

**COMPLAINT INVESTIGATION
WASHOE COUNTY SCHOOL DISTRICT
(#WA050417)**

Report Issued on June 28, 2017

INTRODUCTION

On May 4, 2017, 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., 34 C.F.R. Part 300; and Chapter 388 of the Nevada Revised Statutes and the Nevada Administrative Code (NAC) with regard to the placement of a student with a disability enrolled in the Washoe County School District (WCSD). The Parent alleged that the WCSD did not provide the Parent the required notice and parental involvement when the WCSD made a unilateral decision on February 2, 2017 to change the student's placement for the 2017/2018 school year from one school in the WCSD to another school in the WCSD.

The Parent also raised an allegation in the Complaint regarding the discriminatory treatment of the student on the basis of disability. The Nevada Department of Education (NDE) does not have jurisdiction through the special education complaint investigation process to investigate complaints of discrimination or other civil rights violations of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§705, 794, 794a, 794b; 34 C.F.R. Part 104. The Parent was referred to the appropriate offices of the WCSD and the United States Department of Education, Office of Civil Rights, in this regard.

All documents and arguments submitted by the Parent and the WCSD relevant to the issues in the Complaint were reviewed in their entirety in this investigation. 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 ISSUE

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 issue for investigation:

Issue:

Whether the WCSD complied with the IDEA and NAC, Chapter 388, with regard to changing the special education placement of the student, specifically with regard to the provision of a Prior Written Notice to the Parent and the participation of the Parent in the February 2, 2017 determination to place the student in the "Strategies" program in a different location for the 2017/2018 school year.

FINDINGS OF FACT

General

1. The student had multiple Individualized Education Programs (IEPs) in effect in the 2016/2017 school year: the April 25, 2016 annual IEP that was subsequently revised on February 8, 2017 and the May 19, 2017 annual IEP developed after the filing of this Complaint with services to begin May 19, 2017 with the anticipated duration of services to May 18, 2018. (IEPs)
2. All of the student's IEPs in effect in the 2016/2017 school year, including the May 19, 2017 IEP also in effect at the commencement of the 2017/2018 school year, have the same placement determination; percentage of time in the regular education environment; and justification for the student's removal from the regular education environment. The appropriateness of these IEP determinations are not in dispute in this Complaint:
 - a. The student's placement on the continuum of options is in a self-contained program with 98 percent of the time in the regular education environment.
 - b. The justification for the student's removal from the regular education environment indicated that the student required additional adult support throughout the school day because of the student's medical and behavior needs and received the majority of the instruction in a general education classroom, with additional adult support. When the student becomes upset and/or frustrated the student is able to use the "Strategies" classroom to calm down and refocus in a less stressful environment. (IEPs)
3. The student's sole specially designed instruction in the IEPs in effect in the 2016/2017 school year, including the May 19, 2017 IEP also in effect at the commencement of the 2017/2018 school year, is in the area of social, emotional, and behavior skills in the special education setting. This special education setting is the "Strategies" classroom and the appropriateness of this program for the student is not in dispute. The student had a behavior plan in the 2016/2017 school year and will continue to have a behavior plan in the 2017/2018 school year throughout the school day in both the special education and general education settings. (IEPs, Behavior Plan)
4. The WCSD's "Strategies" program is for students who require a different type of presentation of curriculum. Replacement behavior skills are included in the program focus. Regardless of location, all "Strategies" programs in the WCSD are required to follow the same staffing and programming guidelines. (WCSD, Autism Programs - Strategies/Social Resource)
5. The "Strategies" program at the school the student attended in the 2016/2017 school year is among eleven "Strategies" programs that the WCSD determined would move to a different school site in the 2017/2018 school year in an effort to provide special programming at students' zoned or neighborhood school and enable students to matriculate with their neighborhood peers. No "Strategies" program will remain at the school the student attended in the 2016/2017 school year. (WCSD February 22, 2017

Correspondence, WCSD Specialized Program Movement – February 24, 2017, Response of the WCSD, May 24, 2017 WCSD Email,)

