

# **COMPLAINT INVESTIGATION DOUGLAS COUNTY SCHOOL DISTRICT**

**(#D0031017)**

**Report Issued on May 9, 2017**

## **INTRODUCTION**

On March 10, 2017, the Nevada Superintendent of Public Instruction received an amendment to an open Complaint, Complaint #D0020917, from Parents<sup>1</sup> alleging 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) in the special education program of a student with a disability enrolled in the Douglas County School District (DCSD).

The Parents' amendment sought to add new allegations of noncompliance under the IDEA and the NAC, Chapter 388, and a new proposed resolution. Based on several factors, including the inclusion of another school year in the requested amendment, the NDE decided not to exercise its discretion to amend the existing Complaint, but rather to accept the amendment as a new Complaint. (Discussion of the IDEA regulations: Federal Register, Vol. 71, No. 156, August 14, 2006, p. 46603) Given the relatedness of the issues regarding the student's health and safety, the NDE conducted the investigation of the two Complaints at the same time to ensure a comprehensive investigation. The proposed resolutions in the amendment and the associated Complaint were accepted for purposes of both Complaints

The IDEA and the NAC, Chapter 388, require that a Complaint must allege a violation that occurred not more than one year prior to the date that the Complaint was received. (34 C.F.R. §300.153(c); NAC §388.318(1)(b)) Therefore, the time period of this Complaint is for the allegations of violations that occurred on or after March 10, 2016. Within this mandatory time limitation, the Parents alleged that up to October 7, 2016 the DCSD failed to:

- Provide the student with an Individualized Healthcare Plan (IHP) under the IDEA and the NAC, Chapter 388, that was developed, implemented and monitored by the school nurse in accordance with best practices by the National Association of School Nurses;
- Consider the student's present levels of functional performance and how the student's healthcare needs affect or have the potential to affect safe and optimal school attendance, including the student's poor upper body strength and the inability to operate a wheelchair;
- Ensure the school nurse or other individual who was familiar with the health and safety tests and information and could interpret the instructional implications of the results of the evaluation either attended the IEP meetings that took during the Spring of 2016 or submitted a written report on the student's health and safety;
- Consider the Parents' concerns regarding the student's mobility regression and safety in the development of the student's October 7, 2016 IEP and provide the Parents written documentation or an evaluation as to why the safety procedures/health narrative was

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<sup>1</sup> While some of the documentation cited in this Report was from one Parent, the term Parents will be used throughout the Report.

unilaterally removed from the present levels of academic achievement and functional performance in the student's IEP.

All documents submitted by the Parents and the DCSD and information provided in an interview with the Parents relevant to the issues in the Complaint were reviewed/considered in their entirety in this investigation. A significant amount of the documentation from both the Parents and the DCSD related to events after the time period of this Complaint. The documentation is cited as relevant to the issues in this Complaint and/or for consideration with regard to the Order for Corrective Action. The Complaint Investigator also received, 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 allegations in the Complaint, as further clarified during the investigation, that are under the jurisdiction of the NDE to investigate through the special education complaint process raise the following issues for investigation:

### **ISSUE ONE:**

Whether the DCSD complied with the IDEA and the NAC, Chapter 388, in the development of the student's IEP, specifically:

- a. Whether the student's IEPs developed from March 10, 2016 through October 7, 2016 included a statement of the student's present levels of functional performance, specifically with regard to the student's inability to operate a wheelchair; poor upper body strength; and healthcare needs that do/may affect the student's safe and optimal school attendance and academic performance, including, as appropriate, the student's need for an IHP; and
- b. Required members of the IEP Team were present, specifically the school nurse or other individual who was familiar with the health and safety tests and information and could interpret the instructional implications of the results of the evaluation at the IEP meetings that took place after March 10, 2016 in the 2015/2016 school year.

### **ISSUE TWO:**

Whether the DCSD complied with the IDEA and the NAC, Chapter 388, with respect to parent participation, specifically considering the concerns of the Parents in the development of the October 7, 2016 IEP regarding the retention of the safety procedures/health narrative in the present levels of academic achievement and functional performance; the regression of the student's mobility; and the student's safety during the school day.

## **FINDINGS OF FACT**

1. From March 10, 2016 through October 7, 2016, there were two IEPs that were developed/revised: the May 25, 2016 IEP revision for the sole purpose of the extended school year service of physical therapy and the October 7, 2016 annual IEP. The

student's prior annual IEP was the September 23, 2015 IEP. (The student's Parents believed there was an April IEP meeting regarding the student's transition to middle school; however it was not an IEP meeting.) (IEPs, Parents Response)

