

**COMPLAINT INVESTIGATION
DOUGLAS COUNTY SCHOOL DISTRICT
(#DO102119)**

Report Issued on December 18, 2019

INTRODUCTION

On October 21, 2019, the Nevada Superintendent of Public Instruction received a Complaint from a Parent alleging violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. and the IDEA regulations, 34 C.F.R. Part 300; and Chapter 388 of the Nevada Revised Statutes and the Nevada Administrative Code (NAC) by the Douglas County School District (DCSD). The Parent alleged DCSD failed to implement a Student’s Individualized Education Program (IEP), with regard to the percentage of time the Student is being educated with students without disabilities.

In an October 30, 2019 issue letter to the DCSD, the Nevada Department of Education (NDE) provided an opportunity to respond to the allegations raised in the State Complaint and requested documents and information in order to timely investigate the Complaint. The DCSD was notified in that same communication that if the DCSD disputed the allegations of noncompliance in the Complaint, the documents and information submitted must include: “A denial of the alleged noncompliance; a brief statement of the factual basis for the denial; and must specifically reference the documentation provided to the NDE that factually supports the denial.” The NDE correspondence further specified that failure to timely provide a denial of the alleged noncompliance and the related information would be deemed a concession of noncompliance for purposes of the investigation of the State Complaint. The DCSD provided its Response, dated November 12, 2019, denying any noncompliance in the implementation of the Student’s IEP and providing the requested documentation.

Parent’s Complaint, DCSD’s Response to Parent’s Complaint (DCSD’s Response), including supporting documents, and documents subsequently provided by DCSD in response to a follow up inquiry made by the Complaint investigation team, were reviewed in this investigation. The Findings of Fact cite the source(s) of the information determined necessary to resolve the issues in this Complaint.

COMPLAINT ISSUE

The allegations in the Complaint that are under the jurisdiction of the NDE to investigate through the special education complaint process raise the following issue for investigation, as clarified in the course of the investigation:

Issue One: Whether DCSD complied with the requirements of the IDEA and the NAC, Chapter 388, in the implementation of the Student’s March 14, 2019 IEP, specifically with regard to the student spending 50% of the student’s academic time with students without disabilities in the 2019-2020 school year.

FINDINGS OF FACT

1. The Student is a student eligible for special education services under the categories of developmental delay and speech/language impairment. (3/14/2019 IEP)
2. An initial IEP was developed for the Student in the 2018-2019 school year and identified the Student’s grade as “PKSE” or Pre-Kindergarten Special Education. The same IEP was in effect in the 2018-2019 school year and at the time of the alleged violation that is the subject of this Complaint in the 2019-2020 school year. (3/14/2019 IEP)
3. Student’s Parents participated in the IEP team process, together with the Local Educational Agency Representative, Special Education Teacher and a Speech/Language Pathologist. Student’s Mother signed indicating agreement with the components of the IEP and consented to the IEP’s Implementation. (3/14/2019 IEP)
4. The Student’s IEP identifies the following under Specially Designed Instruction:

Specially Designed Instruction	Beginning and Ending Dates	Frequency of Services	Location of Services
Pre-Academic, Social-Emotional, and Communication	03/14/2019 – 03/13/2020	750 minutes per week	Early Childhood Special Education

(3/14/2019 IEP)

5. The Student’s IEP identifies the following under Related Services:

Related Service	Service Type and/or Description <i>A - Assessment</i> <i>C - Consultative</i> <i>D - Direct</i>	Beginning and Ending Dates	Frequency of Services	Location of Services
x – Speech/ Language	D	03/14/2019 – 03/13/2020	40 minutes per week	Special education
x – Transportation	D - Curb to Curb 5 Point Harness/Car Seat	03/14/2019 – 03/13/2020	60 minutes per day	Transportation /Bus

(3/14/2019 IEP)

