

**COMPLAINT INVESTIGATION
CLARK COUNTY SCHOOL DISTRICT
(#CL111820)
Report Issued on February 11, 2021**

INTRODUCTION

On November 18, 2020, the Nevada Superintendent of Public Instruction received a State Complaint from an organization on behalf of a student alleging violations by Clark County School District (CCSD) in the student's special education program. The allegations in the Complaint were that, since the closure of school in March 2020 due to the COVID-19 pandemic, CCSD failed to provide the student a free appropriate public education (FAPE) by not complying with the student's IEP; failed to provide in-person, one-to-one support/aide during instruction; failed to provide adequate education modifications other than prohibited restraints; and the skilled nursing facility failed to provide support to the student and failed to comply with the law due to staffing shortages. The Complainant's proposed resolution was to provide the services in the student's IEP and provide a one-to-one aide to provide in-person assistance during instruction.

In accordance with the requirements in the IDEA, 34 C.F.R. §§300.9 and 300.622, the Nevada Department of Education (NDE) must obtain parental consent before personally identifiable information is disclosed to unauthorized parties. Since the Complainant was not the parent of the named student, the Complainant organization was informed that in order for NDE to release any personally identifiable information, including the Complaint Investigation Report, NDE must receive parental consent authorizing disclosure of such information. (34 C.F.R. §300.622; NAC §388.289) In addition, given the student is a ward of the State, NDE requested a copy of the Court Order (or relevant pages of that Order) that established the parent's retention of parental rights with regard to education as stated in the Complaint. The Complainant provided the Order to Appoint an Education Volunteer Advocate to be Educational Surrogate and Decision Maker for the student from the Eighth Judicial District Court and signed consent from the Educational Surrogate¹ for the disclosure of personally identifiable information to the organization for purposes of this State Complaint.

Both the Individuals with Disabilities Education Act (IDEA) and the Nevada Administrative Code (NAC) permit an extension of the 60-day timeline to conduct the investigation and issue the written decision if exceptional circumstances exist with respect to a particular complaint. (34 C.F.R. §300.152(b); NAC, §388.318(5)(a)) On December 4, 2020, NDE received a request from the CCSD for an extension of the due date to provide requested documentation and information to NDE due to the recent re-closure of all CCSD buildings due to COVID-19 and an upcoming school/business holiday. Given the exceptional circumstance of the intervening event of the closure of all CCSD buildings and the absence of sufficient information for NDE to commence its investigation, both parties were provided an extension of time to submit documentation and the timeline for the issuance of the Report was extended to February 17, 2021.

In both the initial issue letter and in the extension correspondence, the CCSD was provided notice 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 the specified timeline would be considered a concession of noncompliance for purposes of this State Complaint. CCSD did timely respond and dispute the allegations

¹ Given the Educational Surrogate is the Parent of the child as defined by the IDEA, 34 C.F.R. §300.30, and NAC §388.071, that term is used throughout this Complaint.

of noncompliance in the Complaint in their entirety and did specifically reference the provided documentation that factually supported the denial in sufficient regards.

The IDEA, 34 C.F.R. §300.152(c), provides that if an issue raised in a State Complaint has previously been decided in a due process hearing involving the same parties, the due process hearing decision is binding on that issue and the agency must inform the complainant to that effect. In this case, a Due Process Complaint (DPC) dated October 12, 2020 was withdrawn as a result of a Resolution Agreement with the last signature of agreement on October 5, 2020. (It was noted that the date of the signed Resolution Agreement preceded the filing of the DPC, however, both parties provided this Resolution Agreement as the Agreement resulting in the withdrawal of the DPC.) Given the resolution of this case was not reached by a due process decision issued after a hearing, Title 34 C.F.R. 300.152(c) of the IDEA does not apply in this regard. (Resolution Agreement and DPC)

NDE requested a copy of the complete Resolution Agreement from both parties in order to determine whether the assumption of jurisdiction over this Complaint was precluded by the Resolution Agreement. NDE timely received a copy of the Agreement from both parties. While a term of the Resolution Agreement required the Parent to withdraw the request for the due process hearing with prejudice, the filing of a State Complaint was not precluded by the Resolution Agreement. (Resolution Agreement)

The terms of the Resolution Agreement included that the parties' entry into the Resolution Agreement was not and must not be construed as an admission as to the merits of the other party's position or claims raised in the DPC. (Resolution Agreement) Accordingly, NDE will not construe the Resolution Agreement as an admission as to the merits of the claims in this State Complaint. However, the agreed upon remedies in the Resolution Agreement will be considered in the event it is determined that noncompliance occurred with regard to the designated issues in the Complaint and corrective action is warranted.

