

**STATE PUBLIC CHARTER SCHOOL AUTHORITY  
COMPLAINT INVESTIGATION  
(#SC011822)**

*Report Issued on March 10, 2022*

**INTRODUCTION**

On January 18, 2022, 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 (NRS) and the Nevada Administrative Code (NAC).

The allegations in the Complaint were that, from March 11, 2021 to July 22, 2021, the Imagine School at Mountain View (ISMV)/State Public Charter School Authority (SPCSA) failed to comply with its responsibility for wearing, storing, and caring for an assistive technology device, the Connect Clip for the student's Oticon hearing device, and upon the loss of the Connect Clip at school, ISMV/SPCSA refused to replace the device and failed to provide a Prior Written Notice to the Parent of that refusal. It is the Parent's position that the use of the Connect Clip by the student's teacher was "critical" to the student receiving a Free Appropriate Public Education. The Parent's proposed resolutions were for the SPCSA/ISMV to find and return the missing Connect Clip or pay one of the named facilities \$300.00 to replace the device; and, due to the ISMV staff failing to wear the Connect Clip since March 11, 2021 and thereby denying the student a Free Appropriate Public Education, to provide 152 hours of compensatory education from a licensed special education teacher (at a contracted prevailing rate of \$45.00 an hour) to be completed by December 31, 2023.

SPCSA is the local educational agency for all purposes for the charter schools it sponsors, including the provision of a Free and Appropriate Public Education to each enrolled student; and the provision of special education and related services by the SPCSA-sponsored charter school. NRS §388A.159. In this case, SPCSA is the local educational agency for ISMV for all purposes. NDE has jurisdiction over SPCSA as the local educational agency for ISMV in this State Complaint.

In the January 21, 2022 issue letter to SPCSA, NDE requested additional documents and information in order to investigate the State Complaint. SPCSA was notified in that same correspondence that if SPCSA disputed the allegations of noncompliance in the Complaint, the submitted documents and information must include a denial of the alleged noncompliance; a brief statement of the factual basis for the denial; and specifically reference the documentation provided to NDE that factually supported the denial and that a failure to do so by February 11, 2022 or an extended timeline authorized by NDE, would be considered a concession of noncompliance for purposes of this State Complaint. On February 11, 2022 SPCSA requested an extension of time to February 15, 2022, noting a need for "a few additional days" to complete its response to the Complaint. NDE granted the requested extension for the submission of documents, but determined it was unnecessary to extend the timeline of March 19, 2022 for issuing the decision as a result of the extension. SPCSA did then timely respond through ISMV and dispute the allegation of noncompliance in the Complaint in its entirety. (ISMV's response on behalf of SPCSA will be referred to as SPCSA's response hereinafter.)

The SPCSA's response asserted that the Connect Clip was not an assistive technology device in the IEP, but rather, was listed as a supplemental aid and service that the Parent was responsible for. Therefore, when the Connect Clip went missing, it was not its responsibility to replace it and declined to do so.

The Parent's Complaint and documents submitted with the Complaint and in the course of the investigation, and the denial of all claims and all documents submitted by SPCSA in response to the issue in the Complaint were reviewed in their entirety in this investigation. The Parent requested an opportunity to provide information orally as well as in writing and NDE did afford the Parent this additional opportunity. 34 C.F.R. §300.152(a)(2). The Findings of Fact cite the source(s) of the information determined necessary to resolve the issues in this Complaint.

## COMPLAINT ISSUES

The allegations in the Complaint that are under the jurisdiction of NDE to investigate through the special education complaint process raise the following issues for investigation against the named local educational agency, SPCSA:

**Issue One:** Whether SPCSA complied with the IDEA and NAC, Chapter 388, with regard to providing the student's assistive technology service related to the wearing, storing, and caring for the student's assistive technology device, the Connect Clip for the student's Oticon Hearing Aid, from March 11, 2021 to July 22, 2021

**Issue Two:** Whether SPCSA complied with the IDEA and NAC, Chapter 388, with regard to the provision of a Prior Written Notice a reasonable time before SPCSA refused to replace the student's missing assistive technology device, the Connect Clip for the student's Oticon Hearing Aid, on or after March 11, 2021.

