

**COMPLAINT INVESTIGATION
CHARTER SCHOOL
(#SC081419)**

Report Issued on October 11, 2019

INTRODUCTION

On August 14, 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) with regard to the provision of special education services to a student with a disability attending a Charter School authorized by the State Public Charter School Authority (SPCSA).

The Parent alleged that the Charter School failed to conduct an appropriate manifestation determination review (MDR) following a disciplinary incident, failed to comply with certain procedural requirements in the development of the student's most recent Individualized Education Program (IEP), and failed to offer an IEP designed to provide a Free Appropriate Public Education (FAPE) to the student.

The Complaint also raised allegations regarding placement in an Interim Alternate Educational Setting (IAES), IEP development, progress reporting and class assignments. Specifically, the Parent alleged no IAES was proposed or provided for the student. The Complaint alleged that present levels of performance, data and evaluation were not addressed in developing the student's IEP, nor were behaviors that impede the student's learning. The Complaint further alleged that Parent did not receive progress reports on the goals developed 3/2/2018 and 2/21/2019. In addition, the Complaint alleged that the student's schedule was not changed, despite request, and the student was not allowed to attend Physical Education or U.S. History and did not receive instruction in those subject. No specific facts were articulated as a basis for these additional allegations. In order for the NDE to exercise jurisdiction and investigate violations contained in a State Complaint, each of the alleged violations must comply with all of the requirements of the IDEA and NAC for special education programs, Chapter 388. In filing a State Complaint, allegations that a public agency has committed a violation of the IDEA and NAC for special education programs, Chapter 388, must be supported by alleged facts. NAC 388.318(3)(b). These additional allegations regarding placement in an IAES, IEP development, progress reporting and class assignments were not supported by any alleged facts and were, therefore, found to be outside the jurisdiction of the special education state complaint process and beyond the scope of this investigation and the Parent was notified of this determination.

Parent's Complaint and all documents submitted by the Charter School relevant to the issues in the Complaint, including legal argument, were reviewed in their entirety in this

investigation. The Findings of Fact cite the source(s) of the information determined necessary to resolve the issues in this Complaint.

Responsible Public Educational Agency

Prior to June 5, 2019, NRS §388A.159 deemed the SPCSA a local educational agency (LEA) for certain purposes, specifically for the purpose of directing the proportionate share of any money available from federal and state categorical grant programs to charter schools which were sponsored by the SPCSA. At the time of the filing of this Complaint, NRS §388A.159 had been amended and deemed the SPCSA a LEA for all purposes, including the provision of FAPE and the provision of special education and related services provided by a charter school sponsored by the SPCSA. AB78, Chapter 338, Statutes of 2019.

Upon consideration of Nevada law and regulation, the NDE provided an opportunity for both the Charter School and SPCSA to submit a written response and documentation responsive to the Complaint. The Charter School submitted a response and the SPCSA did not. The Parent was also provided the opportunity to submit additional documentation supporting the Complaint and did not provide additional documentation.

In an August 26, 2019 issue letter to the Charter School and the SPCSA, the NDE requested additional documents and information in order to timely investigate the State Complaint. The Charter School and the SPCSA were notified in that same communication that if the Charter School and the SPCSA disputed the allegations of noncompliance in the Complaint, the submitted documents and information from the Charter School must include specifically referenced content relevant to that denial and that a failure to timely do so would be considered a concession of noncompliance for purposes of the investigation of the State Complaint. The Charter School did timely dispute the allegations of noncompliance in the Complaint and specifically referenced the documents relevant to that denial.

COMPLAINT ISSUES

The allegations in the Complaint 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 Charter School complied with the requirements of the IDEA and the NAC, Chapter 388, in the consideration of factors required by the IDEA in conducting the student's March 6, 2019 MDR.

Issue Two: Whether the Charter School complied with the requirements of the IDEA and the NAC, Chapter 388, with regard to development of the student's May 28, 2019 IEP, specifically 1) whether the student's placement for Alternative Instruction Arrangements (AIA) was predetermined; and 2) whether the student's placement for AIA in the 2019-2020 school year constituted an improper change in placement.