### **May 25 IEP**

2. The revision of the student's May 25, 2016 IEP was done without an IEP meeting and there is no list of participants in the IEP revision. The DCSD indicated that the Parents agreed in a phone conversation to revise the IEP without convening a meeting. The Parents indicated that while they allowed the revision of the student's IEP to proceed and discussed the contents, they did not agree to the revision without a meeting. The DCSD was unable to provide any documentation that the DCSD and the Parents agreed to the revision of the student's IEP without a meeting. (Prior Written Notice, IEP, DCSD Response)
3. The May 25, 2016 IEP incorporated the assessment results with the associated effect on the student's involvement and progress in the general education curriculum from the September 23, 2015 annual IEP. These assessment results included a safety procedures/health assessment from the nurse and Parent information; a physical therapy assessment; a gross motor development assessment and an assessment on field trips. The May 25, 2016 IEP added new assessment results from the physical therapist that included the student:
  - a. Has been required to walk long distances multiple times a day and reported that it's not quite as difficult, although still fatiguing;
  - b. Does an excellent job of accessing the total school environment independently and is able to walk over various surfaces without hesitation or assistance;
  - c. Is able to safely and independently negotiate steps and curbs and open all doors of various resistances independently;
  - d. Manages belongings independently for short distances, but does rely on friends or staff to help carry things long distances (over 200 feet);
  - e. Continues to struggle with large power movements (such as climbing up stairs or getting up from the floor). The student is able to complete them, but often requires upper extremity assistance and/or increased time compared to peers;
  - f. Due to the nature of the disability, has some days that are better than others and some days is more fatigued;
  - g. Is able to walk quickly, but is unable to run;
  - h. Has access to a wheelchair in the school (close proximity to the classroom) to be used in case of emergency that requires the student to move a long distance very quickly; and
  - i. Has made progress with endurance in the 2015/2016 school year. (IEP)
4. The effect of these assessment results in the May 25, 2016 IEP on the student's involvement and progress in the general education curriculum included that the student had a history of losing functional strength and endurance during long breaks and was moving to a middle school campus in the 2016/2017 school year. The recommendation was for a minimum of one direct physical therapy session at home beginning June 20, 2016 and ending July 15, 2016. The Parent did not object to the DCSD's proposal to provide the student the extended school year service in physical therapy or the associated goals. (IEP, Review of Records)

5. There was no documentation of a concern of the DCSD or the Parents regarding the student's inability to operate a wheelchair; poor upper body strength or the need for a healthcare plan at the time of the May 25, 2016 IEP. (IEPs, Review of Documents)

### **October 7, 2016 IEP**

6. The student's October 7, 2016 IEP was developed over two meetings, on September 21, 2016 and October 7, 2016. The October 7, 2016 IEP was to be implemented on October 7, 2016. (IEP)
7. The student's October 7, 2016 IEP included the following assessment results regarding the student's functional abilities related to gross motor, strength, health and safety and how the results affected the student's involvement and progress in the general education curriculum:
  - a. An adaptive physical education consultation comment that referenced the student's locomotion and object control skill in the last formal assessment of the student's gross motor development in September 23, 2015.
  - b. An occupational therapy report included that the student has good organizational skills and completed handwritten and typed assignments independently; used classroom materials independently, including the laptop for longer writing assignments; and previously used dynamic seating in the classroom, but is now sitting in a typical chair and no longer needs adapted scissors.
  - c. The physical therapist's report included:
    - i. The student's significant progress toward the student's IEP goals of managing belongings from the bus to the classroom on a sidewalk with rest breaks as needed; and, as reported by the student, the longer distances were getting easier with repetitive practices;
    - ii. With regard to the gait speed, the student struggled with the goal due to low muscle tone and progress toward the goal fluctuated greatly depending on weather, time of day and fatigue level. The physical therapist observed the student maneuvering safely and independently in crowded classrooms and hallways on multiple occasions;
    - iii. The student independently managed the backpack and lunch and consistently and independently opened doors of various resistances throughout the school (exterior and interior);
    - iv. The student consistently demonstrated independence in getting into/up from classroom desks and chairs;
    - v. The student demonstrated twice that the student could independently open the locker utilizing the key/padlock;
    - vi. The student maneuvered throughout the school without difficulty with the exception of a slower pace when fatigued; and
    - vii. A conclusion that it is not necessary that the student be pulled from academic time to provide direct physical therapy. The physical therapist recommended the student be provided consultative services with the caveat that direct services may be needed when mobility and educational access is affected. (IEP)
8. The school nurse did not conduct a new assessment and/or provide a written report on safety procedures or health prior to the conduct of the IEP meetings on May 25, 2016, September 21, 2016, and October 7, 2016 and was not an invited IEP Team member for the development of the student's October 7, 2016 IEP. The DCSD indicated the related

service providers provided the added assessment results in the student's IEP with regard to health and safety and they were the professionals familiar with the assessments that had been completed. (IEP, Notification of Meeting, Parents Response, September 21, 2016 Prior Written Notice, September 26, 2016 Parents Email, DCSD Response)

9. The Parents provided the DCSD a written statement of the student's strengths and concerns regarding the student's educational needs dated September 21, 2016, the first day of the IEP meeting for the October 7, 2016 IEP. These concerns included the student's physical safety during safe transitions in hallways, classrooms, and on campus; lack of physical movement at the middle school and regression in walking; the student's endurance and gross motor skills; a safe location for the student's bike; physical safety on field trips and band trips; and safety riding the bus. The Parents requested IEP services for the student to address these concerns, including the following:
  - a. A paraprofessional attending the student on field trips to address the student's safety needs;
  - b. Accommodations in the classroom to support the student's physical limitations within the classroom environment such as access to computer in all classrooms for school work and easy accessible seating;
  - c. Speech therapy consult that included if the student has a speech concern the student can go to the speech therapist;
  - d. Assistance entering and exiting the bus safely; and
  - e. Continuation of direct physical therapy. (September 21, 2016 Statement of Parents, IEP)
10. The Parents' September 21, 2016 statement of concerns was included verbatim in the Statement of Parent Educational Concerns in the student's October 7, 2016 IEP. The Parents did not raise a concern regarding the student's inability to operate a wheelchair and poor upper body strength in the September 21, 2016 or the subsequent September 26 statements of concerns. (September 21, 2016 Statement of Parents, IEP)
11. On September 26, 2016, after the September 21, 2016 IEP meeting, the Parents indicated that the student's safety was still a strong concern and asked the following questions:
  - a. The Parents indicated that the IEP Team discussed that staff is not trained if the student falls on how to help the student get up. The physical therapist agreed to show staff some ways to help the student if the student falls. The Parents inquired as to how this would be addressed.
  - b. What instruction does the student need to overcome fatigue and need for the wheelchair and how should the student be instructed with day to day gross motor skill function/fatigue and who to go to and what to do; and
  - c. As the cold weather approaches, what instruction will the student need in this environment to access the student's education needs safely. (September 26 Parents Email)
12. The DCSD responded to the Parents' September 26, 2016 email offering alternatives to address the Parents' stated concerns. The student's IEP Team removed the safety procedures/health assessment results and effect in the present levels of academic achievement and functional performance that were in the student's prior annual IEP and the Parents disagreed with its removal. The student's October 7, 2016 IEP included the following services related to the Parents' concerns:
  - a. The related services of:

- i. Areas of assessment in assistive technology, school health services (with regard to assessment and develop need for health and safety plan), psychological services and occupational therapy;
      - ii. Written consult of speech/language therapy with core teachers bi-monthly with the frequency of services at 20 minutes a month;
      - iii. Consult physical therapy for 30 minutes per term; and
      - iv. Collaboration with the general physical education teacher and physical therapist 120 minutes per month.
    - b. Supplementary aids and services of a stool to be utilized when the student gets on and off the bus; and access to a wheelchair per field trip and safety plan.
    - c. The IEP indicated that the student required assistive technology devices and services and it was addressed in the student's IEP. (IEP, September 26, 2016 DCSD Email)
13. The DCSD's Prior Written Notice proposing to implement the student's October 7, 2016 IEP was signed by the case manager, but did not include whether it was a proposal or refusal or any other information other than that the student's IEP developed on October 7, 2016 would be implemented. (October 7, 2016 Prior Written Notice)
14. In the course of the investigation, the Complaint Investigator requested additional documentation from the DCSD of the IEP Team's consideration of the concerns of the Parents in the development of the 2016 IEP regarding the retention of the safety procedures/health narrative in the present levels of academic achievement and functional performance; the regression of the student's mobility; and the student's safety during the school day. The DCSD responded with an explanation that the IEP Team agreed to conduct comprehensive assessments and have the nurse assist with an IHP based on the information from the related service professionals who would be conducting comprehensive assessments. While the student's IEP reflects these actions, neither the October 7, 2016 Prior Written Notice nor other documentation after the development of the IEP, and prior to its implementation, supported the IEP Teams' consideration of the Parents' above stated concerns at the IEP meetings to develop the student's October 7, 2016 IEP. (DCSD Response, October 7, 2016 Prior Written Notice, Review of the Record)
15. The DCSD issued a second Prior Written Notice on October 31, 2016 refusing to provide the student additional adult assistance requested by the Parents. The Prior Written Notice indicated additional adult support is an IEP Team decision and the request would be addressed when the results of the upcoming comprehensive assessments were discussed. (October 31, 2016 Prior Written Notice)
16. After the development of the student's October 7, 2016 IEP, the DCSD continued to discuss and/or meet with the Parents on the Parents' concerns with the student's IEP and need for an IHP including:
- a. On October 19, 2016, the Parents informed the DCSD they disagreed, with the October 7, 2016 IEP, among other things, with regard to the IEP Team's action on services that were in the student's September 23, 2015 IEP: the removal of occupational therapy; physical therapy being changed from direct to consultative; the absence of direct instruction in adaptive physical education; and the student's need for a paraprofessional. The DCSD responded that same day to the concerns of the Parents and indicated that the DCSD would set up a time to revise the IEP after the review of the reevaluation results.

- b. After the implementation of the student's IHP, the student's physical therapist provided transfer training with staff on how to assist the student up from the floor after a fall and demonstrated/reviewed this transfer training with the student.
- c. The student's IEP Team met on January 27, 2017 to address the Parents' concerns and review/revise the student's IEP and IHP. The student's IEP was revised and the February 3, 2017 and February 8, 2017 Prior Written Notices indicated the proposed revision was because of health and safety concerns. The school nurse participated in the January 27, 2017 IEP revision. The DCSD set another IEP meeting as late as March 22, 2017. (October 19, 2016 DCSD and Parents Emails, October 21, 2016, November 17, 2016 and November 29, 2016 DCSD Emails, November 21, 2016, December 1, 2016 and December 5, 2016 Revised Statement of Parent Educational Concerns and Responses, November 29, 2016, December 1, 2016, January 31, 2017, February 3, 2017, February 8, 2017, and March 10, 2017 Prior Written Notices, March 21, 2017 Notification of Meeting, DCSD Response)

### **Reevaluation**

- 17. On September 21, 2016, the Parents requested a full reevaluation of the student to help better understand the student's unique needs to ensure the IEP Team could meet the student's needs more accurately and effectively to ensure the student thrives in a safe and least restrictive school environment. Specifically the Parents wanted the identification of the student's unique needs based on the medical diagnoses of the orthopedic impairment and speech related insufficiency. The Parents did not specify that the reevaluation should include an assessment of the student's upper body strength or ability to operate a wheelchair. The physical therapist states the Parents' primary concerns for the September 21, 2016 request for reevaluation in the area of physical therapy include the student's safety in middle school due to the potential for falling in congested hallways, lack of physical activity, and fear of regression in motor skills without direct physical therapy intervention. (September 21, 2016 Request, November 30, 2016 Physical Therapy Reevaluation)
- 18. In response to the request from DCSD on the areas of evaluation being requested, the Parents responded they wanted assessments in the areas of:
  - a. Physical therapy;
  - b. Occupational therapy;
  - c. Adaptive technology;
  - d. Cognitive;
  - e. Speech and language;
  - f. Emotional - only to assess emotional function and for depression, anxiety;
  - g. Social;
  - h. Health;
  - i. Adaptive physical education;
  - j. Adapted equipment;
  - k. Fine motor skills;
  - l. Gross motor skills; and
  - m. Academics. (Parents Email)
- 19. By December 8, 2016, the DCSD completed the conduct of the following assessments in the reevaluation of the student:

- a. Psychological assessment of the student's cognitive, emotional, social, health and academics;
  - b. Physical therapy of the student's physical therapy needs, adaptive equipment and gross motor skills;
  - c. Adaptive physical education on the student's adaptive physical education and adaptive equipment needs and gross motor skills;
  - d. Speech and language;
  - e. Occupational therapy needs and fine motor skills; and
  - f. Assistive technology of the student's adaptive equipment needs as it pertains to assistive technology. (Assessments, December 8, 2016 DCSD Email)
20. On December 9, 2016, the DCSD provided a detailed list to the Parents that addressed all of the requested areas of assessment and the corresponding conducted assessments. (December 9, 2016 DCSD Email)
21. The physical therapist's assessment of the student commencing October 13, 2016 included an observation of functional school related tasks; musculoskeletal system review; posture and gait; strength; motor planning/coordination; a school function assessment to measure the student's performance of functional tasks (also performed by the occupational therapist); a 30 second walk test and gait speed; timed up and go; timed floor to stand; pediatric balance scale; and a six minute walk test. The physical therapist determined that current testing did not indicate that the skilled expertise of a physical therapist was required by way of direct intervention to help the student participate in school activities at that time. The Parents raised the student's upper body strength with the physical therapist after the conduct of the physical therapy assessment. The Parents then requested an independent educational evaluation in the area of physical therapy and the DCSD provided the Parents information, including where an independent educational evaluation could be obtained. (January 31, 2017 DCSD Correspondence, Parents Email and DCSD' February 8, 2017 Response, IEP, Physical Therapy Reevaluation, Occupational Therapy Evaluation)
22. The DCSD reviewed the results of the reevaluation with the Parents commencing at a meeting held on December 15, 2016. Subsequent to the conduct of the reevaluation of the student, a medical doctor provided a January 25, 2017 assessment that the student has recent generalized weakness which has affected the student's mobility and makes the student feel unsafe walking more than a few feet and it is worse with stairs. The doctor noted the student cannot carry a laptop from class to class because it exhausts the student and indicated the student would benefit from a one on one aide. (February 28, 2017 Prior Written Notice, January 25, 2017 Medical Group Memorandum)

### **IHP**

23. The development of an IHP for the student arose at the October 7, 2016 IEP meeting. Prior to the development of the student's IHP, the DCSD indicated that the student's health and safety concerns were addressed with physical therapy and adaptive physical education services and supports. The student's physical therapist and occupational therapist attended the student's October 7, 2016 IEP meeting. (DCSD Response)
24. The October 7, 2016 IEP included the related service for school health services, school services, and school nurse services to assess and develop the need for a health and safety plan. The Parents believed that the resultant IHP was part of the student's IEP.



The DCSD informed the Parents that while the student's IEP indicated that the DCSD would follow an IHP, the IHP was outside the IEP and did not require an IEP Team meeting to revise it, allowing the document to be more fluid and address needs as they arise (change in weather, environment, physical health, etc.). (January 19, 2017 Parents and DCSD Emails)

25. On October 31, 2016, the DCSD sent a draft IHP to the Parents. The Parents were provided an opportunity to provide input. The skills addressed in the IHP were mobility, stamina and safety with a goal to be aware of the student's mobility needs and provide for the student's safety. Specific actions were included regarding the student's ambulation; fatigue/stamina; access to a wheelchair for emergency situations and days in which the student has extreme muscle weakness or fatigue at the student's request; in the event of snow or ice; in the hallways for class transitions; the provision of district transportation and adult physical assistance necessary to transfer from floor to stand in the event the student should fall. (October 31, 2016 DCSD Email and Draft IHP)
26. On November 10, 2016, the DCSD provided the Parents a Prior Written Notice proposing to implement the IHP for the student previously transmitted on October 31, 2016, given the report of the student's fall. The DCSD indicated that while the plan was being implemented, there was an option to revise the plan if any member of the team felt it was necessary, including the Parents. The only cited changes from the draft IHP were the listing of staff with full disclosure and the addition of some clarifying language regarding physical assistance if it was necessary for the student to transfer from the floor to standing. (November 10, 2016 Prior Written Notice, IHP, DCSD Response, November 17, 2016 Parents' Edits)
27. In response to a request from the Parents for a copy of the DCSD's policies and procedures on a health and safety plan, the DCSD responded that the DCSD did not have a board policy on IHPs and the initiation, amendment and discontinuation of an IHP would be the responsibility of the licensed school nurse. (DCSD December 2016 Email)
28. The National Association of School Nurses have a position statement on IHPs and the role of the school nurse<sup>2</sup>: "It is the position of the National Association of School Nurses (NASN) that the registered professional school nurse (hereinafter referred to as school nurse), in collaboration with the student, family and healthcare providers, shall meet nursing regulatory requirements and professional standards by developing an Individualized Healthcare Plan (IHP) for students whose healthcare needs affect or have the potential to affect safe and optimal school attendance and academic performance." "The IHP is a document based on the nursing process. . . .The term IHP refers to all care plans developed by the school nurse, especially those for students who require complex health services on a daily basis or have an illness that could result in a health crisis. These students may also have an Individualized Education Plan (IEP), a 504 Student Accommodation Plan to ensure school nursing services and access to the learning environment, or an Emergency Care Plan (ECP) for staff caring for these students (Hermann, 2005)." "Development of the IHP by the school nurse provides a framework for meeting clinical and administrative needs. . . a variation of the nursing care plan."