## FINDINGS OF FACT

1. The student is a student with disabilities who was enrolled in a school of SPCSA from March 11, 2021 through July 22, 2021 (the "relevant period"). Classes at the student's school for the 2020/2021 school year commenced August 10, 2020, and the last day of classes for students was May 20, 2021.<sup>1</sup> The Extended School Year program for the student was from June 1, 2021 through July 22, 2021. The student is no longer enrolled in the school and is now being home schooled. (February 2, 2021 IEP, Complaint, 2020/2021 School Calendar ISMV Response, ISMV "Sub-Grant Award Application")
2. The student was determined eligible as a student under the multiple impairment category with an overall cognitive ability well below average range. While the student had normal hearing thresholds, the student is not able to properly process sounds: "Due to student's auditory processing deficits, [student] struggles with listening to directions, paying attention, is easily distracted, has difficulty with phonics and sound discrimination, difficulty with following auditory directions. This can impact [ ]<sup>2</sup> in the classroom." (February 26, 2020 IEP, February 2, 2021 IEP, February 14, 2020 Letter from Audiologist)
3. SPCSA conducted an Assistive Technology Assessment in March 2020. The assistive technology practitioner's recommendation was to provide the student an augmentative

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<sup>1</sup> Student's grade returned to in-school learning at the SPCSA school on March 1, 2021, ten days prior to the loss of the Connect Clip.<sup>1</sup> (February 16, 2021 ISMV Letter to Families)

<sup>2</sup> [ ] denotes the redaction of personally identifiable information.

- device of an iPad with communication applications. (March 17, 2020 Assistive Technology Assessment)
4. During the relevant period, the student had a February 2, 2021 IEP in effect that was the IEP following the three-year reevaluation of the student. (February 2, 2021 IEP)
  5. The student's February 2, 2021 IEP included eight annual goals in the following areas: writing; reading; functional math; speech/language, social communication; social skills; and motor skills. The student's writing goal; one of the reading goals, reading fluency; social communication; and speech and language goals were to be addressed in the student's Extended School Year program. (February 2, 2021 IEP)
  6. The student's February 2, 2021 IEP provided the student specially designed instruction in the areas of reading, writing, math, and social skills and the related services of speech/language therapy and occupational therapy.
  7. The student's February 1, 2021 IEP also included the following relevant supplementary aid/services:
    - a. "Oticon OPN 1 Play hearing devices and a connect clip (provided by parent). Follow instructions/procedures given by parent." The frequency of the supplementary aid/service was "throughout the day," and the location of "school campus."
    - b. "The student will have access to an iPad to include augmentative communication apps. This device can travel to home and back from school."
    - c. A one-to-one aide in the location of general education for 1285 minutes a week;
    - d. When given directions for independent work, the student will explain the student's understanding of the assigned task;
    - e. Allowing additional time for the student to process information during instruction; and
    - f. Preferential seating. (February 1, 2021 IEP)
  8. The supplementary aid/service to follow instructions/procedures given by Parent for the parentally provided Oticon OPN 1 Play (hereafter, Oticon) and the Connect Clip hearing devices was also included in the student's prior February 26, 2020 and March 19, 2020 IEPs to be provided throughout the school day in the location of the school campus. (February 26, 2020 and March 19, 2020 IEPs)
  9. The Oticon and Connect Clip devices are designed to eliminate and manage background noise for the student, while providing increased amplification to important speech. The Oticon hearing device is hearing aid technology to worn by the student that helped the student "tremendously" in the school and community. The Connect Clip is a remote microphone that the student's Parent and teachers can wear to provide "additional support" to help direct auditory input where the student is able to process sound more efficiently. (April 7, 2021 and February 14, 2020 Letters from Audiologist)
  10. The student's Audiologist indicated that with continued use and acceptance of the hearing devices into the student's daily classroom routine, the student is likely to experience the ability to focus and learn more efficiently, communicate more easily and connect better to the world around. Both the student's Parent and a dance instructor reported seeing benefit from the student wearing the device. (February 14, 2020 Four-page Letter from Audiologist)