The Complainant was notified that NDE did not have jurisdiction through the State Complaint process to investigate the allegation that the skilled nursing facility at which the student currently resides did not provide support to the student or a sufficient number of members of the nursing staff as required by NAC§449.74517. 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.

COMPLAINT ISSUE

In the course of the investigation, it became clear that the Complainant organization's allegation regarding providing the student adequate education modifications, other than prohibited restraints, was not an issue concerning the determination of the IEP Team as to the modifications required to provide the student a FAPE as it appeared on the face of the Complaint. Rather, the allegation was one of CCSD's failure to implement the modifications in the student's IEP and the use of prohibited restraints as an alternative educational modification. (See for example Finding of Fact (FOF) #19) As such, the statement of issues has been revised from the preliminary statement set forth in the November 24, 2020 correspondence from NDE.

The allegations in the Complaint that are under the jurisdiction of NDE to investigate through the special education complaint process raise the following issue for investigation in the 2019/2020 school year from school closure in March 2020 and from commencement of the 2020/2021 school year to the date of the Complaint, November 18, 2020.

Issue:

Whether the CCSD complied with the IDEA and NAC, Chapter 388, with regard to implementing the student's IEP(s) in effect in the 2019/2020 and 2020/2021 school years through distance education, specifically with regard to providing the student:

- a. The minutes per week of services; and
- b. The modifications to provide assistance to the student during instruction, including a one-to-one aide, instead of the CCSD's use of mechanical restraints as a modification.

FINDINGS OF FACT**General**

1. The student is a student with a disability enrolled in a self-contained program in CCSD. The student is a ward of the state and resides in a long-term care facility. (November 13, 2020 IEP, CCSD Response)
2. The student is determined eligible as a student with intellectual disability (primary) and multiple impairments (secondary) with the additional impairments of orthopedic impairment and hearing impairment. The student has global delays in communication, self-care, home living, social, use of community, self-direction, health and safety, and functional academic skills. The student is considered non-verbal with moderate-to-severe hearing loss. (While sounds enter the student's ear normally, the signal from the inner ear to the brain is not transmitted properly.) (November 13, 2020 IEP)
3. The student needs full adult supervision at all times in school and is dependent on adult caregivers for all aspects of daily living. With adult supervision, the student is able to independently maneuver the wheelchair and a dynamic stander. (November 13, 2020 IEP, January 17, 2020 observation)
4. The last day of school for the 2019/2020 school year was May 20, 2020 and school began August 24, 2020 for the 2020/2021 school year. With regard to extended school year (ESY), if appropriate, students with disabilities typically attend ESY for 20 to 30 school days for six hours a day. (CCSD School Calendars, CCSD Website)
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 the 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. On January 14, 2021, CCSD presented, and the Board of Trustees approved, a plan that permitted schools to invite individual or small groups of students to return to school campus on a voluntary basis for academic screening, interventions and small-group instruction. In addition, the Board of Trustees approved a plan to transition students in Pre-Kindergarten through Grade 3 into the hybrid instructional model. The implementation of the hybrid instructional model for students in Pre-Kindergarten through Grade 3 will begin on March 1, 2021 for students. (CCSD Website -January 14, 2021 Meeting Recap)

IEPs

9. Prior to school closure, the student had a March 10, 2020 annual IEP that was anticipated to be in effect until March 9, 2021. This IEP was revised on October 1, 2020 for distance education and again on November 13, 2020 due to the terms of the Resolution Agreement that resulted in the withdrawal of the DPC dated October 12, 2020. (IEPs, DPC, Resolution Agreement)
10. The student's Parent agreed with the components of the March 10, 2020 and November 13, 2020 IEPs and disagreed with all or part of the revised October 1, 2020 IEP. (IEPs)
11. The student's March 10, 2020 annual 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 October 1, 2020. The student was determined to require ESY services. The student placement was in the self-contained program with 22% of the school day in the regular education environment. The March 10, 2020 IEP had the following specially designed instruction, related services and supplementary aides and services:
 - a. 1065 minutes of specially designed instruction per week in the location of self-contained and 200 minutes of physical education skills per curriculum per month. All of the specially designed instruction was in the location of self-contained, except for the 400 minutes per week of social/behavior (lunch, recess, specials, transition) in the location of general education. (The student's functional reading, functional math, functional communication self-help, fine motor and behavioral/social goals were all to be addressed during ESY.)
 - b. Direct related services to the student in the location of self-contained: speech/language therapy 120 minutes per month with 30 minutes per week during ESY; physical therapy 20 minutes per month; occupational therapy 60 minutes per month and 30 minutes per month during ESY; curb to curb transportation 10 minutes per week; and consultative audiology 60 minutes per year. In addition, 30 minutes a month of physical therapy was to be provided in the form of staff training re transfers/equipment during ESY.
 - c. Supplementary aides and services that included hand-over-hand instruction in order to participate and complete activities-fade as skills develop with the frequency of services

during instruction/tasks/activities in the locations of self-contained and general education; and one-to-one adult assistance in all areas of daily living with the frequency of services daily during self-help needs in the location of the school campus. Adult assistance is also included as a modification during other, but not, all specific activities.