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<sup>2</sup><https://www.nasn.org/PolicyAdvocacy/PositionPapersandReports/NASNPositionStatementsFullView/tabid/462/smId/824/ArticleID/32/Default.aspx>

29. The Parents continued to have concerns regarding the student's IEP and IHP and, in response to the Parents' request on January 19, 2017, the DCSD proposed a review/revision of the student's IEP and IHP to take place after the review of the conducted assessments. The DCSD did conduct an IEP meeting with the Parents present on January 27, 2017. (See related FOF #16) The following supplementary aids/services were added to the student's IEP from January 27, 2017 to October 7, 2017: "When wheelchair is accessed in any environment only trained adults will be utilized to assist and push the wheelchair. Training for adults will include training specific to health care plan, wheelchair, and transfer training." "Para professional to be available on all field trips to assist with any mobility concerns." (January 18, 2017 and January 30, 2017 Parents Emails and January 19, 2017 DCSD Email, February 28, 2017 Prior Written Notice)
30. The Parents provided a thorough response to the Complaint Investigators' inquiry regarding the proposed resolution of a functional assessment given the DCSD's reevaluation of the student in response to the Parents' September 21, 2016 request for a comprehensive evaluation. The Parents' response cited their disagreement with the results of the evaluations in the areas evaluated; emergent needs after November 2016; a desire to have independent evaluations in the cited areas of disagreement; and two pending independent educational evaluations agreed to by the DCSD. (Parents' Response)

## **CONCLUSIONS OF LAW**

### **Introduction**

Parental participation in the IEP creation process is of vital importance under the IDEA. (*Doug C. ex rel. Spencer C. v. State of Hawaii, Dep't of Educ.*, 720 F.3d 1038; 61 IDELR 91 (9th Cir. 2013)) The student's Parents in this case are active participants in their student's education and, along with the student, are fervent advocates for the student's receipt of a free appropriate public education, and that is commendable. While the student's Parents and the DCSD have had numerous disagreements in the 2016/2017 school year regarding what constitutes a free appropriate public education for the student, the documentation is also replete with the DCSD responsiveness to the concerns of the Parents and efforts to resolve disagreements regarding the student's education, and that is also commendable. While there are findings of the DCSD's noncompliance with regard to the student's education in this Complaint for which corrective actions are ordered, it is the hope of the NDE that this Report will serve to correct these noncompliant procedures and strengthen, rather than diminish, the DCSD's and the Parents' partnership in the provision of a free appropriate public education to the student.

### **Issue One:**

Whether the DCSD complied with the IDEA and the NAC, Chapter 388, in the development of the student's IEP, specifically:

- a. Whether the student's IEPs developed from March 10, 2016 through October 7, 2016 included a statement of the student's present levels of functional performance, specifically with regard to the student's inability to operate a wheelchair; poor upper body strength; and healthcare needs that do/may affect the student's safe and optimal school attendance and academic performance, including, as appropriate, the student's need for an IHP; and
- b. Required members of the IEP Team were present, specifically the school nurse or other individual who was familiar with the health and safety tests and information and could interpret the instructional implications of the results of the evaluation at the IEP meetings that took place after March 10, 2016 in the 2015/2016 school year.

## **Functional Performance**

In accordance with the IDEA and the NAC, Chapter 388, an IEP must include a statement of the student's present levels of academic achievement and functional performance, including how the student's disability affects the student's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled students). (34 C.F.R. §300.320(a)(1), NAC §388.284(1)(a)) While the term "functional performance" is not defined in the IDEA<sup>3</sup> or the NAC, Chapter 388, the NDE IEP Guidelines<sup>4</sup> provide that "[F]unctional performance generally refers to a student's ability to function in real-world environments."

In this case, the Parents raised the absence of a statement of the present levels of functional performance regarding the student's ability to operate a wheelchair, upper body strength; and healthcare needs in the student's IEPs developed/revised from March 10, 2016 through October 7, 2016. There were two IEPs that were developed/revised for the student during this time period: the May 25, 2016 IEP revision for the sole purpose of extended school year services and the October 7, 2016 annual IEP. (Finding of Fact (FOF) #1)

### **May 25, 2016 IEP**

With regard to the May 25, 2016 IEP, the present levels of academic achievement and functional performance in the September 23, 2015 annual IEP were incorporated by reference and the IEP also included the assessment results from a new assessment by the physical therapist. (FOF #3) Upon consideration of the present levels of functional performance in the student's September 23, 2015 IEP and the added results from the physical therapist in the student's May 25, 2016 IEP, the student's IEP did include the student's healthcare need regarding fatigue; the student's health assessment from the nurse incorporated from the September 23, 2015 IEP; and safety needs, including with regard to the student's mobility and independence on the school campus and the student's access to a wheelchair. (FOFs #3, #4, #8) There was no documentation of the DCSD's or the Parents' concern regarding the student's operation of a wheelchair and upper body strength or the need for a healthcare plan at the time of the May 25, 2016 IEP. (FOF #5)

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<sup>3</sup> The United States Department of Education's Discussion of the 2006 IDEA regulations: "We do not believe it is necessary to include a definition of "functional" in these regulations because the word is generally used to refer to activities and skills that are not considered academic or related to a child's academic achievement as measured on Statewide achievement tests." (Vol. 71 Fed. Reg. pg. 46579 (August 14, 2006))

