

**COMPLAINT INVESTIGATION
CLARK COUNTY SCHOOL DISTRICT
(#CL030413B)**

Report Issued on 05/17/13

INTRODUCTION

On 03/04/13, the Nevada Superintendent of Public Instruction received a Complaint dated 02/27/13 alleging systemic violations by the Clark County School District (CCSD) with respect to placement determinations for students with disabilities. The Complainant alleged the CCSD violated and continues to violate several provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. and 34 C.F.R. Part 300, and the Nevada Administrative Code (NAC), Chapter 388 specifically:

- 1) The CCSD does not allow parent participation in placement decisions, but rather the CCSD's Case Management Department makes administrative placement decisions without the involvement of the parent and with no knowledge about the unique needs of the student. "The IDEA does not prohibit districts from making the decision about where to provide services, but the educational placement, as used in the IDEA, means "educational program" not the particular location where the program is implemented. The CCSD practice of unilaterally determining the program/placement for a child violates IDEA."
- 2) IEP Teams determine the continuum of placement option and are not allowed to delineate the characteristics of the self-contained classroom, or which of the four special schools they believe might meet the child's needs.
- 3) The CCSD is making categorical placement decisions based on the category of disability, severity of disability, availability of special education services, configuration of the service delivery system, available space, and administrative convenience.

Both the IDEA and the NAC permit an extension of the 60-day timeline to conduct the investigation and issue the written decision if exceptional circumstances exist with respect to a particular complaint. (34 C.F.R. §300.152(b); NAC §388.318(5)(a)) The Complainant requested additional time to submit documentation in support of the Complaint. The Nevada Department of Education (NDE) determined this request was an exceptional circumstance warranting an extension, and granted an extension pursuant to the IDEA and the NAC.

COMPLAINT ISSUE

The allegations in the Complaint raise the following issue under the jurisdiction of the NDE to investigate for the time period 03/04/12 - 03/04/13:

Issue: Whether the CCSD's policies and procedures with respect to the placement of students with disabilities complied with the IDEA and the NAC, Chapter 388, specifically did the policies and procedures:

- a) Require the placement of a student with a disability to be determined by a group of persons, including the parents of the student and other persons who were knowledgeable about the student, the meaning of the evaluation data and the placement options?**
- b) Ensure placement decisions were determined on an individual, case-by-case basis, depending on each student's unique needs and circumstances and based on the student's IEP?**

PERSONS PROVIDING INFORMATION

The investigation team reviewed information received from the following people:

- Complainant
- Compliance Officer

DOCUMENTS REVIEWED

The documents reviewed in the investigation included the following:

- a) The Complaint and additional documentation provided by the Complainant, including individual parent statements and letter of assignment (Complaint and Supplemental Information)
- b) CCSD Student Support Services Division Special Education Procedures Manual (on USB Drive)
- c) Written response from the CCSD to complaint investigation team's request for additional documentation
- d) CCSD: Individualized Education Program (IEP) Process-Section 11
- e) Copies of legal authority submitted by the Complainant and the CCSD
- f) Electronic information on the CCSD website-Case Management Office:
<http://ccsd.net/divisions/student-support-services-division/case-management>

It is important to note that while the Complainant provided some student specific information (FOF #4) in the complaint process to support the systemic allegations, the Complaint did not include allegations and facts regarding noncompliance with respect to a specifically identified child or children; but rather alleged systemic noncompliance. (34 C.F.R. §300.153; 109 LRP 41916 (OSEP 2009)) As such, the student specific information was considered relative to the systemic Complaint and the scope of this investigation was limited to the issue set forth above and a determination whether the CCSD's policies and procedures on placement determinations were in accordance with the IDEA and the NAC, Chapter 388.