Issue Three: Whether the Charter School complied with the requirements of the IDEA and the NAC, Chapter 388, to offer a FAPE in the student's May 28, 2019 IEP for the student in the 2019-2020 school year, specifically whether the student was offered access to the general curriculum and the opportunity to make progress toward the student's IEP goals.

FINDINGS OF FACT

1. The student, born March 18, 2004, is eligible for special education services pursuant to IDEA and NAC, Chapter 388 under the disability category of specific learning disability. The student was enrolled at the Charter School in the 8th grade in the 2018-2019 school year. (2/21/2019; 3/14/2019 IEP; 5/28/2019 IEP)
2. An annual IEP Team meeting was conducted on March 2, 2018. The resulting IEP contained reading, written expression, math and behavior goals. The behavior goal focused on following directions and working on task. The 3/2/2019 IEP provided for Specialized Instruction in the amount of 250 minutes per week of direct instruction for reading, 250 minutes per week of direct instruction for math and 250 minutes per week of direct instruction for writing in the Resource classroom. The IEP was in effect at the start of the 2018-2019 school year. (3/2/2018 IEP)
3. An IEP Team meeting was conducted on February 21, 2019. The resulting IEP contained reading, writing, math and behavior goals. The behavior goal focused on turning in assignments for a grade. The 2/21/2019 IEP provided for 75 minutes per week of direct instruction for reading and 75 minutes per week of direct instruction for writing in the general education classroom. The IEP further provided for 250 minutes per week of direct instruction for math, 50 minutes per week of direct instruction for behavior, 100 minutes per week of direct instruction for reading and 100 minutes per week of direct instruction for writing in the Resource classroom. (2/21/2019 IEP)
4. On February 25, 2019, the student was involved in a disciplinary incident where the student was found to be in possession of a knife on school grounds and was subsequently suspended for 5 days pending expulsion. (2/25/2019 Notice of Suspension; 2/27/2019 Notification of Possible Expulsion; Recommendation for Expulsion Support Documents)
5. On March 6, 2019, a MDR was held. The meeting was attended by the Parent and student, and a Nevada PEP advocate, telephonically, a Charter School representative, a special education teacher and a regular education teacher, in person. The MDR found that the conduct was not caused by, nor had a direct and substantial relationship to, the student's disability and the conduct was not the direct result of the Charter School's failure to implement the IEP. (3/6/2019 Manifestation Determination Summary (3/6/2019 MDR Summary); 9/9/2019 Charter School Response to Complaint (9/9/2019 Response))

6. The MDR team considered the following:
 - "Relevant information supplied by the student's parents;
 - Teacher observations of the student; and
 - The student's IEP." (3/6/2019 MDR Summary)
7. The MDR team considered the 2/25/2019 disciplinary incident and found the incident regarding possession of a knife to be "a one time incident (sic)." Following a report from another student, this student was questioned by the Principal and Assistant Principal and found to have a knife in their¹ possession which they reported they forgot they had and that they had it because they needed it for safety when walking home. The MDR team found, prior to the 2/25/2019 disciplinary incident, the Student did not have prior disciplinary issues in the "Dean's Chronology" for the 2018-2019 school year. (3/6/2019 MDR; 9/9/2019 Response)
8. The MDR team considered teacher observations of the Resource classroom teacher that when the student did not want to complete work in class, they would put their head down, and when they completed work it was accurate. Another teacher indicated that the student had been observed making "appropriate choices in the classroom setting" and had been observed choosing "to not complete work." (3/6/2019 MDR)
9. The MDR Summary contained a page of "Considerations and Additional Comments During Meeting." Therein the team reported considering the following:
 - Parent's position that she believed the behavior had a direct relationship to the student's disability because she did not feel the student acted as maturely as student's chronological age.
 - Parent's belief that the conduct was a direct result of a failure to implement the student's IEP, in that the student's first semester schedule did not align to the 3/2/2018 IEP's service page.
 - The Charter School representative, special education teacher and general education teacher's conclusion that the behavior was not directly related to the student's disability.
 - The Charter School representative, special education teacher and general education teacher's observation that the "Student displayed non compliant (sic.) work behavior while on campus, however not consistently, not with intensity, nor with duration that has caused the school based team to consider this specific incident to be directly related to [their] disability."
 - The student's responding in the negative to the question of whether the incident occurred because the school did not follow the student's IEP.