6. The student's Parent was notified by letter dated February 2, 2017 that the student's "Strategies" program would be moving to another school (School B) in the WCSD in the 2017/2018 school year and the student would be assigned to the new school site for the 2017/2018 school year. The student's assignment to the "Strategies" program in another location was not made by the student's IEP Team or other group of persons that included the student's Parent. (School Calendar, IEP, Complaint, Response of the WCSD)
7. Except for a new teacher of the "Strategies" program at School B, it was the WCSD's plan to have the remainder of the "Strategies" program aides and assistants from the school the student attended in the 2016/2017 school year assigned to School B. School B is not the student's zoned school and the Parent would need to obtain a standard zone variance for the student to attend. The school may not be considering zoning variances for the 2017/2018 school year. (Complaint, Response of the WCSD, May 2, 2017 WCSD Email, May 4, 2017 Parent Email)
8. Subsequent to the notice to the Parent of the student's assignment to School B, the WCSD created a "Strategies" program at a school within the student's attendance zone (School C). On February 22, 2017, the WCSD notified the Parent that the student would be assigned to School C in which a "Strategies" program had been placed. The assignment of the student to the student's zoned school, School C, does not preclude the Parent from seeking a standard zone variance at School B. (Complaint, Response of the WCSD, May 4, 2017 WCSD Email)
9. The student's Parent did not allege that the specially designed instruction, related services, and supplementary aides and services in the student's IEP(s) and the student's behavior plan could not be implemented at the new school(s) to which the student was assigned; the WCSD intended to change those aides and services to accomplish the transfer to a new school; or that the student would not be able to participate in nonacademic and extracurricular services to the same extent. The Parent asserts that the reassignment of the Student from the current to a new school in the 2017/2018 school year is likely to affect the student's learning experience in a significant way. Specifically, the Parent asserts the student has difficulty with transitions/changes that can trigger behavior problems; environmental sources of anxiety must be reduced for the student; and separation from former classmates and staff would affect the student to a higher degree than other students with disabilities and deprive the student of positive interactions. Without any stated justification, the Parent also alleged that the school staff at the new school would be inexperienced and lack the knowledge and training required to prevent or de-escalate the student's behaviors. (Complaint, Parent Response, February 17, 2017 and March 14, 2017 Parent Emails)
10. The student's 2016/2017 school is 12.2 miles from the student's residence; School B is 9.2 miles from the student's residence; and School C is 6.4 miles from the student's residence.

CONCLUSIONS OF LAW

A. Change of Placement?

In accordance with the IDEA, 34 C.F.R. §300.503(a), and NAC §388.300(8), a parent must be provided a written notice a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of a free appropriate public education to the student. Further, in accordance with the IDEA, 34 C.F.R. §300.116, and the NAC §388.245(6), in determining the educational placement of a student with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and is made in conformity with the least restrictive environment. Any change in the placement of a student with a disability must be based upon the student's current IEP; the initial evaluation or most recent reevaluation of the student, as applicable; and information relating to the current educational performance of the student. (NAC §§388.245(6), 388.255; 34 C.F.R. §300.116)

All of the student's IEPs in effect in the 2016/2017 school year, including the May 19, 2017 IEP also in effect at the commencement of the 2017/2018 school year (Finding of Fact (FOF) #1), include: the same placement determination on the continuum of options; a self-contained program with the same percentage of the student's time in the regular education environment, 98 percent; and the same justification for the student's removal from the regular education environment. The student's sole specially designed instruction in these IEPs is in the area of social, emotional, and behavior skills in the special education setting, the "Strategies" classroom. The appropriateness of the "Strategies" program for the student; the student's placement on the continuum of program options; and the percentage of the student's time in the regular education environment are not in dispute in this Complaint. (FOFs #2, #3)

At issue in this Complaint is the change of the student's school assignment from the school the student attended in the 2016/2017 school year to another school for the 2017/2018 school year. The WCSD made an administrative determination to discontinue the "Strategies" program at the school the student attended in the 2016/2017 school year and move it to a different school site in the 2017/2018 school year. (FOFs #5, #6) The student's classmates and the program aides and assistants in the "Strategies" program in the school the student attended in the 2016/2017 school year will also be assigned to other "Strategies" programs in the WCSD. (FOFs #5, #7)