FINDINGS OF FACT

1. Parents of children with disabilities are involved in the determination of placement of their child along the continuum of placement options. (Complaint; CCSD Student Support Services Division Special Education Procedures Manual, pg. 125)
2. The following sets forth the CCSD's written policies and procedures with regard to the determination of the placement of students with disabilities¹:
 - a. "After a student's IEP has been developed, their educational placement which includes programs and services must be determined by the IEP team. That level of placement occurs along the continuum of placements available for students with disabilities. Often confused, but not interchangeable, is the term "location". "Location" refers to the physical setting, such as the specific classroom or facility where a student's IEP will be implemented." (CCSD Student Support Services Division Special Education Procedures Manual, pg. 125)
 - b. "The student's educational placement must be determined by a group of persons, including the parent, and other persons who are knowledgeable about:
 - the student;
 - the meaning of the evaluation data; and
 - the placement options.The IEP team determines the student's placement. When the student requires a level of placement which is not available at the zoned school, the District, through the Case Manager's Office, will determine the location of placement once the IEP team has determined the appropriate placement." (CCSD Student Support Services Division Special Education Procedures Manual, pg. 125)
 - c. "An explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular education environment including academic classes, nonacademic settings, and extra-curricular activities must be discussed.
 - a. Each placement must be reviewed and considered until a choice is made by the team. All placements discussed must either be rejected or accepted (If considering a change of placement, see Chapter 8.0)". (CCSD Student Support Services Division Special Education Procedures Manual, pg. 118)
 - d. "The IEP team determines the placement not the specific site location." (CCSD Student Support Services Division Special Education Procedures Manual, pg. 118)
 - e. "8.3.1. The content of the student's IEP determines placement, rather than the placement determining the content of the IEP.
8.3.2. The placement decision must be individualized and based on the student's IEP.
8.3.3. Placement, not location, is determined by the IEP team.

¹ The cited CCSD policies, procedures, and practices during the time period of this Complaint remained in effect at the time of this Report, and therefore may be variously referred to in the present tense in this Report for ease of reading.

- 8.3.4. Self-contained classroom school assignments (location) are determined by the Case Management Office.
- 8.3.5. School assignments are made as close as possible to the student's home if the IEP team has determined a specialized level of service.
- 8.3.6. Eligibility, administrative convenience, the availability of educational or related services, or the availability of space do not determine placement." (CCSD Student Support Services Division Special Education Procedures Manual, pg. 127)
- f. "Case Management facilitates the placement of Special Education students that [*sic*] require a self-contained program. The self-contained program placement is based upon the student's Individual Education Program (I.E.P.)." (CCSD website-Case Management Department, CCSD Supplemental Information)
- g. "Not all schools have self-contained programs. Case Management works to place students in the closest program to the student's home and monitors the number of students in each self-contained program based on case load and class size according to the Nevada Administrative Code (NAC)." (CCSD website-Case Management Department)
3. For those students who require a self-contained program, the CCSD's Case Management Office notifies parents of the assignment of a student to a particular classroom or school. (CCSD website-Case Management Office; Letter of Assignment)
4. Individual parents disagreed with their child's placement determination and CCSD's placement procedures and believed placement determinations were made without parental participation. (Complaint and Supplemental Information)
5. Other than a copy of a CCSD letter of assignment noted in FOF #3 and individual parent statements noted in FOF #4, the Complainant did not provide any CCSD written policies and procedures to support the allegations in the Complaint. (Complaint and Supplemental Information)

CONCLUSIONS OF LAW / RATIONALE

Issue: Whether the CCSD's policies and procedures with respect to the placement of students with disabilities complied with the IDEA and NAC, Chapter 388, specifically did the policies and procedures:

- a) **Require the placement of a student with a disability to be determined by a group of persons, including the parents of the student and other persons who were knowledgeable about the student, the meaning of the evaluation data and the placement options?**

b) Ensure placement decisions were determined on an individual, case-by-case basis, depending on each student's unique needs and circumstances and based on the student's IEP?

A. Placement versus Location Determinations

In accordance with the IDEA, 34 C.F.R. §300.116, and the NAC §388.245(6), the placement of a student with a disability must be determined by a group of persons, including, without limitation, the parents of the student and other persons who are knowledgeable about the student, the meaning of the evaluation data and the placement options. The placement determination must be made in conformance with the requirements of least restrictive environment, be based on the student's IEP and be as close as possible to the child's home. (In CCSO, the group of knowledgeable persons is the student's IEP Team. (FOF #s 2a and 2b))

As a general matter, the Complainant and the CCSO agree on the controlling law under the IDEA and the NAC and interpretations by the United States Department of Education, Office of Special Education Programs (OSEP), and the courts with regard to placement determinations, including parental participation. (34 C.F.R. §§300.327 and 300.116; NAC §§388.245(6) and 388.302) The Complainant conceded that parents of students with disabilities were involved in the determination of placement of their child along the continuum of placement options (FOF #1) and did not contest that placement determinations were made in conformance with the requirements of least restrictive environment.