12. The student's October 1, 2020 distance education IEP was in effect until the November 13, 2020 IEP revision. The student placement was in the self-contained program with 23% of the school day in the regular education environment. Given the facts set forth above with regard to the student's need for hand-over-hand instruction and one-to-one adult assistance, only the synchronous specially designed instruction, related services and supplementary aides and services are included as relevant facts:
 - a. 1030 minutes of specially designed instruction per week and 100 minutes of physical education skills per curriculum/distance education per month. All services were in the location of self-contained/distance education except for the specially designed instruction of specials for 250 minutes per week in general education/distance education and the 100 minutes of physical education skills per curriculum/distance education per month.
 - b. Direct related services to the student in the location of self-contained/distance education: speech/language therapy 30 minutes per week; physical therapy 20 minutes per month; occupational therapy 60 minutes per month and 30 minutes per month during ESY; curb to curb transportation 10 minutes per week; and consultative audiology 60 minutes per year. In addition, 30 minutes a month of physical therapy was to be provided in the form of staff training re transfers/equipment during ESY.
 - c. Supplementary aides and services that included hand-over-hand instruction in order to participate and complete activities-fade as skills develop with the frequency of services during instruction/tasks/activities in the locations of self-contained and general education; and one-to-one adult assistance in all areas of daily living with the frequency of services daily during self-help needs in the location of self-contained and general education/distance education. (October 1, 2020 IEP)
13. The student's November 13, 2020 distance education IEP revised the student's March 10, 2020 IEP due to the Resolution Agreement. The ending date for all of the student's services is March 9, 2021 and the IEP review date is on that same date. The student's three-year reevaluation date is March 8, 2021. (November 13, 2020 IEP)
14. The student's placement in the November 13, 2020 IEP was in the self-contained program with 68% of the school day in the regular education environment. Given the facts set forth above with regard to the student's need for hand-over-hand instruction and one-to-one adult assistance, only the synchronous specially designed instruction, related services and supplementary aides and services provided during distance education are included as relevant facts:
 - a. 550 minutes of specially designed instruction per week and 100 minutes of physical education skills per curriculum/distance education per month. All services were in the location of self-contained/distance education except for the specially designed instruction of specials for 250 minutes per week in general education/distance education and the 100 minutes of physical education skills per curriculum/distance education per month.
 - b. Direct related services to the student in the location of self-contained/distance education: speech/language therapy 120 minutes per month and 60 minutes per month in ESY; physical therapy 20 minutes per month; occupational therapy 60 minutes per month and 30 minutes per month during ESY; curb to curb transportation 10 minutes per week; and consultative audiology 60 minutes per year. In addition, 30 minutes a month of physical therapy was to be provided in the form of staff training re transfers/equipment during ESY.

- c. Supplementary aides and services that included hand-over-hand instruction in order to participate and complete activities with the frequency of services during instruction/tasks/activities in the locations of self-contained/distance education and general education distance education. The one-to-one adult assistance in all areas of daily living with the frequency of services daily during self-help needs was removed in this IEP. (November 13, 2020 IEP)
15. The statement of educational concerns of the Parent at the October 1, 2020 IEP meeting included that the only provided modification were forms of restraint which are impermissible in the facility and not consented to; the student had not been receiving physical therapy or assistive technology and speech/language therapy; and the student was showing signs of regression especially for fine motor, gross motor and functional mobility. (October 1, 2020 IEP)