The student's current "Strategies" program is among eleven "Strategies" programs that the WCSD determined would move to a different location in an effort to provide special programming at students' zoned or neighborhood school and enable students to matriculate with their neighborhood peers. (FOF #5) Regardless of location, all "Strategies" programs in the WCSD are required to follow the same staffing and programming guidelines. (FOF #4)

The student's Parent was notified by letter dated February 2, 2017 that the student's "Strategies" program would be moving to another school (School B) in the WCSD in the 2017/2018 school year and the student would be assigned to the new school site for the 2017/2018 school year. The student's assignment to the "Strategies" program in the new location was not made by the student's IEP Team or other group of persons that included the student's Parent. (FOF #6)

In order to resolve this issue, it is necessary to determine whether the assignment of the student to a new school with a "Strategies" program constituted a change in placement that required a Prior Written Notice (34 C.F.R. §300.503(a), NAC §388.300(8)) and parental participation (34 C.F.R. §300.116, NAC §388.245(6)), or a change in location that was within the administration discretion of the WCSD.

Citing to other Federal Circuit Court of Appeals cases, including *Concerned Parents & Citizens for Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ.*, 629 F.2d 751 (2d Cir. 1980), the Ninth Circuit Court of Appeals¹ has determined the meaning of "educational placement" under the IDEA: "Based on Supreme Court case law, Congress's express intent in the statute, the agency's implementing regulations, and sister circuits' decisions, we hold that "educational placement" means the general educational program of the student. More specifically we conclude that under the IDEA a change in educational placement relates to whether the student is moved from one type of program -- i.e., regular class -- to another type -- i.e., home instruction." (*N.D. et al. v. State of Hawaii Department of Education*, 600 F.3d 1104; 54 IDELR 111 (9th Cir. 2010))

In the discussion of the IDEA regulations in 2006, the United States Department of Education consistently explained:

"Historically, we have referred to "placement" as points along the continuum of placement options available for a child with a disability and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement." (Discussion of the IDEA regulations: Vol. 71, Fed. Reg. pp. 46587 and 46588 (Aug. 14, 2006))

The case cited by the Ninth Circuit Court of Appeals, *Concerned Parents & Citizens for Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ.*, 629 F.2d 751 (2d Cir. 1980), is analogous to this instant matter. In *Malcolm X*, the school district closed a school and then planned the transfer of the students with disabilities to various other schools in the same school district. While the Court acknowledged that the move was disconcerting to many of the students with disabilities who had attended the school, the issue before the Court was whether the transfer of the students with disabilities in special classes at one school to substantially similar classes at other schools within the same school district constituted a change in placement sufficient to trigger the IDEA's Prior Written Notice and hearing requirements.

In the *Malcolm X* case, the Second Circuit Court of Appeals considered that the transferred students with disabilities remained in the same classification, the same school district, and the same type of educational program-special classes in regular schools and noted that while the classes at the new schools varied in some respects from the prior program, there was no suggestion that the change was intended to alter the placement of any transferred student with a disability. The Court concluded ". . . that the term "educational placement" refers only to the general type of educational program in which the handicapped child is placed and not to all the various adjustments in that program that the educational agency, in the traditional exercise of

¹ The State of Nevada is in the United States Court of Appeals, Ninth Circuit.

its discretions, may determine to be necessary.” “So construed, the prior notice and hearing requirements of 1414(b)² would not be triggered by a decision, such as that made by the Board in this case, to transfer the special education classes at one regular school to other regular schools in the same district. . . . Moreover, strong policy considerations support a restrictive interpretation of the term; a broad interpretation would virtually cripple the Board’s ability to implement even minor discretionary changes within the educational programs provided for its students and would tend to discourage the Board from introducing new activities or programs or from accepting privately sponsored programs. In addition, the hearing and judicial safeguards provided by the Act could be used to indefinitely forestall implementation of such changes.”