While the Complainant and the CCSO have varying interpretations of the law, the concurrence on the law extends to the existence of a legal distinction between a placement determination by the requisite group of persons, including the parent, and the permissible administrative discretion on the determination of the location of the services based on that placement determination. However, while the Complainant conceded that school districts were authorized to make an administrative decision about where to provide services, the Complainant argued contrarily that the CCSO's practice of assigning a student to a particular location was an educational program/placement decision.

As clarified in the Complainant's legal argument in the addendum to the Complaint, the crux of the dispute in this case is whether the assignment of a student with a disability to a particular school or class was an administrative determination or, in the alternative, whether this assignment, case-by-case, may have risen to an educational program decision and, therefore, necessitated parental involvement in the determination of the location of services. (34 C.F.R. §300.116; NAC §388.245(6)) In order to apply the law to the facts in this case, it is necessary to untangle this complicated argument relative to prevailing case law and guidance from the United States Department of Education, specifically:

- What is the meaning of 'educational placement' under the IDEA, 34 C.F.R. §300.116, and the NAC, Chapter 388?
- Can a determination of the location of services result in a placement determination for a student?

- And, if so, does that require all location determinations to be made by the requisite placement team?

Meaning of Educational Placement

“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.” (50 IDELR 48 (OSEP 2007); 37 IDELR 10 (OSEP 2001); Discussion of the IDEA regulations: 71 Fed. Reg. pp. 46587 and 46588 (Aug. 14, 2006))

Citing to other Circuit Court of Appeals, the Ninth Circuit Court of Appeals recently defined “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); See also Doe v. Maher, EHLR 557:353 (9th Cir. 1986))

The Complainant cited the Fifth Circuit Court of Appeals decision White v. Ascension Parish School Board, 343 F.3d 373; 39 IDELR 182 (5th Cir. 2013) as persuasive authority for the assertion that educational placement connotes a broad interpretation. In that case, the Fifth Circuit Court of Appeals expressly rejected the parents’ assertion that the placement determination under the IDEA has a broad meaning:

“The Whites note that "placement" in 34 C.F.R. §300.552 appears to have a broader meaning than just educational program (thus, the requirement that "placement" be based on the IEP, which contains the educational program, along with other requirements) and to relate in some way to location (thus, the reference to distance from the child's home). Ascension responds that "placement" does not mean a particular school, but means a setting (such as regular classes, special education classes, special schools, home instruction, or hospital or institution-based instruction). It cites 34 C.F.R. §300.551, which describes "placement" options as such. This is the better view.”

In citing the interpretations by the United States Department of Education, Office of Special Education Programs (OSEP), the Court further opined: “Whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make.”

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.

Can a determination of location rise to a placement decision?

In order to answer this legal question, it is instructive to look at the applicable authority on what constitutes a change in educational placement since much of the case law and the guidance from the United States Department of Education regarding the meaning of educational placement and determinative factors are in that context. In order for a change in program or services to be considered a change in placement, the change must be significant. (Doe v. Maher, EHLR 557:353 (9th Cir. 1986)) In accord, it is the United States Department of Education’s longstanding position that maintaining a student’s placement in an educational program that is substantially and materially similar to the former placement is not a change in placement. (112 LRP 27623 (OSEP 2012); 21 IDELR 992 (OSEP, 1994))

The OSEP has provided some factors to examine in determining whether a change in program is a placement determination rather than a change in location:

“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 option is the same option on the continuum of alternative placements.”