11. On February 19, 2020, Parent provided the school of the SPCSA information regarding the Oticon and Connect Clip, noting that she had scanned a four-page letter from Anderson Audiology, and further explaining that the Connect Clip would arrive at school every day fully charged and that the teachers were to wear the Connect Clip, which would transmit the teacher's voice to the student's hearing aid device, reducing noise and enhancing the teacher's speech. The school principal acknowledged the receipt of the instructions and indicated the Parent's message with all of the information would be forwarded to the student's team. (February 19, 2020 and February 21, 2020 Email Correspondence)
12. The instructions in the February 14, 2020 Audiology Letter provided basic instructions and specified that the Connect Clip would be turned on in the streaming mode and the teacher would wear the Connect Clip either on their shirt, or attached to a lanyard around their neck, where the Connect Clip could pick up and transmit the teacher's oral instructions directly to student's Oticon hearing device. (February 14, 2020 Audiology Letter)
13. The principal of the school of the SPCSA acknowledged the receipt of the Audiology Letter instructions and indicated the Parent's message with all of that information would be forward to the student's team. (February 21, 2020 Email Correspondence)
14. On March 11, 2021, the student's Parent emailed the student's teacher at the school of the SPCSA to report that the student came home without the Connect Clip. The teacher replied the next day noting that he had not seen the Connect Clip box, and after a follow up email from the Parent clarifying that she was looking for "the small black box connected in a lanyard," the teacher replied: "I understand. Throughout the day I just had [ ] wear the lanyard instead of having me carry it around the room." (March 12, 2021, Email Correspondence between Parent and SPCSA School)
15. The principal at the school of the SPCSA replied to Parent on May 7, 2021, noting that the Connect Clip had not been found and "[P]erhaps [ ] lost it someplace else? While this loss is unfortunate, the school is not responsible for a student's lost items. Accordingly, the school will not replace (student's) lost Oticon Connect Clip." (May 7, 2021 Email from SPCSA School to Parent)
16. Subsequent to the loss of the Connect Clip on the school campus, the Parent repeatedly requested the SPCSA either locate the parentally provided Connect Clip or cover its replacement cost, including appearing before the Governing Board of the school of the SPCSA on September 8, 2021 explaining that the school misplaced the Connect Clip when they tasked the student with the "responsibility to monitor the location of the device," instead of wearing the device as required. The Parent did indicate in these communications seeking reimbursement that the Connect Clip was needed to "help [ ] succeed" at school; and the student "needs the support of [ ] Oticon hearing aids with the Connect Clip to be successful in school and in the community." To date, SPCSA deferred to the school's student handbook and refused to replace the missing Connect Clip device on the basis that it was a missing personal item. (September 8, 2021 ISMV Governing Board Meeting Minutes, April 30, 2021 and May 18, 2021, Emails from Parent)
17. The cost for a Connect Clip is \$325.14. (March 1, 2022 Letter from Anderson Audiology)

## CONCLUSIONS OF LAW

**Issue One:** Whether SPCSA complied with the IDEA and NAC, Chapter 388, with regard to providing the student's assistive technology service related to the wearing, storing, and caring for the student's assistive technology device, the Connect Clip for the student's Oticon Hearing Aid, from March 11, 2021 to July 22, 2021

### Implementation of the Student's IEP

The student's February 2, 2021 IEP, in effect during the relevant period (Finding of Fact (FOF) #4), sets forth the student's individual needs, the services required to meet those needs and the corresponding goals of the IEP. Once an IEP is developed for a student, the public agency is obligated to provide services "in conformity with" students' IEPs. *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995) (*Capistrano*); *Van Duyn v. Baker School Dist.*, 502 F. 3d 811 (9th Cir.<sup>3</sup> 2007) (*Van Duyn*); 34 C.F.R. §§300.17(d), 300.101; NAC §388.281(6)(e).

Pursuant to IDEA, 34 C.F.R. §300.320(a)(4), an IEP must include a statement of the special education and related services and supplementary aids and services to be provided to the student, or on behalf of the student to enable the student to advance appropriately toward attaining the annual goals; to be involved in and make progress in the general education, and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children in described.