¹ The gender-neutral plural pronouns "they," "them" and "their" will be utilized throughout in reference to the student to further safeguard confidentiality of student information.

- The student's schedule, which from August 2018 to December 2018 did not match the service minutes of the student's IEP, and which was changed prior to the end of first semester, and the subsequent revision of the student's IEP which was implemented in February 2019. (3/6/2019 MDR)
10. The MDR team determined a functional behavioral analysis and behavior intervention plan were not warranted because the underlying behavior was a "one time incident (sic.)" The team made reference to the student's IEPs and stated its position that the behavior was not caused by any failure to follow the student's IEP. (3/6/2019 MDR)
 11. On March 7, 2019, the Charter School Committee held a hearing on the recommended expulsion and upheld the expulsion. The Parent subsequently appealed the expulsion to the Charter School Board of Directors. On March 22, 2019, the Board of Directors upheld the "permanent expulsion" of the student. (3/7/2019 Notification of Committee Decision; 3/22/2019 Notification of Board Decision)
 12. On March 7, 2019, the Charter School provided a Notice of Proposed Meeting Arrangement (Meeting Notice) to revise the student's IEP, change the student's special education placement and/or related services and add "AIA to services." The reference to AIA was included in the Meeting Notice in error and the resulting IEP did not include any reference to an AIA placement. (3/7/2019 Meeting Notice; 9/9/2019 Response; Email chain provided by Charter School Assistant Director of Special Education regarding post-expulsion educational services; 3/14/2019 IEP)
 13. An IEP Team meeting was conducted March 14, 2019. The resulting IEP contained reading, writing, math and behavior goals that were each substantively identical to those of the 2/21/2019 IEP. The 3/14/2019 IEP contained the same number and subject allocation of direct service minutes as the 2/21/2019 IEP and changed the location of services to "[O]n school campus after school hours," with beginning and ending dates of 3/14/2019 - 5/29/2019. The 3/14/2019 IEP restated the direct service minutes with the location of services of regular education classroom and resource room, with beginning and ending dates of 5/30/2019 - 2/21/2020. This difference in the dates was intended to create an option for a future IEP Team to implement the IEP if Parent chose to seek, and obtained, enrollment in a public school outside other than the Charter School. (3/14/2019 IEP; 9/9/2019 Response; Email chain provided by Charter School Assistant Director of Special Education regarding 2019-2020 educational services)
 14. Under Supplementary Aids, the 3/14/2019 IEP Team noted that "[T]he school will provide instruction sessions for [Student] between 3/11/2019 and 3/11/2020. The instruction will occur on the school campus, after school for 120 minutes per day, on a typical school day," with beginning and ending dates of 3/14/2019 - 5/29/2019. (3/14/2019 IEP)

15. Under Placement Considerations, the 3/14/2019 IEP Team selected "[O]ther... Services provided after school hours." Further justification was provided, stating "[Student] has been expelled from school and will not be attending the school's campus. [Student] is still entitled to receive services through [their] individualized education program to ensure [they are] receiving a free appropriate public education. [Student] will be able to receive the instructional time in the areas of reading, math, written language, and behavior while they are on campus however the instruction will be after the school hours, and on a typical school day. Potential harmful effects of this placement is less exposure to the general education curriculum." (3/14/2019 IEP)
16. On May 22, 2019, the Charter School provided a Notice of Proposed Meeting Arrangement (Meeting Notice) to revise the student's IEP, change the student's special education placement and/or related services and under description of the proposed or refused change stated "Extending 'services as a result of expulsion', to the end of the annual IEP." (5/22/2019 Meeting Notice)
17. An IEP Team meeting was conducted on May 28, 2019. The resulting IEP contained reading, writing, math, and behavior goals which were substantively identical to the 3/14/2019 and 2/21/2019 IEPs. The 5/28/2019 IEP contained the same number and subject allocation of direct service minutes as the 2/21/2019 and 3/14/2019 IEPs, identifying location of services as "[O]n school campus after school hours," with beginning and ending dates of 5/28/2019 – 2/21/2020. The IEP Implementation section notes Parent, who was present, together with the student and a Nevada PEP advocate, indicated her disagreement with the IEP. (5/28/2019 IEP; 9/9/2019 Response)
18. The 5/28/2019 IEP provided a list of assessments conducted, and their effects on the student's involvement and progress in the general education curriculum, spanning the period from the student's last Multidisciplinary Evaluation Team Report (MDT) to the student's Dean's Chronology and 3/6/2019 MDR Report, and including a series of growth assessments conducted through the 2018-2019 school year. (5/28/2019 IEP)
19. The student's grades, assignments, and any assessments to be administered under the 5/28/2019 IEP were to be determined by the instructors providing services in collaboration with the Charter School special education teacher. (5/28/2019 IEP)