<sup>4</sup> IEP Guidelines, pg. 6, publically available at: [http://www.doe.nv.gov/Special\\_Education/IDEA\\_Forms\\_\\_\\_Documents/](http://www.doe.nv.gov/Special_Education/IDEA_Forms___Documents/)

## **October 7, 2016 IEP**

The present levels of academic achievement and functional performance in the student's October 7, 2016 IEP included assessment results regarding the student's functional abilities related to gross motor, strength, health and safety and how the results affected the student's involvement and progress in the general education curriculum. The assessments included:

- a. An adaptive physical education consultation referencing the student's locomotion and object control skill in the last formal assessment of the student's gross motor development in September 23, 2015;
- b. An occupational therapy report that noted that the student was now sitting in a typical chair in the classroom and no longer needed adapted scissors; and
- c. The physical therapist's report that included the student's muscle tone and fatigue, endurance and gait speed walking on campus, the student's ability to maneuver safely and independently in crowded classrooms and hallways, the impact of fatigue on the student, and the student's independent skills throughout the school. (FOFs #7, #8)

No documentation was provided to the Complaint Investigator during the course of the investigation that the student had other healthcare needs at the time of the development of the October 7, 2016 IEP, including in the Parents' statements of the student's strengths and educational concerns. (FOFs #7, #9, #11, #23) The same is true of the student's functional performance with regard to the student's ability to operate a wheelchair and upper body strength. (FOFs #7, #9, #10, #11, #17) The Parents did raise the student's upper body strength with the physical therapist after the development of the October 7, 2016 IEP. (FOF #21)

Since the development of an IHP for the student was given such a prominent role in the Complaint and is likely to continue to be a subject of controversy between the Parents and the DCSD, the Complaint Investigator determined the discussion of this Issue should include the pertinent facts regarding the development and provision of an IHP for the student and any requirements under the IDEA and the NAC, Chapter 388 in this regard. Neither the IDEA nor the NAC, Chapter 388, specifically require or mention an IHP in law or regulations. However, an IHP is also not precluded under the IDEA or NAC, Chapter 388.

Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a student with a disability to benefit from special education and the list of named services in the IDEA is not exhaustive. (34 C.F.R. §300.34, NAC §388.101) Pertinent to this Complaint, the related service of school health services and school nurse services are defined as health services that are designed to enable a student with a disability to receive a free appropriate public education as described in the student's IEP. (34 C.F.R. §300.34(c)(13), NAC §388.101) In addition, supplementary aids and services are defined as aids, services and other supports that are provided in regular educational classes, other education-related settings, extracurricular settings and nonacademic settings to enable students with disabilities to be educated with students who are not disabled to the maximum extent appropriate. (34 C.F.R. §300.42, NAC §388.132)

Therefore, if a student's IEP Team determines the student with a disability requires an IHP in order to be provided a free appropriate public education (34 C.F.R. §§300.17, 300.101), an IHP could be a school health service if required to assist the student with a disability to benefit from special education (34 C.F.R. §300.34(c)(13), NAC §388.101) or, if required for the student with a disability to be educated with students who are not disabled to the maximum extent

appropriate, a supplementary aid/service under the IDEA, 34 C.F.R. §300.42, and the NAC §388.132.

Given the absence of a requirement for an IHP in the IDEA or the NAC, Chapter 388, it is not surprising that there are no legal standards for the development of an IHP in these laws, including the absence of a requirement that a local educational agency develop such standards.<sup>5</sup> (See FOF #27 regarding DCSD) In this case, the development of an IHP for the student arose at the student's October 7, 2016 IEP meeting and the IEP Team included a related service of a need for an assessment in school health services (with regard to assessment and to develop the need for a health and safety plan) in the student's IEP. (FOFs #12, #23, #24) It is noted that, after the time period of this Complaint, the DCSD did develop and implement an IHP for the student. (FOFs #24 - #26)

Upon consideration of the present levels of functional performance in the student's October 2017 IEP and the consideration that the student may need a health and safety plan (FOF #12), the student's October 7, 2016 IEP did include the student's healthcare needs known at that time and there was no documentation that the present levels of the student's functional performance as a result of the student's upper body strength and ability to operate a wheelchair needed to be addressed at that time.

### **IEP Team**

Pursuant to the IDEA and the NAC, Chapter 388, a student's IEP Team must include a person who is familiar with the tests and other assessments performed on or by the student and their results and who can interpret the instructional implications of the results of the evaluation. (NAC §388.281(1)(e)), 34 C.F.R. §300.321(a)(5)) The Parents' allegation in this Complaint is limited to the IEP meetings that took during the spring of 2016. There was only one IEP revision in the spring of 2016, the May 25, 2016 IEP revision. This IEP revision was for the sole purpose of adding extended school year services for physical therapy. (FOFs #2, #3)

The student's May 25, 2016 IEP included a new assessment from the physical therapist in the present levels of academic achievement and functional performance. (FOFs #3, #4) The physical therapy assessment included results regarding the student's health, including fatigue and endurance; and safety, including the safe negotiation of steps and curbs. (FOF #5)

There is no documentation of the individuals who participated in the revision of the May 25, 2016 IEP. (FOF #2) Based on the IEP contents alone, it appears that the physical therapist participated in the revision of the student's IEP and the Parents acknowledge being contacted about the revision of the IEP. (FOFs #2, #3) The Parents did not object to the DCSD's proposal in the May 25, 2017 IEP to provide the student the physical therapy service during the extended school year or the associated goals. (FOF #4) However, the Parents did object in this Complaint to the absence of the required individual who was familiar with the tests and other assessments performed on or by the student and their results and who could interpret the instructional implications of the results of the evaluation.