“In certain instances, the question of whether a change in educational placement has occurred is easily answered. For example, if the placement team, ...determines that a student currently placed in a self-contained class at the [] Learning Center should be placed at the school located within the District that the student would attend if not disabled, in a regular class with supplementary aids and services, rather than in a self-contained class, the proposed action would constitute a change in educational placement that would trigger Part B's written prior notice requirements. The inquiry becomes more complex when no changes from the prior year's IEP are proposed, and the option on the continuum remains the same, but the District proposes to change only the location, i.e., the school or facility located within the District in which the student's IEP and option on the continuum will be implemented. If the District determines, based on the student's individual needs, that the student should have the same educational program and opportunities for interaction with his or her nondisabled peers as he or she had during the placement at the [] Learning Center, the change in location alone would not constitute a change in educational placement, and Part B's written prior notice requirements would not be triggered. This is because under these circumstances, the change in location alone

would not substantially or materially alter the child's educational program.” (21 IDELR 992 (OSEP, 1994); see also 22 IDELR 639 (OSEP 1995))

Therefore, an administrative determination of the location of services, or change in the location of services, can rise to a placement determination, or a determination to change the placement, of an individual student if the assignment to a school is not consistent with the decision of the group determining placement and the location would substantially or materially alter the student's educational program.

Does this require all location determinations to be made by the placement team?

“If this inquiry leads to the conclusion that a substantial or material change in the child's educational program has occurred, the public agency must provide prior written notice that meets the content requirements of 34 CFR §300.505, as required by 34 CFR §300.504(a). If a change in educational placement has occurred, Part B's written prior notice requirements are triggered. If it is determined that no change in educational placement has occurred, we assume the District would utilize its normal procedures to notify parents of the proposed change in location of their child's program. In such a communication, the District may wish to provide the parents with an explanation of why in its view the change in location would not substantially or materially alter the student's educational program. In either case, the parent always has an opportunity to initiate a due process hearing regarding any matter relating to the identification, evaluation, or educational placement of their child, or the provision of FAPE to their child. 34 CFR § 300.506(a).” (21 IDELR 992 (OSEP, 1994))

Therefore, the fact that a parent may disagree with a school district that the administrative designation of a location, or change of location, for a specific student constitutes an educational program decision rather than the permissible exercise of administrative discretion to determine location assignments does not diminish the district's administrative flexibility to make location assignments as a general matter. As such, the assignment of a student to a location is not required to be made by the placement team.

This conclusion does not leave the parents of an individual child without a means of redress. The parent may request a due process hearing to resolve this disagreement. (21 IDELR 992 (OSEP, 1994); N.D. et al. v. State of Hawaii Department of Education, 600 F.3d 1104; 54 IDELR 111 (9th Cir. 2010); Discussion of the IDEA regulations in the context of a disciplinary change of placement: 71 Fed. Reg. pp. 46540, 46729 (Aug. 14, 2006))

Application of the Law to the Facts

In this case, other than a copy of a CCSD's letter of assignment to a parent and individual parent statements, the Complainant did not provide any CCSD written policies and procedures or other documentation to support the allegations in the Complaint that the CCSD engaged in a systemic practice of making administrative placement determinations, rather than the permissible administrative location decisions. (FOF #s 4-5) The following summarizes the CCSD's written policies and procedures on the determination of the placement of students with disabilities that are set forth in detail in the Findings of Fact:

- Educational placement which includes programs and services must be determined by the IEP Team. A placement decision must be based on the student's IEP. (FOF #s 2a, 2b and 2e)
- The placement decision is the point along the continuum of placement options. Each placement must be reviewed and considered until a choice is made by the Team. All placements discussed must either be rejected or accepted. (FOF #s 2a and 2c)
- Placement, not the specific site location, is determined by the IEP Team. (FOF #s 2a-2e and 3)
- "Location" refers to the physical setting, such as the specific classroom or facility where a student's IEP will be implemented." (FOF #s 2a-2e and 3)
- For students who require a self-contained classroom, the assignment of a student to a particular classroom or school (location) is determined by the CCSD Case Management Office. (FOF #s 2b and 2e-2g and 3)

Nothing in the CCSD's written policies and procedures on the determination of the placement of students with disabilities is inapposite to the IDEA, 34 C.F.R. §300.116, the NAC §388.245(6), and the above cited interpretations of the IDEA. The IEP Team, including the parents of the student, determines the educational placement of the student. The CCSD's practice of using the Case Management Office to determine the particular school or classroom that the student would be assigned to consistent with the decision of the group determining placement complied with the IDEA and the NAC.