6. Under Placement Considerations, the IEP team rejected “[R]egular class with supplementary aids and services (no removal)” and “[R]egular class and special education class (e.g., resource) combination,” and selected “[S]elf-contained program.” (3/14/2019 IEP)
7. Under Percentage of Time In Regular Education Environment, the IEP team indicated: “The student will spend 50% of his or her school day in the regular education environment.” (3/14/2019 IEP)
8. In justifying the Student’s removal from the regular education environment, the IEP team stated the following, “Due to delays [Student] requires specially designed instruction with professionals trained to meet [their]¹ needs. The harmful effect could be time away from typically developing peers. The team believes the benefits outweigh the possible harmful effect.” (3/14/2019 IEP)
9. In the 2018-2019 school year, the Student was enrolled in, and attended, a Pre-Kindergarten Special Education (PKSE) classroom at Elementary School 1 (ES 1) from March through the end of the school year. (11/12/2019 Student Enrollment History (Enrollment History); ES 1 Program Description)

¹ Student will be referred to by the gender-neutral pronouns “they,” “them,” and “their” in this Report to maintain confidentiality.

10. In the 2018-2019 school year, ES 1 housed a PKSE program as well as a general education preschool program (PKEC). At ES 1, the Student spent some part of the school day with typically developing preschool-aged peers, participated in recess with the PKEC students and sometimes participated with the students when the PKSE and PKEC programs were joined for part of the school day. PKSE students were exposed to typically developing peers in the PKEC program at irregular intervals as a large group, in smaller groups, during outdoor time, or when PKEC students came in to the PKSE classroom for some part of the day. (ES 1 Program Description; Parent Complaint)
11. In the 2018-2019 school year, DCSD staff understood that the student was also regularly attending a preschool program at a private school. The DCSD staff considered this when calculating the student's time in the regular environment and identifying that time as 50% of the school day. The 3/14/2019 IEP does not make reference to the private preschool program. (ES 1 Program Description; 3/14/2019 IEP)
12. The Student's Parents refer to the private school as a preschool, and also refer to the program as daycare. Parents' Complaint does not make reference to the private school program. (9/9/2019 Email; 8/21/2019 Email; 3/27/2019 Email; Parent Complaint)
13. Prior to the 2019-2020 school year, DCSD informed the Parents of its intent to implement the Student's IEP at Elementary School 2 (ES 2), as the DCSD had expanded by placing a Prekindergarten special education program at ES 2, which is the Student's zoned school. The Parental Prior Written Notice (PWN) provided to Parents stated: "DCSD has opened an inclusive early childhood program at [ES 2]. This is the least restrictive environment for [Student]. Parent is able to seek a variance to [ES 1] following the DCSD's variance policy." (8/13/2019 PWN)
14. In the 2019-2020 school year, the Student was enrolled in a Prekindergarten Special Education classroom at ES 2, in the afternoon program, which contained a total of eight students. (Parent Complaint; 8/13/2019 PWN; Enrollment History; ES 2 Program Description; Student Attendance Detail)

15. In the 2019-2020 school year, ES 2 houses an early childhood special education program – also referred to as PKSE - that is for 2.5 hours/day and meets for morning or afternoon sessions. 2.5 hours/day of student attendance equals 750 minutes per week. There is not a PKEC program for typically developing preschool aged students at ES 2. ES 2 is recruiting typically developing peers to this program to serve as “peer models” in the PKSE program. Depending on individual student need, PKSE students have exposure to typically developing Kindergarten students at recess, library, story time or specials. (ES 2 Program Description)
16. The Student attended ES 2 for the first five school days of the school year from 8/12/2019 – 8/16/2019. Student remains enrolled at ES 2. (Enrollment History, Student Attendance Detail; ES 2 Program Description; Parent Complaint; District Response; DCSD Elementary School Calendar)
17. On 8/21/2019, expressing concern about the Student’s lack of exposure to typically developing peers at ES 2, Parents communicated an intent to withdraw the Student from attendance in the DCSD preschool program and continue receiving the related services of speech/language. In subsequent communications, Parents indicated having decided against the withdrawal of the Student. (8/21/2019 Email; 9/9/2019 Email)
18. On 8/23/2019 Parents requested an IEP team meeting to discuss a change of placement for the Student. Parents’ request stated, “We are most concerned about [Student’s] behavioral regression and the inability to meet or exceed [their] social/emotional benchmarks as laid out in [their] IEP as a result of placement in a self contained (sic.) program in lieu of an integrated one.” In subsequent communications Parents clarified their desire that the IEP place the Student in the ES 1 program. (8/23/2019 Parent Correspondence to ES 2 Principal (8/23/2019 Letter); 9/9/2019 Email; Parent Complaint; District Response)
19. DCSD considered the request to transfer from ES 2 to ES 1 as a variance in the Student’s attending school and indicated that this variance in attendance would be considered as resulting from parental choice and Parents would have to supply transportation. (District Response; Parent Complaint; 8/13/2019 PWN)