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<sup>5</sup> Based on the Parents' documentation provided in the course of this investigation, it is recognized that there is a position statement from the National Association of School Nurses on IHPs and the role of the school nurse. The position paper indicates that a school nurse must meet nursing regulatory requirements and professional standards by developing an IHP. The National Association of School Nurses views an IHP as a variation of the nursing care plan: "Development of the IHP by the school nurse provides a framework for meeting clinical and administrative needs.(FOF #29)

Both the IDEA and the NAC, Chapter 388, provide that in making changes to a student's IEP after the annual IEP Team meeting for a school year, the parent of a student with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the student's current IEP. (34 C.F.R. §300.324(a)(4), NAC §388.281(7)) However, the NAC §388.281(7)(a) requires that the agreement of the parent and the public agency be in writing. In this case, the Parents and the DCSD disagree on whether there was an agreement to revise the student's IEP without convening a meeting of the IEP Team. (FOF #2) Given the DCSD did not have a written agreement to revise the student's IEP without a meeting as required by the NAC §388.281(7)(a), the DCSD was not authorized to do so. Therefore, it is unnecessary to make a determination as to the truth of the matter regarding any oral agreement to do so.

The Parents had the right to participate in the review and revision of the student's IEP, including the IEP Team's consideration of the results of the most recent physical therapy evaluation of the student and the concerns of the Parents for enhancing the education of their child. (34 C.F.R. §§300.321 and 300.324; NAC §388.281) Therefore, in the absence of the DCSD's and Parents' written agreement to revise the student's IEP without convening a meeting, the DCSD was required to convene a meeting and ensure the physical therapist or other individual who was familiar with the performed assessments and could interpret the instructional implications of the results of the assessment was present as a member of the student's IEP Team.

*Therefore, the DCSD complied with the IDEA and the NAC, Chapter 388, in the development of the student's IEPs developed from March 10, 2016 through October 7, 2016 with regard to the inclusion of a statement of the student's present levels of functional performance in the specifically cited regards; but failed to comply with regard to ensuring a required member of the IEP Team was present in the revision of the student's May 25, 2016 IEP that was required to be revised at a convened meeting in the absence of a written agreement otherwise.*

## **ISSUE TWO:**

Whether the DCSD complied with the IDEA and the NAC, Chapter 388, with respect to parent participation, specifically considering the concerns of the Parents in the development of the October 7, 2016 IEP regarding the retention of the safety procedures/health narrative in the present levels of academic achievement and functional performance; the regression of the student's mobility; and the student's safety during the school day.

Parents are a member of their child's IEP Team and an equal participant integral to the IEP process. (34 C.F.R. §300.321, NAC §388.281) In accordance with the IDEA, 34 C.F.R. §300.324(a)(1)(ii), and NAC 388.284(2)(a), in developing each student's IEP, the IEP Team must consider the concerns of the parents for enhancing the education of their child. As such, the IEP Team was required to consider the Parents' concerns and the information that they provided regarding the student in the development/revision of the IEPs at issue. This requirement to consider the Parents' concerns and information did not, however, require the DCSD to adopt the recommendations of the Parents or allow their veto over any individual IEP provision. (*Mrs. S. v. Vashon Island School District*, 337 F.3d 1115; 39 IDELR 154 (9th Cir. 2003); cert denied. 125 S.Ct. 1662 (2005)) However, the DCSD was required to provide a prior written notice that included an explanation of why the agency was not adopting the Parents'

recommendations and to explain any other options it considered and why it did not adopt those options. (34 C.F.R. §300.503, NAC §388.300, 32 IDELR 206 (*Letter to Faustini*, OSEP 1999))<sup>6</sup>

The student's October 7, 2016 IEP was completed at the second IEP meeting on that same date with services to be implemented that day. (FOF #6) In accordance with the IDEA, 34 C.F.R. §300.503, and NAC §388.300, the DCSD was required to provide the Parents a written notice a reasonable time before the public agency proposed or refused to initiate or change the provision of a free appropriate public education to the student. In relevant part, a Prior Written Notice has the following mandatory content: a description of the action proposed or refused by the agency; an explanation of why the agency proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; and a description of other options that the IEP Team considered and the reasons why those options were rejected; and a description of other factors that are relevant to the agency's proposal or refusal. (34 C.F.R. §300.503(b), NAC §388.300(10))

A Prior Written Notice serves an important purpose:

"We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement placement, if any." (*Union School District v. B. Smith*, 15 F.3d 1519; 20 IDELR 987, 990 (9th Cir. 1994))

In this case, the Parents provided the DCSD comprehensive statements on the Parents' concerns and requested services. (FOFs #9, #11) The student's IEP Team did include the statement of concerns verbatim in the student's IEP and, based on the IEP content, there is evidence that the IEP Team considered some of the Parents' concerns and requested services, such as the retention of a stool to access the bus, access to a wheelchair, and the assessment and development of the student's need for health and safety plan. (FOF #14)

However, the Prior Written Notice issued after the IEP Team made the final decision on the contents of the student's IEP on October 7, 2016 did not include any acknowledgment of the Parents' proposals or the IEP Team's refusals. (FOFs #11, #13 #14) In fact, the DCSD's October 7, 2016 Prior Written Notice proposing to implement the student's IEP was signed by the case manager, but did not include whether it was a proposal or refusal or any other information other than that the student's IEP developed on October 7, 2016 would be implemented. (FOF #13) As such, the DCSD failed to provide the Parents the required Prior Written Notice pursuant to the requirements of the IDEA, 34 C.F.R. §300.503(b), and the NAC §388.300(9).