CONCLUSIONS OF LAW

Issue One:

Whether the Charter School complied with the requirements of the IDEA and the NAC, Chapter 388, in the consideration of factors required by the IDEA in conducting the student's March 6, 2019 MDR.

Consistent with IDEA, the NAC requires, in relevant part, that no student with a disability may be subject to any suspension, expulsion or exclusion which will result in a change in the student's placement, except upon compliance with requirements as set out by law. NAC §388.265(1). Prior to initiating discipline that will result in a change of placement, a public agency must convene a meeting of the relevant members of the IEP committee. NAC §388.265(2). A change of placement is deemed to occur, in relevant part, when a student is removed from the student's current placement for 10 or more consecutive days. 34 C.F.R. §300.536.

This convened team must consider all information relevant to the behavior which is the subject of the disciplinary action, including, without limitation, the student's IEP, observations of the student, and evaluations and diagnostic results, including any information supplied by the parent, and must reach a determination as to whether the student's behavior, which is the subject of the disciplinary action, is conduct which was "(1) Caused by or directly and substantially related to the student's disability; or, (2) The direct result of the public agency's failure to implement the student's individualized educational program." §388.265(3)(a)(b). A team finding that either (1) or (2), above, apply to the student, must deem that the misconduct was a manifestation of the student's disability. NAC §388.265(3)(b), 34 C.F.R. §300.530(e). The NAC further requires that a report be prepared setting out the team's findings and conclusions. NAC §388.265(3)(c).

The uncontested facts in the instant Complaint establish that the student was involved in a disciplinary incident involving a weapon on February 25, 2019 and subsequently suspended, pending expulsion proceedings. (Findings of Fact (FOF) #4) The Charter School convened a MDR on March 6, 2019, which was the seventh (7th) school day following the student's disciplinary removal from school. (FOF #5) The MDR team was made up of IEP committee members, who had knowledge of the student and could, and did, speak to the issues relevant to the disciplinary incident. (FOF #5, #7, #8, #9)

The issue raised by Parent's Complaint, which was procedural and not substantive in nature, alleged that the MDR team did not consider the required factors in arriving at its determination; however, a review of the evidence demonstrates that, consistent with the requirements of the NAC, the MDR team considered requisite factors and produced a Summary memorializing findings and conclusions. (FOF #6, #7, #8, #9, #10) NAC §388.265(3)(c). While merely checking boxes indicating consideration of the requisite factors would not have been enough to demonstrate compliance, the 3/6/2019 MDR Summary provides evidence that the MDR team engaged in consideration of the required factors.

The evidence shows the MDR team, including the Parent, discussed the student's statements that the student was carrying the knife for safety on the walk home, discussed the data provided by the Dean's Chronology report, together with the teacher observations, which did not evidence any behavioral issues in the 2018-2019 school year beyond occasional issues relating to non-compliance with work tasks. (FOF #6, #7, #8, #9) The Summary further demonstrates the MDR team considered – but disagreed with – the Parent's position in answering the required questions and reaching the determination that the behavior at issue in the disciplinary action, bringing a weapon to

school, was 1) not caused by or directly and substantially related to the student's disability, Specific Learning Disability, and 2) not the direct result of the Charter School's failure to implement the student's IEP, as the Team determined that the IEP was being implemented at the time of behavior. (FOF #5, #6, #7, #8, #9)

Thus, the evidence reviewed in the investigation of this Complaint indicates that while the Parent expressed disagreement with the MDR team's determinations as to whether the behavior that was the subject of the disciplinary action was a manifestation of the student's disability², the Charter School considered the required factors in making the determination that the misconduct was not a manifestation of the student's disability in the conduct of an MDR.