CCSD Distance Education Guidance

16. Distance Education Guidance for Students with Disabilities: “The District is required to provide a Free Appropriate Public Education (FAPE) for students with disabilities. Special education and related services for students with disabilities in accordance with the student’s IEP.... The following guidance is intended to highlight special education procedures associated with the implementation of distance education. If specific procedures are not indicated in these documents, refer to standard special education procedures.” (Reopening Our Schools Implementation Guide, CCSD, Working Document, September 24, 2020, pg. 22. Hereinafter, CCSD Implementation Guide.)
17. Delivery of Equitable Access to Educational Opportunities: “During distance education, school staff will consider alternative ways to provide equitable access and appropriate educational opportunities for students with disabilities, including exploring all available supplementary aids and services through online and/or virtual platforms, and/or other activities, such as paper correspondence....” (CCSD Implementation Guide, pg. 22)
18. “Instructional schedules for students with IEPs must meet the instructional requirements and structures established in each student’s IEP, including co-taught classroom instruction.” (CCSD Implementation Guide, pg. 22)
19. Services for Students with Disabilities in Distance Education: “CCSD must consider, and where possible, make efforts to provide special education and related services to students with disabilities in accordance with the student’s Individualized Education Program (IEP) and for students entitled to free appropriate public education (FAPE) under Section 504, consistent with the accommodation plan developed to meet the requirements of Section 504. Due to school closures and social distancing, it is noted that all services may not be able to be provided in the same manner that are typically provided. School teams and parents are encouraged to work collaboratively and creatively to consider how to support components of a student’s IEP or Section 504 Accommodation Plan. *Please refer to the Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary, and Secondary Schools While Serving Children with Disabilities.” (CCSD -School Closures Related to COVID-19-School Guidance for Individualized Education Programs and Section 504 Accommodation Plans, Updated April 20, 2020. Hereinafter, School Guidance)

Student’s Participation in Distance Education

20. The student did not participate in distance education after the closure of CCSD school buildings March 16, 2020 due to the COVID-19 pandemic for the rest of the 2019/2020 school year, including ESY. (It was noted that the student’s occupational therapist and speech/language therapist did

attempt to provide indirect services on behalf of the student on two occasions.) (November 13, 2020 IEP, Speech Language Pathologist Observations, Response)

21. With regard to the student's participation in distance education in the 2020/2021 school year, even when the student is logged on, the student is unable to access instruction unless someone is with the student. The student "does not have the necessary tools to participate." (October 1, 2020 IEP, November 13, 2020 IEP, Complaint)
22. Documentation for the implementation of the student's specially designed instruction through distance education was only available commencing October 8, 2020. From October 8, 2020 until October 21, 2020 the student was not available for whole group or one-on-one distance education instruction. On October 21, 2020 the student logged on to the one-to-one session and a long-term care facility staff member assisted for about 10 to 15 minutes of the 30-minute session. The student was not logged on again until November 18, 2020 for a 23 minutes session and again on November 20, 2020 for a portion of the distance education. During both of the November 2020 sessions the student was muted. (Confidential Status Record, November 13, 2020 IEP)
23. From November 20, 2020 up to at least December 18, 2020, the student logged on regularly for whole group and one-to-one distance education instruction. However, without an adult present, the student did not remain in the learning area, but rolled away and came back multiple times during the sessions. (December 18, 2020 Progress Report)
24. The student's occupational therapist worked with the student on an occasion at the end of September 2020 when a facility occupational therapist was physically present with the student. (November 13, 2020 IEP)

Progress

25. All of the student's annual goals in the IEPs in effect during the time period of this Complaint relied upon observation and documentation/implementation for the method of measuring the student's progress toward the annual goals. Consistent with the student's IEP, CCSD issued quarterly specialized progress reports on May 20, 2020, October 6, 2020, and December 18, 2020 Progress Reports during the time period of this Complaint. (IEPs, Progress Reports)
26. The student's May 20, 2020 Progress Report reported the student had made satisfactory progress toward all of the student's annual goals. However, none of the goals were met at that time. (May 20, 2020 Progress Report)
27. With regard to the 2020/2021 school year, the student's October 6, 2020 Progress Report reported the student made satisfactory progress toward all of the student's annual goals, with the exception of functional and expressive communication. The student's progress toward these communication goals was unsatisfactory and the comments indicated that there had not been any data taken for the 2020/2021 school year due to missed sessions and miscommunications regarding distance education. The need for more data was also cited in the gross motor and physical education goals. (October 6, 2020 and December 18, 2020 Progress Reports)
28. In November 2020, the speech/language pathologist reported that: "The Spring 2020/COVID school closure appeared to have minimal negative impact on [] functional communication skills." (November 13, 2020 IEP -Speech Language Pathologist Observations)

29. The December 18, 2020 Progress Report reported the student's progress toward the agreed upon revised November 13, 2020 distance education IEP. The student's progress toward every goal was unsatisfactory (with the exception of the gross motor goal which did not include any rating). (December 18, 2020 Progress Report)