CONCLUSIONS OF LAW

Issue One: Whether DCSD complied with the requirements of the IDEA and the NAC, Chapter 388, in the implementation of the Student’s March 14, 2019 IEP, specifically with regard to the student spending 50% of the student’s academic time with students without disabilities in the 2019-2020 school year.

A student's IEP describes his/her individual needs and sets out the proper placement *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005). Once an IEP is developed for a student, the public agency must implement the student's IEP with all of its required components. 34 C.F.R. §§300.17(d), 300.101, and 300.323; NAC §388.281.

Courts have found that in addition to setting out a student's needs, the IEP serves as a communication tool through the mechanism of parental participation, which includes not just the parents participating and their consent to the IEP, but also allows parents to monitor and enforce the services that an IEP team has decided are appropriate to provide to the student. "The IEP is a 'formal, written offer [that] creates a clear record that will do much to eliminate troublesome factual disputes... about when placements were offered, what placements were offered, and what additional education assistance was offered to supplement a placement, if any.'" *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 117 LRP 21748 (9th Cir. 2017), *internal citations omitted*.

Relevant and persuasive policy guidance from the federal Office of Special Education Programs indicates that: "The IEP Team meeting serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to make joint informed decisions regarding services that are necessary to meet the unique needs of the child." *Letter to Richards*, 55 IDELR 107, (OSEP 2010)². While the IEP team, including the Parent, should work toward general consensus on the content of the IEP, the public agency – or school district – is "ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE)." *Id.*

The issue presented in this State Complaint addresses implementation of the Student's IEP in the current school year, specifically with regard to the percentage of time the Student spends with typically developing peers. Documents reviewed in investigating the Complaint demonstrate that underlying this implementation issue is a miscommunication between Parents and DCSD about the Student's educational placement and the resulting access to peers.

Parent's Complaint articulates the position that the Student is to spend 50% of their school time with typically developing peers and argues this is not being provided at ES 2. (Finding of Fact (FOF) #18) This position appears to be based on the Percentage of Time in the Regular Education Environment articulated in the Student's IEP which states the Student will spend 50% of his or her school day in the regular education environment, and by the Student's experience at ES 1, where a PKEC program was also housed and students with disabilities interacted informally some amount of time with their typically developing peers each week. (FOFs #7, #10, #18) DCSD's Response articulates a belief that the Student's IEP is being appropriately implemented at ES 2 in the PKSE program and that the amount of exposure to typically developing peers at ES 2, in the form of peer models and Kindergarten students, is substantively similar to that which the Student had access to at ES 1. (FOFs #13, #14, #15)

To a degree, both the Parents' and DCSD's position find a basis in the IEP. However, the core document at issue in this State Complaint is the Student's 3/14/2019 IEP and the IEP itself is internally inconsistent. (FOFs #4, #5, #6, #7, #8) Parents are correct that the Percentage of Time in the Regular Environment requires that the Student will spend 50% of their school day in