Therefore, the Charter School complied with the provisions of IDEA and NAC, Chapter 388, in the consideration of factors required by the IDEA in conducting the student's March 6, 2019 MDR.

Issue Two:

Whether the Charter School complied with the requirements of the IDEA and the NAC, Chapter 388, with regard to development of the student's May 28, 2019 IEP, specifically 1) whether the student's placement for AIA was predetermined; and 2) whether the student's placement for AIA in the 2019-2020 school year constituted an improper change in placement.

The IDEA requires local educational agencies to ensure that parents are members of the team that develops a student's IEP and makes decisions about the student's placement. 34 C.F.R. §300.507; 34 C.F.R. §300.327. It is permissible for IEP teams to prepare for meetings discussing student placement, but it is impermissible for teams to decide in advance what that placement will be. *KD v. Dept. of Educ., State of Hawaii*, 58 IDELR 2 (9th Cir. 2011). Irrespective of the preparation or communication conducted prior to an IEP meeting, the team members must come to the meeting with an open mind and must give meaningful consideration to the parent's input. *HB v. Las Virgenes Unified Sch. Dist.*, 52 IDELR 163 (CD Cal 2008), *affirmed by* 54 IDELR 73 (9th Cir. 2010, unpublished).

A change in a student's educational placement occurs when there is a significant alteration in a student's educational program even if he/she remains in the same setting. *ND v. State of Hawaii Dept. of Educ.*, 54 IDELR 111 (9th Cir. 2010). A student with a disability's placement may be changed as a result of a disciplinary incident if all requisite procedural safeguards are complied with. 34 C.F.R. §300.530; NAC §388.265. At issue in this case is the IEP Team's determination of the placement of the student in the student's 5/28/2019 IEP. This IEP was the second IEP after the student's expulsion on 3/7/2019.

² As noted previously, the Parent's substantive disagreement with the determination of the MDR Team was not raised as an issue in the instant Complaint. Parent retains her right to contest the MDR Team's substantive determination by submitting a Due Process Hearing Request on that issue, as provided for in the IDEA and its implementing regulations (34 C.F.R §300.507) or accessing the IEP facilitation or mediation processes.

Predetermination of AIA?

The review of the Parent's Complaint, in light of the documents reviewed in conducting this investigation, suggests that what Parent has alleged as predetermination was the IEP Team's decision to provide services outside of the regular school day, but this was occasioned by the expulsion, rather than by a predetermined decision of the IEP Team or an improper change in placement.

Specifically, the term AIA appeared in this matter on a Proposed IEP Team Meeting Notice for the 3/14/2019 IEP meeting. (FOF #12) The Charter School staff acknowledged prior to the IEP, and advised the Parent, that this term AIA was used in error and the student had not, in fact, been placed in an AIA setting. (FOF #12) With regard to the student's 5/28/2019 IEP at issue in this Complaint, neither the notice for the 5/28/2019 IEP meeting or the IEP itself included placement in an AIA setting. (FOF #16, #17) Moreover, the evidence demonstrates that the student was not placed in an AIA by either the 3/14/2019 or 5/28/2019 IEPs, thus, such a placement could not have been predetermined. (FOF #13, #17)

Change of Placement

The student's 3/14/2019 and 5/28/2019 post-expulsion IEPs both contained reading, writing, math, and behavior goals that were substantively identical to the student's 2/21/2019 IEP in effect prior to the expulsion. (FOF #13, #17) In addition, the 3/14/2019 and 5/28/2019 IEPs contained the same number and subject allocation of direct service minutes as the student's 2/21/2019 IEP. Both of these post-expulsion IEPs also provided for the student's services to be delivered in the school setting after regular school hours because the student could not attend school during the normal school day due to the expulsion. (FOF #13, #14, #15, #17)