Mechanical Restraint

30. It is uncontested that the use of mechanical restraint is prohibited with a student with a disability unless specifically authorized under NRS 388.503. (Complaint, CCSD Response)
31. On October 2, 2020, the student's educational advocate notified the CCSD in writing that during distance education the teacher directed a staff member at the student's skilled nursing facility to place the student in the student's bed with a computer restraint in order to manage the student's behavior and participate in distance education. The advocate indicated that a therapist found the student in a restraint and contacted the advocate out of concern. The duration of the alleged restraint was two hours. The advocate contacted CCSD again by telephone on October 6, 2020 and augmented the above information regarding the reported incident. CCSD issued notices of the use of physical restraint, mechanical restraint or aversive intervention and notified the parent. (Notices of Use of Physical Restraint, Mechanical Restraint, or Aversive Intervention)
32. Upon receipt of the allegation of restraint, the school contacted CCSD police as well as Child Protective Services to report the incident. Child Protective Services took the report as documentation only. (October 12, 2020 CCSD Report)
33. CCSD school administration conducted an investigation into the allegation of the use of the restraint with the student on October 2, 2020 and, based on the statements of the classroom teacher and aide and one-to-one aide assigned to the student, determined that that the allegation could not be substantiated. (October 12, 2020 CCSD Report)
34. CCSD conducted a training regarding the use of mechanical restraints for personnel at the schools the student was/is enrolled. (Documentation of Attendance at the Mechanical Restraints Training)

Resolution Agreement

35. The DPC regarding this student was filed October 12, 2020 and included the stated issues: The school is utilizing prohibited restraints as an attempted education modification; the school failed to provide a one-to-one aide which is written in the student's IEP and the IEP is not properly implemented. The time period of the DPC was during the end of the last semester in the 2019/2020 school year and the 2020/2021 school year. (October 12, 2020 DPC)
36. Relevant to this State Complaint, the October 5, 2020 Resolution Agreement resulting in the withdrawal of the DPC with prejudice and included the following:
- a. CCSD agreed to convene a revision to the student's IEP within 15 school days of the execution of the agreement to address all components of the student's IEP and align instruction and related services with the CCSD distance education approved platforms;
 - b. CCSD agreed to collect data for six weeks while the student worked with the virtual one-to-one aide in order to determine the appropriate level and duration of services
 - c. CCSD agreed to provide compensatory education services to the student to address IEP goals and objectives as follows:
 - i. Three hours and thirty minutes in the area of occupational therapy;
 - ii. Eleven hours in the area of speech/language therapy.

- d. CCSD agreed to provide training to the special education staff with an administrator present for identified elementary schools on aversive interventions, physical and mechanical restraints.
 - e. The Parent agreed that there were no remaining issues to be resolved or decided through the impartial hearing process by a hearing officer.
37. On January 21, 2021, the CCSD engaged a speech/language therapist to provide the student 11 hours of compensatory speech/language therapy services to be provided outside the therapist's contract day. Until further notice the services were to be provided to the student virtually. CCSD is currently attempting to obtain a provider for the compensatory occupational therapy. (January 21, 2021 CCSD Email to Speech/Language Therapist)
38. CCSD commenced data collection on December 3, 2020 relative to the student's work with a virtual one-to-one aide. The documentation through January 28, 2021 is replete with the student missing the whole group and one-to-one sessions and the student repeatedly leaving the sessions. The long-term care facility did not provide adult assistance to the student during the distance education sessions, except with regard to logging the student on and out of the sessions. On one occasion, a tutor provided by the Parent was present for a session to assist the student on January 28, 2021. (Confidential Status Record)
39. On January 6, 2021, CCSD sent an assistive technology request form to the student's Parent for signature for assistive technology during the distance education sessions. (January 6, 2021 CCSD Email)
40. There were 29 school days from the date of the Resolution Agreement, October 5, 2020, to the date of this Complaint, November 18, 2020. The student's three-year multidisciplinary team meeting and annual IEP meeting is scheduled for March 8, 2021. (CCSD Clark County 2020/20921 School Calendar for Students, Confidential Status Record)

CONCLUSIONS OF LAW

Issue:

Whether the CCSD complied with the IDEA and NAC, Chapter 388, with regard to implementing the student's IEP(s) in effect in the 2019/2020 and 2020/2021 school years through distance education, specifically with regard to providing the student:

- a. The minutes per week of services; and
- b. The modifications to provide assistance to the student during instruction, including a one-to-one aide, instead of the CCSD's use of mechanical restraints as a modification.