² This policy letter is publicly available at: <https://www2.ed.gov/policy/speced/guid/idea/letters/2010-1/richards010710iep1q2010.pdf>

the regular education environment; however, this percentage is inconsistent with the Specially Designed Instruction, Placement Considerations and justification for removal from general education environment portions of the IEP which essentially require that the Student spend 100% of their day in the PKSE environment. More specifically, the Specially Designed Instruction section indicates that the Student will receive 750 minutes per week of specially designed instruction in the Early Childhood Special Education environment and, in a program that runs 2.5 hours per day 750 minutes per week, that means 100% of the Student's time is spent in a special education environment. (FOFs #4, #15) In addition, under Placement Consideration, the IEP team specifically rejected both "[R]egular class with supplementary aides and services (no removal)" and "[R]egular class and special education class (e.g. resource) combination," instead selecting "[S]elf-contained Program," and justifying this selection by articulating that the educational benefits from this placement would outweigh the possible harmful effect of time away from typically developing peers. (FOFs #6, #8)

Documentation submitted by DCSD indicates that at least some members of the IEP team believed the 50% calculation of time in the regular education environment to be an accurate reflection of the Student's school day because, in addition to attending the PKSE program provided by DCSD, the Student was attending a private preschool program which was presumably a general education setting. (FOFs #11, #12) However, the private preschool program is not referenced in the IEP document, and DCSD had not made that placement, thus there appears to have been no appropriate grounds for considering the Student's time in that private preschool as part of the Student's "school day" as defined by the IEP. Whether or not this attendance at the private preschool program was the reason for the 50%, the balance of the evidence contained within the IEP itself, as articulated above, demonstrates that the IEP team intended for the Student to receive the level of special education services available in the PKSE program. In fact, both the programs at ES 1 and ES 2 were self-contained PKSE programs that provided that level of services. (FOFs #4, #5, #6, #8, #10, #15)

A review of the correspondence between the Parents and DCSD as well as documents relevant to the State Complaint that were submitted by DCSD evidence that this misapprehension of what was required by the Student's IEP was complicated by the informal integration of the PKSE students and the PKEC students at ES 1 and the PKSE and Peer Models/Kindergarten students at ES 2. (FOFs #10, #14, #15) In both the instant complaint, and the underlying documents reviewed in this investigation, Parents are advocating for the Student's placement in the ES 1 program rather than the ES 2 program, due to the percentage of time they perceived the Student would spend with typically developing peers, but the IEP does not require such access, but rather places the Student in a full-time PKSE program. (FOFs 10, #15). DCSD staff did not aid in correcting this misapprehension, in that rather than further analyzing and explaining what was required to be provided to the Student by virtue of the IEP, they engaged the Parents in various discussions of what other integrative opportunities existed at ES 2 with Kindergarten classes and peer models, and by discussing with Parents the option of pursuing an enrollment variance, which would allow Parents to petition for enrollment in a school, ES 1, which was not their zoned school, ES 2³. (FOFs #18, #19)

Given the internal inconsistencies on the face of the 3/14/2019 IEP, the DCSD fell short in its obligation to produce an IEP that contained the clarity to serve as an effective communication

³ Analysis of any issue relating to variance process itself is not reached as it falls outside of the jurisdiction of the State Complaint process. NAC 388.318

vehicle required by the Ninth Circuit in *M.C.* and OSEP's *Letter to Richards* as discussed above. However, the balance of the evidence demonstrates that, notwithstanding the designation that the student would be in the general education classroom 50% of the day, all other aspects of the IEP require that the Student participate 100% in a self-contained PKSE program and the program offered at ES 2 was consistent with this requirement⁴.

Therefore, DCSD complied with the requirements of the IDEA and the NAC, Chapter 388, in the implementation of the Student's March 14, 2019 IEP during the 2019-2020 school year.

⁴ This conclusion does not preclude Parents from requesting an IEP revision earlier than the annual review date to review services in the Student's IEP and the placement of the Student, nor does it preclude Parents from engaging in other conflict resolution mechanisms, such as IEP facilitation, mediation, or a due process hearing, if they perceive the stated IEP services and/or placement to be inappropriate for the Student.