The student's 3/14/2019 IEP included a clear statement that the student would be excluded from attendance during the regular school day for the full period that the IEP was expected to be in place prior to a forthcoming annual evaluation. However, it also included the regular education classroom and resource room in addition to the designated placement of "[O]n school campus after school hours" as the location of services. The location of services in the regular education classroom and resource room was to begin on 5/30/2019 after the ending date of the after-hours designation on school campus. (FOF #13, #14, #15)

The Charter School does not dispute that a change in the location of services occurred from the post-expulsion 3/14/2019 IEP to the 5/28/2019 IEP. (FOF #17) The Charter School indicated the different range of dates and inclusion of the location of the regular education classroom and the resource room in the 3/14/2019 IEP was intended to create an option for a future IEP Team to implement the IEP if Parent chose to seek, and obtained, enrollment in a public school other than the Charter School. (FOF #12, #13, #17) The IEP Team's removal of this location of services in the 5/28/2019 IEP was to effectuate the permanent expulsion of the student that occurred on 3/22/2019, after the 3/14/2019 IEP.

The permanent expulsion of the student after the 3/14/2019 IEP was controlling as to whether or not the student could attend the Charter School during the regular school day. The IDEA expressly permits the required educational services, including continued participation in the general education curriculum, be provided to a student who has been subject to a disciplinary change of placement "in another setting," and that is the option of which this IEP Team availed itself. 34 C.F.R. §300.530(d)(i). As such, the change in placement from the 3/14/2019 IEP commencing 5/30/2019 was a permissible change in placement, under the IDEA and NAC, following the MDR and permanent expulsion of the student on 3/22/2019. (FOF #4) 34 C.F.R. §300.530.

Therefore, the Charter School complied with the IDEA and NAC, Chapter 388, with regard to development of the student's May 28, 2019 IEP, in that placement in AIA was not predetermined, and no improper change in placement occurred in the 2019-2020 school year.

Issue Three:

Whether the Charter School complied with the requirements of the IDEA and the NAC, Chapter 388, to offer a FAPE in the student's May 28, 2019 IEP for the student in the 2019-2020 school year, specifically whether the student was offered access to the general curriculum and the opportunity to make progress toward the student's IEP goals.

A student with a disability who is subject to a disciplinary change in placement for behavior that is found not to be a manifestation of that student's disability is entitled to receive continued educational services, constituting a FAPE, so as to enable that student to continue to participate in the general education curriculum and make progress toward his/her goals. 34 CFR §300.530(d)(i). To provide a FAPE, a local education agency must offer an IEP reasonably calculated to enable a student to make progress in light of the student's circumstances. *Andrew F v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (2017) The student's educational program must be "appropriately ambitious in light of his circumstances." (*Id.*)

As discussed previously, the facts at issue in this investigation demonstrate that the 5/28/2019 IEP maintained a level of expectation, as demonstrated by the educational goals and direct instruction minutes, for the student that predated the student's expulsion and was based on consideration of the student's present levels of performance and rooted in the circumstances created by the student's permanent expulsion from the Charter School. (FOF #16, #17) The direct instruction offered was to include grades, assignments and assessments to be determined by school staff providing instructional sessions and the special education teacher, and, as demonstrated by the maintaining of direct service minutes to be provided, were intended to cover both instruction that would have been covered in the general education setting and the resource classroom. (FOF #17, #18, #19) Thus, the credible evidence reviewed in the investigation of this Complaint demonstrates the educational services to be provided subsequent to the student's expulsion, specifically those identified by the 5/28/2019 IEP, offered access to the general curriculum and the opportunity to make progress toward the student's IEP

goals, and was reasonably calculated to enable the student to make educational progress in light of the student's circumstances.

Therefore, the Charter School complied with the IDEA and NAC, Chapter 388, to offer a FAPE in the student's May 28, 2019 IEP for the student in the 2019-2020 school year, that offered access to the general curriculum and the opportunity to make progress toward the student's IEP goals.