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); NDE

March 2020 Guidance² -COVID-19 and Students with Disabilities; COVID-19 Questions & Answers: Implementation of IDEA Part B Provision of Services, (OSEP September 28, 2020); NDE Guidance-COVID-19 and Students with Disabilities (November 10, 2020))³

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)

The CCSD opened all of the 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. (FOFs #6, #7) Recently, the CCSD Board of Trustees approved a plan that permitted schools to invite individual or small groups of students to return to school campus on a voluntary basis for academic screening, interventions and small-group instruction. The Board of Trustees also approved a plan to transition students in Pre-Kindergarten through Grade 3 into the hybrid instructional model. The implementation of the hybrid instructional model for students in Pre-Kindergarten through Grade 3 will begin on March 1, 2021 for students. (FOF #8)

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. 1995); *Van Duyn v. Baker School Dist.*, 502 F. 3d 811 (9th Cir.⁴. 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 to date, CCSD was not relieved of the obligation to provide FAPE to this student under the IDEA and Nevada law and regulations. COVID-19 Questions & Answers: Implementation of IDEA Part B Provision of Services, (OSEP September 28, 2020). In this case, there is also another significant complicating factor that the student resides in a long-term care facility and CCSD was reliant on the facility during distance education to ensure the student was present at the appointed times and to provide facility staff to enable the student to access and participate during the distance education/therapy sessions. (FOF #1, #3, #21-#24) However, despite this additional complicating factor, CCSD remained responsible under the IDEA for implementing the student's IEP, even if by alternate methods of delivery.

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

² 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.

³ The OSEP memorandum is publicly available at:

<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>

NDE Guidance is available at: http://www.doe.nv.gov/home/COVID_Resources/

⁴ The State of Nevada is in the United States Court of Appeals, Ninth Circuit.

other children. Disabled children are not singled out for furlough days.” The Court clarified, however, that 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 1104.⁵

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. (FOF #5) 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 had three IEPs in effect during the time period of this Complaint. The student’s March 10, 2020 IEP was in effect prior to the closure of school buildings due to COVID-19 in the 2019/2020 school year and had an anticipated duration of services until March 9, 2021. The student’s Parent agreed with the components of this IEP. (FOF #9) This IEP remained in effect during the remainder of the 2019/2020 school year, including the student’s ESY period, and the commencement of the 2020/2021 school year until it was revised on October 1, 2020 to address distance education. The October 1, 2020 IEP was in effect only a little over a month before the student’s IEP was revised once again on November 13, 2020 to implement a Resolution Agreement. Based on the duration of the November 13, 2020 IEP, the student’s IEP will be revised again by March 9, 2021. (FOFs #9-14)

“It is each student’s IEP that establishes the specially designed instruction and other services and supports that are individually designed to provide educational benefit to the student with a disability. While it is recognized that COVID-19 may affect how a student’s instruction, services and supports set forth in the student’s IEP are provided, any alternative delivery plan is subordinate to, and does not substitute for the IEP Team’s determination of FAPE.” NDE Guidance-COVID-19 and Students with Disabilities (November 10, 2020).

Therefore, it was the student’s agreed-upon March 10, 2020 IEP developed pre-COVID-19 and the in-person instruction in that IEP that was relied upon in this investigation as the IEP Team’s determination of the specially designed instruction and other services individually designed to provide educational benefit to the student. Notably, however, all of the student’ IEPs in effect during the time period of this Complaint required the student be provided hand-over-hand instruction in order to participate and complete activities. (FOFs #11-14) It is uncontested that the student is unable to access distance education instruction/therapy unless someone is physically present to assist the student at the time of the instruction/therapy. (FOF #21) (While hand-over-hand instruction infers the presence of adult assistance at all times during instruction and assistance is included with regard to self-help needs and several other identified activities, the student’s March 10, 2020 IEP does not expressly include the one-to-one aide cited in the Complaint.)

⁵ 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).

Both the Parent and CCSD agree that the student did not participate in distance education in the 2019/2020 school year, including ESY, after the closure of CCSD school buildings on March 16, 2020 due to the COVID-19 pandemic. (FOF #20) The only documentation provided by CCSD in the course of the investigation of the availability of distance education to the student during this time period was the attempt to provide indirect occupational therapy and speech/language therapy on behalf of the student on two occasions. It is recognized that the student's unique needs and, as discussed previously, the fact that the student resides in a long-term care facility made the provision of distance education to the student particularly challenging. However, it was CCSD's obligation to ensure the student had meaningful access to the distance education opportunities available to all students on March 23, 2020 (FOF #5) and, "to the greatest extent possible", the student was provided the special education and related services in the student's IEP. *U.S. Dept. of Educ., Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 12, 2020). In this case, CCSD did not provide the student the specially designed instruction, related services and supplementary aides and services in accordance with the student's March 10, 2020 IEP for the duration of the 2019/2020 school year, including the ESY (FOFs #17, #20) and this failure to implement the student's IEP was a material failure (*Van Duyen*).

