative Code (NAC)." (CCSD website-Case Management Department)
16. For those students who require a self-contained program, the CCSD's Case Management Office notifies parents of the assignment of a student to a particular

classroom or school. (CCSD website-Case Management Office, CCSD Response, Notification to the Parent)

17. "Assigned schools are determined by program location, student address and available seats within the program. When one program reaches capacity, the next closest school to the student's home address is selected." (CCSD Case Management Procedures, School Age Specialized Placement Office Procedures)

CONCLUSION OF LAW

A. Change of Placement?

In order to resolve this issue, it is necessary to determine whether the reassignment of the student to a new school constituted a change in placement or a change in location. This is a legally significant distinction in that a change in placement must be determined by a group of persons, including the parents of the student and other persons who are knowledgeable about the student, the meaning of the evaluation data and the placement options. Further, any change in the placement of a student with a disability must be based upon the student's current IEP; the initial evaluation or most recent reevaluation of the student, as applicable; and information relating to the current educational performance of the student. (NAC §§388.245(6), 388.255; 34 C.F.R. §300.116)

"Historically, we have referred to "placement" as points along the continuum of placement options available for a child with a disability and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement." (Vol. 71 Fed. Reg. pg. 46588 (August 14, 2006))

Citing to other Circuit Court of Appeals, the Ninth Circuit Court of Appeals has also defined "educational placement" under the IDEA. "Based on Supreme Court case law, Congress's express intent in the statute, the agency's implementing regulations, and sister circuits' decisions, we hold that "educational placement" means the general educational program of the student. More specifically we conclude that under the IDEA a change in educational placement relates to whether the student is moved from one type of program -- i.e., regular class -- to another type -- i.e., home instruction." (*N.D. et al. v. State of Hawaii Department of Education*, 600 F.3d 1104; 54 IDELR 111 (9th Cir. 2010); See also *Doe v. Maher*, EHLR 557:353 (9th Cir. 1986))

Upon consideration of the foregoing authority, "educational placement" as used in the IDEA, 34 C.F.R. §300.116, means the general educational program of the student, that is, the type of the program along the continuum of placement options available for a student with a disability pursuant to 34 C.F.R. §300.115, such as regular class, home instruction, or special school. In this case, the determination of the student's placement in a self-contained program with 22%

participation in the general education classroom was made by the student's IEP Team, including the Parent and the Parent agreed with the determination. (FOF #5)

The student's placement in the prior and new school is in a self-contained classroom, an Autism Program, with participation in the general education classroom. (FOFs #2, #3, #5) As such, the student was not moved from one type of program to another; the standard previously cited in *N.D. et al. v. State of Hawaii Department of Education*. The appropriateness of the student's placement in the Autism Program in a self-contained class is undisputed and, importantly, the Parent did not allege that the Autism Program in the new school was inconsistent with the student's IEP or unable to implement the student's IEP at the time of the new assignment. (FOF #6)

Therefore, the change in the assignment of the student from the self-contained Autism Program in the prior school to the self-contained Autism Program in the new school was not a change of placement, but rather a change in location. As such, the change of location was allowable as a matter of administrative discretion and did not require a placement team pursuant to the IDEA, 34 C.F.R. §300.116, and the NAC §388.245(6). The fact that the Parent disagreed with the CCSD's administrative determination does not diminish the CCSD's administrative flexibility to make the location assignment.

B. Neighborhood School

In accordance with NAC §388.245(1) and (6) and the IDEA, 34 C.F.R. §300.116(b)(3) and (c), a student must be placed in the school that the student would normally attend if possible, or in the school closest to the student's home which is capable of providing the services required by the student's IEP. As such, while public agencies are strongly encouraged to place a student with a disability in the student's neighborhood school, there is no requirement that modifications be made to a student's neighborhood school to enable the student to attend where the student is otherwise provided a free appropriate public education. (Federal Register / Vol. 71, No. 156 / Monday, August 14, 2006 / Rules and Regulations, Page 46588; *Schuldt v. Mankato Independent School District*, 937 F.2d 1357; 18 IDELR 16 (8th Cir. 1991))

In addition to the requirements in the IDEA, the State of Nevada has specific class size requirements for students with disabilities in NAC §388.150(2) and (3). Therefore, the CCSD had to adhere to the placement requirements in the IDEA and the NAC, Chapter 388, as well as the class size restrictions.

Since not all schools have self-contained programs, the CCSD's Case Management Department facilitates the placement of special education students who require a self-contained program. (FOFs #15, #16) The CCSD assignment policies provide: "Assigned schools are determined by program location, student address and available seats within the program. When one program reaches capacity, the next closest school to the student's home address is selected." (FOF #17)

The CCSD's practice of monitoring and adhering to the availability of space in the administrative assignment of a location based on case load and class size (FOF #15) facilitates its compliance with the case load and class size requirements in the NAC §388.150. Neither the IDEA nor the NAC preclude consideration of class size in the selection of school assignments.

The CCSD's Autism Programs have a class size of six in a class or up to eight with an aide

present, per period, and a case load of 12. (FOF #11) The only explanation provided by the CCSD to the Parent on the reassignment of the student was that another student, who had moved into the CCSD in December 2015, required the school program and lived closer to the prior school than the student by .2 of a mile. With the addition of the new student, the self-contained program was at the class size capacity of eight students and retaining the student in the school would cause the class size to expand to nine students. (FOFs #12, #13)

The Parent actively opposed the assignment of the student to the new school prior to and after the commencement of the school year and requested the class size in the prior school be expanded as permitted by Nevada law to allow the student to remain. (FOFs #13, #14) While the NAC §388.150(7) does permit exceptions to the maximum class size enrollment requirements, if approved by the NDE, a district is not required to seek an exception. In this case, the CCSD elected not to seek an exception/modification for the retention of the student in the prior school, and that was a permissible exercise of discretion.

As previously discussed, a student must be placed in the school that the student would normally attend, or in the school closest to the student's home which is capable of providing the services required by the student's IEP. (NAC §388.245(1) and (6); 34 C.F.R. §300.116(b)(3) and (c)) In this case, while the new school is not the student's home-zoned school, it is actually closer to the student's residence. (FOFs #2, #3) Therefore, the CCSD's selection of the closest school (FOF #3) to the student's home that had the required type of program for the student and a permissible class size was consistent with the IDEA and the NAC, Chapter 388. While the need to remove the student from the previously successful prior school program (FOF #7) was unfortunate, the Complaint Investigation Team determined it was a permissible exercise of CCSD's administrative discretion consistent with their school assignment procedures. (FOF #17)

As a final matter, this Complaint was limited to an investigation of CCSD's determination in August 2016 to administratively reassign the student to the new school. Given the Parent's concern with regard to the harmful effect the change in location may have had on the student's receipt of a free appropriate public education (FOFs #8, #9, #10, #11, #14), if the Parent and the CCSD cannot reach agreement as to what constitutes a free appropriate public education for the student through the IEP process (FOF #9), the Parent still has a means of redress through a due process hearing, IEP facilitation or mediation. This Report does not preclude either the Parent or the CCSD from filing a due process hearing complaint to resolve any such disagreement through an evidentiary hearing or accessing the IEP facilitation or mediation processes.

Therefore, the CCSD complied with the IDEA and the NAC, Chapter 388, with regard to the student's removal from the home-zoned school to another school in the 2016/2017 school year, specifically the student's administrative removal from the home-zoned school and the school the student would normally attend.