B. Individualized Placement and Location Determinations

As set forth above, the educational placement of a student with disabilities is an individualized determination by the requisite knowledgeable group of persons, including the child's parents. (34 C.F.R. §300.116; NAC §388.245(6)) "The overriding rule is that placement decisions must be determined on an individual, case-by-case basis, depending on each child's unique needs and circumstances and based on the child's IEP. In all cases, however, placement decisions must not be made solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience." (50 IDELR 48 (OSEP 2007); 20 IDELR 1217 (OSEP 1993); 37 IDELR 10 (OSEP 2001); Discussion of the IDEA regulations: 71 Fed. Reg. pp. 46587 and 46588 (Aug. 14, 2006))

"...[I]t is the program of specialized instruction and related services contained in the student's IEP that forms the basis for the placement decision." (21 IDELR 1152 (OSEP 1994)) It is the role of the IEP Team, including the parent, to ensure the IEP is clear to all who are involved in both the development and implementation of the IEP, including the statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel. (17 IDELR 1180 (OSEP 1991)) While the Complainant alleged parents were not allowed to delineate the characteristics of the location they believed might meet their child's needs, there is no allegation that parents were inhibited from participating in the development of the program of specialized instruction and related services in their child's IEP.

Once the student's IEP has been developed and the placement determination is made, as discussed above, whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination, provided that determination is consistent with the placement team's decision. In this case, the Complainant alleged that the CCSD was making categorical placement decisions based on the category of disability, severity of disability, availability and configuration of the service delivery system, available of space, and administrative convenience. The Complainant did not provide any CCSD written policies and procedures or other documentation to support the allegation in the Complaint that the CCSD engaged in a practice of systemic noncompliance in this regard. (FOF #5)

The following summarizes the CCSD's written policies and procedures on an IEP Team's determination of a placement for an individual student and the administrative assignment of the student to a location that are set forth in detail in the Findings of Fact:

- Eligibility, administrative convenience, the availability of educational or related services, or the availability of space do not determine placement (FOF #2e);
- The content of the student's IEP determines placement, rather than the placement determining the content of the IEP (FOF #2e);
- The placement decision must be individualized and based on the student's IEP (FOF # 2e);
- School assignments are made as close as possible to the student's home if the IEP team has determined a specialized level of service (FOF #2e);
- Each placement must be reviewed and considered until a choice is made by the team. All placements discussed must either be rejected or accepted (FOF #2c);
- The Case Management Office facilitates the placement of students with disabilities who require a self-contained program. The self-contained program placement is based upon the student's IEP. In the assignment of students to a self-contained classroom or school, the Case Management Office works to place students in the closest program to the student's home and monitors the number of students in each self-contained program based on case load and class size according to the Nevada Administrative Code (NAC). (FOF #s 2f and 2g)

As described above, the CCSD does have a documented practice of monitoring the availability of space in the administrative assignment of a location for services. Specifically, the CCSD monitors the number of students in each self-contained program based on case load and class size. However, this monitoring facilitates compliance with the case load and class size requirements by the NAC §388.150 and the cited OSEP interpretations do not preclude such considerations. The NAC §388.150 also provides for exceptions to the prescribed maximum enrollments made with the written approval of the NDE. Therefore, the practice regarding monitoring the availability of space was consistent with the IDEA and the NAC. (34 C.F.R. §300.116; NAC §388.245(6))

In conclusion, the CCSD's written policies and procedures on the determination of the placement of students with disabilities are consistent with the requirement that the educational placement of a student with a disability is an individualized determination by the requisite knowledgeable group of persons, including the child's parents, and complied with the IDEA and the NAC. As

discussed previously, the parents of an individual child with a disability may request a due process hearing if they disagree with the school district that the educational placement of their child is based on their child's unique needs, circumstances, and IEP.

Therefore, the complaint investigation team concluded that the CCSD's policies and procedures with respect to the placement of students with disabilities complied with the IDEA and NAC, Chapter 388, specifically the policies and procedures:

- a) Required the placement of a student with a disability to be determined by a group of persons, including the parents of the student and other persons who were knowledgeable about the student, the meaning of the evaluation data and the placement options and*
- b) Ensured placement decisions were determined on an individual, case-by-case basis, depending on each student's unique needs and circumstances and based on the student's IEP.*