With regard to the 2020/2021 school year, at least by October 8, 2020, CCSD consistently made distance education available to the student, but the long-term care facility only logged the student on to the available distance education sessions on two occasions during the time period of this Complaint. (FOF #22) However, as previously discussed, even when the student is logged on to distance education, the student is unable to access instruction unless someone is with the student and that only occurred on one of those occasions. (FOF #21) Therefore, the availability of distance education alone without the assistance required by the student's IEP to access and meaningfully benefit from the instruction does not relieve CCSD of the obligation to provide services "in conformity with" the student's IEP and, in this case, this failure to implement the student's IEP was also a material failure (*Van Duyen*).

All of the student's annual goals in the IEPs in effect during the time period of this Complaint relied upon observation and documentation/implementation for the method of measuring the student's progress toward the annual goals. (FOF #25). Given this designated method of measurement of observation was unavailable until November 20, 2020 when the student regularly logged on to the distance education sessions (FOF #23), the May 20, 2020 and October 6, 2020 quarterly progress reports were accorded little weight in this investigation. (FOFs #26-28) The most recent December 18, 2020 progress report in the 2020/2021 school year, however, was issued after the student's progress could be measured by observation to some extent and was relied upon in this investigation. This most recent progress report reported the student's progress toward every annual goal in the agreed upon revised November 13, 2020 distance education IEP was unsatisfactory (with the exception of the gross motor goal which did not include any rating). (FOF #29)

There is insufficient data at this time to determine the extent to which the student has regressed as a result of the failure of CCSD to implement the student's IEP after the closure of school buildings due to the pandemic in the 2019/2020 school year and, for the 2020/2021 school year, the inability of the student to access specially designed instruction, related services and supplementary aides and services given the absence of the physical presence of an adult at the time of the instruction/therapy. However, in this case, the student's IEP Team consistently determined the student required ESY services during the relevant periods of this State Complaint. (FOFs #11-12). In accordance with the IDEA, 34 C.F.R. §300.106, ESY services must be provided if a student's IEP Team determines, on an individual basis, that the services are necessary for the provision of FAPE to the student. In *N.B. and C.B. v. Hellgate Elementary Sch. Dist.* 541 F.3d 1202, 50 IDELR 241 (9th Cir. 2008), the Ninth Circuit Court Appeal discussed the standards for the provision of extended school year services and cited the Fourth Circuit Court of Appeals: "ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months."

Given the protracted period of time the student has been unable to meaningfully access instruction/therapy since the closure of school buildings on March 16, 2020 and the student's IEP Team's determination that the student required ESY in order to be provided a FAPE, it is determined that the student's gains in the 2019/2020 school year prior to school closure on March 16, 2020 have been "significantly jeopardized" and it is unlikely the student will be able to recoup the lost skills and progress without a student-specific corrective action that addresses the needs of the student. 34 C.F.R. §300.151(b).

As a final matter, it is uncontested that the use of mechanical restraint is prohibited with a student with a disability unless specifically authorized under NRS 388.503. (FOF #30) While there was a report of CCSD personnel directing the use of a mechanical restraint on the student during distance education as an educational modification, CCSD's investigation into the alleged use of a mechanical restraint resulted in the determination that the allegation could not be substantiated. (FOF #31) Notwithstanding the outcome of the investigation, as a result of the previously referenced due process hearing Resolution Agreement entered into by the Parent and CCSD, CCSD conducted a training regarding the use of mechanical restraints for personnel at the schools in which the student was/is enrolled. (FOFs #32-34) As previously discussed, NDE does not construe the Resolution Agreement or its implementation as an admission as to the merits of the claims in the State Complaint. In the absence of documentation otherwise, NDE relies on the outcome of CCSD's investigation and does not reach a contrary determination with regard to the alleged use of a prohibited mechanical restraint as an educational modification.

Therefore, the CCSD failed to comply with the IDEA and NAC, Chapter 388, with regard to implementing the student's IEP(s) in effect in the 2019/2020 and 2020/2021 school years through distance education, specifically with regard to providing the student the minutes per week of services and the modifications to provide assistance to the student during instruction, including hand-over-hand assistance. The alleged use of a mechanical restraint during distance education as an educational modification was not substantiated.