Upon consideration of the foregoing authority, “educational placement” as used in the IDEA, 34 C.F.R. §300.116, means the general educational program of the student, that is, the type of the program along the continuum of placement options available for a student with a disability pursuant to 34 C.F.R. §300.115, such as regular class, home instruction, or special school. In this case, the determination of the student’s placement in a self-contained program with 98 percent participation in the general education classroom was made by the student’s IEP Team, including the Parent, (FOF #2) and this general educational program for the student was not affected by the change. As such, the WCSD’s determination on February 2, 2017 to place the student in the “Strategies” program in a different location for the 2017/2018 school year did not change the student’s educational placement and, therefore, neither Prior Written Notice nor parental participation was required pursuant to the IDEA, 34 C.F.R. §§300.116 and 300.503, and NAC §§388.245(6) and 388.300(8).

However, given the Parent’s allegation of the substantial effect the change in location will have on the student, the Complaint Investigation Team determined it was instructive to also consider the programmatic factors set forth in guidance from the United States Department of Education to ascertain the impact of these factors on the above conclusion:

“In determining whether a “change in educational placement” has occurred, the public agency responsible for educating the child must determine whether the proposed change would substantially or materially alter the child’s educational program. In making such a determination, the effect of the change in location on the following factors must be examined: whether the educational program set out in the child’s IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement is the same option on the continuum of alternative placements. If this inquiry leads to a conclusion that a substantial or material change in the child’s educational program has occurred, the public agency must provide prior written notice. . . .” (*Letter to Fisher* 21 IDELR 992 (OSEP July 6, 1994); Recently cited in: *Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools Under the Individuals with Disabilities Education Act*, 69 IDELR 78 (OSERS December 28, 2016)³)

² Under current law, these provisions are in 20 U.S.C. §1414(e) and §1415(b)(3).

³ The Frequently Asked memorandum is publically available at:

<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/faq-idea-charter-school.pdf>

The *Letter to Fisher* is publically available only at third party sites such as the:

<https://www.scribd.com/document/80618691/Letter-to-Fisher> (No inference of endorsement should be taken by the website reference in this Report.)

Importantly, the student's Parent did not allege that the specially designed instruction, including the agreed upon "Strategies" program, related services, and supplementary aides and services in the student's IEP(s) and the student's behavior plan could not be implemented at School B or School C; the WCSD intended to change those aides and services to accomplish the transfer to a new school; or that the student would not have the same opportunities to participate in nonacademic and extracurricular services. (FOFs #2, #3, #9) Further, as previously described, the student's placement in this new location is the same option on the continuum of program options, a self-contained program, and the student will be educated with students without disabilities to the same extent. Consistent with the requirements in the IDEA and the NAC, both School B and School C are also closer to the student's place of residence than the school the student attended in the 2016/2017 school year, with School C being the school closest to the student's home that the student would attend if the student did not have a disability. (34 C.F.R. §300.116(b)(3) and (c), NAC §388.245(6))

Therefore, after consideration of the programmatic factors set forth in guidance from the United States Department of Education to ascertain whether a change is a change in educational placement or location, the conclusion is the same: the WCSD's February 2, 2017 determination to change the assignment of the student from the "Strategies" program in the school the student attended in the 2016/2017 school year to the "Strategies" program in another school for the 2017/2018 school year was not a change of placement, but rather a change in location and allowable as a matter of administrative discretion.

The fact that the Parent disagreed with the WCSD's administrative determination and has concerns regarding the impact of this change on the student does not diminish the WCSD's administrative discretion to do so. However, this conclusion also does not minimize the Parent's concerns with regard to the student's difficulty with transitions/changes. The concerns of the Parent for enhancing the education of the student are matters to be raised with, considered by, and, if appropriate, addressed by the student's IEP Team to ensure the provision of a free appropriate public education to the student at the new school site. (34 C.F.R. §300.324(a)(1)(ii), NAC §388.284(2)(a))

Therefore, the WCSD complied with the IDEA and NAC, Chapter 388, in that the WCSD's February 2, 2017 determination to assign the student in the "Strategies" program to a different location for the 2017/2018 school year was not a change of placement necessitating a Prior Written Notice to the Parent and the participation of the Parent.