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<sup>6</sup> This letter is not available publically; therefore the relevant portions are cited here: "The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions . . . . Parents are considered equal partners with school personnel in making these decisions, and the IEP team must consider the parents' concerns and the information that they provide regarding their child in developing, reviewing, and revising IEPs (300.343(c)(2)(iii) and 300.346(a)(1) and (b)). . . .The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. . . . If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing."

The Complaint Investigator did note that the DCSD issued a second Prior Written Notice on October 31, 2016 refusing to provide the student additional adult assistance requested by the Parents. (FOF #15) However, this Prior Written Notice was not issued a reasonable period before the implementation of the DCSD's proposed or refused initiation/change on October 7, 2016 (FOF #6) and still did not include a description of the DCSD's refusal to provide the other requested services in accordance with the IDEA and the NAC, Chapter 388.

As discussed previously, the DCSD was not required to adopt the Parents' proposals, but it was required to consider all of the Parents' proposal and provide the Parents a Prior Written Notice that met the requirements of the IDEA, 34 C.F.R. §300.503, and the NAC §388.300(10). In the absence of a Prior Written Notice, it is determined that the student's IEP Team failed to consider the Parents' concerns regarding the retention of the safety procedures/health narrative in the present levels of academic achievement and functional performance; the regression of the student's mobility; and, in some regards, the student's safety during the school day at the IEP meetings to develop the October 7, 2016 IEP.

After the development of the student's October 7, 2016 IEP, the DCSD did continue to meet with the Parents on their concerns with the student's IEP and IHP. The student's October 7, 2017 IEP was revised at least on one occasion, January 27, 2017, to address the Parents' concerns. Given the scheduled IEP meeting as late as March 22, 2017, the student's January 27, 2017 IEP may have even been revised again by the date of the issuance of this Report. (FOF #16)

*Therefore, the DCSD failed to comply with the IDEA and the NAC, Chapter 388, with respect to parent participation, specifically, given the absence of the required Prior Written Notice, considering the concerns of the Parents in the development of the October 7, 2016 IEP regarding the retention of the safety procedures/health narrative in the present levels of academic achievement and functional performance; the regression of the student's mobility; and, in some regards, the student's safety during the school day.*

## **ORDER OF CORRECTIVE ACTION**

The DCSD is required to take corrective action to address the DCSD's failure to comply with the IDEA and the NAC, Chapter 388, with respect to parent participation, specifically, given the absence of the required Prior Written Notice, considering the concerns of the Parents in the development of the October 7, 2016 IEP and failure to ensure the required member of the IEP Team familiar with the tests and other assessments performed on or by the student and their results and who could interpret the instructional implications of the results of the evaluation was present in the revision of the student's May 25, 2016 IEP.

As stated in the introduction in the Conclusions of Law, the student's Parents in this case are active participants in their child's education and the DCSD has been and continues to be responsive to the concerns of the Parents on behalf of their child, including during the course of this investigation. In the determination of the corrective action required to address the DCSD's identified noncompliance, the following was considered: the nature of the noncompliance, including the Parents' agreement with the provision of the physical therapy service in the student's May 25, 2016 IEP; the DCSD's actions after the October 7, 2016 IEP meeting, including the conduct of a comprehensive reevaluation of the student requested by the Parents,



an authorized independent educational evaluation and subsequent IEP meetings to consider the results of the reevaluation of the student and the Parents' concerns (FOFs #16, #17 - #22); the conduct of staff transfer training on behalf of the student (FOF #16); and the development of an IHP. (FOFs #25 - #29) Based on these considerations, it was determined that an individual student remedy is not required. As such, the remedies in this Complaint are systemic in nature rather than student specific.

However, the determination that a student specific remedy is not required in this Complaint, including the requested functional assessment, does not preclude the Parents from requesting an evaluation for the cited emergent needs after November 2016; the referenced independent educational evaluations (FOF #30) pursuant to the IDEA, 34 C.F.R. §300.502, and NAC §388.450; or accessing other available dispute resolution processes under the IDEA and the NAC, Chapter 388, to resolve any disagreement regarding the provision of an appropriate evaluation to the student.

### **Directed Action - Training**

As soon as possible, but no later than the commencement of the 2017/2018 school year, the DCSD must conduct a training(s) with at least the DCSD representative(s) who attend IEP meetings in that capacity and any other individual responsible for the issuance of Prior Written Notices at the elementary and middle schools the student attended that were the subject of this Complaint, including the assigned case manager(s), on the following:

- The contents of a Prior Written Notice with regard to the proposed or refused actions of the DCSD to initiate or change the provision of a free appropriate public education to a student, including documentation of the consideration of the parents' concerns and requests refused by the DCSD .
- The requirement of the NAC §388.281(7)(a), for a written agreement of the parent and the DCSD with regard to making changes to a student's IEP after the annual IEP Team meeting for a school year without convening an IEP Team meeting for the purposes of making those changes. (34 C.F.R. §300.324(a)(4), NAC §388.281(7)) The training must include the provision of a model form.

The training on the above subjects must include a method for the DCSD to determine that the participants have mastered the contents of the training and documentation of that mastery. If any personnel are not present on the day of training, the DCSD must provide a written assurance of how and when the absent personnel will be instructed on this information. The DCSD will be responsible for following-up on the training for absent members and reporting to the NDE on its completion.

The training may be conducted electronically at the DCSD's discretion; however, the DCSD must have documentation of the participants by role and their mastery of the contents. This documentation and any assurances and the model written agreement form must be provided to the NDE within 15 days of the completion of the training of all required personnel to document the implementation of this Order.