CORRECTIVE ACTION

The CCSD is required to take corrective action to address the violations found in this Complaint. 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. Given the fluidity of the situation in the midst of the COVID-19 pandemic, this corrective action must be twofold: if the student is not provided in-person instruction on or before March 3, 2021, a mitigation strategy is necessary to address the current distance education instruction in the student's agreed upon November 13, 2020 IEP (FOF #15) or the subsequent annual IEP developed in March 2021 and, upon the student's return to in-person instruction, a strategy is also necessary to provide the educational benefits that likely would have accrued to the student if the student's IEP had been implemented.

As previously discussed, the October 12, 2020 DPC regarding this student included the issues alleged in this Complaint and the Complainant and CCSD agreed to a binding Resolution Agreement on October 5, 2020 that resulted in the Parent's agreement that there were no remaining issues to be resolved through the impartial hearing process and the withdrawal of the DPC. (FOFs # 35-36) Documentation was provided in the course of this investigation regarding the implementation of this Resolution Agreement. (FOFs #37-#39) Since the Parent agreed to these remedies as addressing the very issues in this Complaint up to October 5, 2020, the ordered CAP addresses only the time period from the date of the Resolution Agreement to the date of the Complaint, November 18, 2020. This is a period of 29 school days. (FOF #40)

There are several significant upcoming events that will inform both the necessary mitigation strategy and the strategy upon the student's return to in-person instruction: the student's three-year reevaluation on or about March 8, 2021; completion of the data collection as a result of the Resolution Agreement on the student's work with the virtual one-to-one aide, including the persistent lack of access to distance education

without an adult present after the filing of this Complaint (FOF #38); the anticipated IEP review date on March 9, 2021; and, hopefully, additional information on the date the student will return to in-person instruction. (FOFs #8, #13) NDE encourages the Parent and CCSD to continue to work together to develop a student-specific corrective action to enable the student to recoup the lost skills and progress that resulted from the failure to implement the student's IEP during the period of distance education, including the absence of the hand-over-hand assistance.

In the event the CCSD and the Parent do not agree otherwise in writing otherwise, the CAP must provide for the following student-specific directed action, including the timeline within which it will be implemented:

A. Distance Education- Mitigation

If the student is not provided in-person instruction on or before March 3, 2021, this mitigation corrective action is designed to implement the student's November 13, 2020 agreed upon distance education IEP to "the greatest extent possible"⁶ for the duration of the distance education in the 2020/2021 school year. This mitigation strategy is consistent with the CCSD Distance Education Guidance. (FOFs #16-19)

The CAP must, at minimum, mitigate any loss of educational benefit to the student due to the absence of the required hand-over-hand instruction for the student to participate and complete activities and include a description of any measures that will be taken to ensure that the student is assisted by an adult in logging on to and participating in distance education instruction throughout every scheduled one-on-one and whole group instruction.

B. Compensatory Education for the 2020/2021 School Year

Given the determination that the absence of the hand-over-hand assistance required by the student's IEP to access, and meaningfully benefit from the instruction was a material failure to implement the student's IEP, compensatory education must be provided for the time period of 29 school days in the 2020/2021 school year not addressed in the Resolution Agreement.

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 establish what may make the student whole for the denial of services.

Notwithstanding CCSD's efforts to make distance education available to the student during the 29 school days, given the persistent lack of access to that distance education and hand-over-hand assistance required to provide the student meaningful educational benefit, those efforts did not relieve CCSD of the obligation to provide FAPE to the student. Therefore, it is determined that day-for-day compensatory education/services for 29 school days is appropriate to make the student whole for the denial of services during the time period of this Complaint. Based on the weekly specially designed instruction and direct

⁶U.S. Dept. of Educ., *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 12, 2020).

related services in the student's March 10, 2020 IEP, CCSD's CAP must include at least the following compensatory education/services:

- a. 6,390 minutes (106 hours) of specially designed instruction;
- b. 180 minutes (3 hours) of direct speech/language;
- c. 30 minutes (.5 hours) of direct physical therapy;
- d. 90 minutes (1.5 hours) of direct occupational therapy. (FOFs #11, #40)

Even if CCSD and the Parent are unable to agree on 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 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, including ESY, and, as such, must be provided during school breaks or before or after school.

Documentation of the completion of the CAP must be provided to NDE within 14 days of its completion. (In recognition that the first student-specific mitigation strategy, if applicable, will be completed earliest, the submission of the documentation on the completion of this mitigation strategy must be submitted within 14 days of its completion, notwithstanding the later submission of documentation related to the ordered compensatory education upon the return to in-person instruction at school.)