In this case, the student's IEP did include the supplementary aid/service: "Oticon OPN 1 Play hearing devices and a connect clip (provided by parent). Follow instructions/procedures given by parent." (FOF #7) While the supplementary aid/service does indicate that the Oticon and Connect Clip devices will be provided by the Parent, it provides a requirement to "follow instructions/procedures" given by the Parent, and it is that aid/service that is at issue in this Complaint.

The Parent provided the school of the SPCSA the instructions/procedures for the Oticon device and Connect Clip. The instructions provided that teachers would wear the Connect Clip either on their shirt, or attached to a lanyard around their neck, where the Connect Clip could pick up and transmit the teacher's oral instructions directly to student's hearing device. (FOFs #11 - #13) On March 11, 2021, the day the Connect Clip was lost while on school campus, one of the student's teachers did not implement the instructions in the student's IEP to wear the Connect Clip, but rather had the student wear the lanyard. (FOF #14)

When developing a student's IEP, the IEP Team is required to consider whether the student requires assistive technology devices and services. 34 C.F.R. §300.324(a)(2)(v); NAC §388.284(2)(f). IDEA, 34 C.F.R. §300.5, defines an assistive technology device as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability." (See also NAC §388.023.) An assistive technology service is one that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. 34 C.F.R. §300.5; NAC §388.024. Once a student's IEP Team determines that an assistive technology device and/or service is required to provide a student a Free Appropriate Public Education, such services may be provided

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<sup>3</sup> The State of Nevada is in the United States Court of Appeals, Ninth Circuit.

as special education; related services; or supplementary aids and services. NAC §388.284(1)(d); 34 C.F.R. §300.105.

The parentally provided Oticon and Connect Clip devices, which are for the purpose of aiding the student to process the words spoken by students' teachers (FOFs #2, #9 - #11), do meet the definition of an assistive technology device set forth in the IDEA and the NAC. However, as discussed above, the inquiry does not stop there. A public agency is responsible for the provision of the assistive technology device as part of a student's Free Appropriate Public Education, only if the device is *required* as part of the student's special education, related services, or supplementary aids and services. NAC §388.284(1)(d); 34 C.F.R. §300.105; Federal Register / Vol. 71, No. 156 / Monday, August 14, 2006, pg. 46581.

In this case, while the student's IEP Team determined the assistive technology device of an iPad with augmentative communication 'apps' was required to be provided to the student, and included the device as a supplementary aid/service in the student's February 2, 2021 IEP, the IEP Team did not determine that the student's Oticon and Connect Clip devices were required in order to provide a Free Appropriate Public Education to the student. (FOFs #3, #7) The student's IEP Team did, however, determine that the student required the instructions/procedures for the parentally provided Oticon and Connect Clip devices to be followed as a supplementary aid/service. (FOF #7)

As previously discussed, the requirements of the provision of a Free Appropriate Public Education to students with disabilities under the IDEA and the NAC, Chapter 388, necessitate that special education and related services and supplemental aids and services are provided in conformity with an IEP that is in effect at the relevant time. 34 C.F.R. §§300.17(d), 300.101; NAC §388.281(6)(e) *Capistrano; Van Duyn*. In this case, SPCSA failed to implement the supplementary aid/service in the student's IEP to "follow instructions/procedures" for the student's teacher to wear the Oticon Connect Clip device, either attached to their shirt, or on a lanyard, daily and across all school settings on the school campus. (FOFs #7, #11, #12 #14) The fact that following the instructions/procedures for the parentally provided device was not identified as an assistive technology service in the student's IEP does not negate the SPCSA's responsibility to provide the designated service in conformity with the student's IEP.

*Therefore, notwithstanding the absence of the identification of the wearing of the Connect Clip as an assistive technology service in the student's IEP, SPCSA failed to comply with the IDEA and NAC, Chapter 388, with regard to providing the student's supplementary aid/service of following instructions/procedures for the Connect Clip for the student's Oticon hearing device, from March 11, 2021 to July 22, 2021.*

**Issue Two:** Whether SPCSA complied with the IDEA and NAC, Chapter 388, with regard to the provision of a Prior Written Notice a reasonable time before SPCSA refused to replace the student's missing assistive technology device, the Connect Clip for the student's Oticon Hearing Aid, on or after March 11, 2021.

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. "The purpose of such advance notice is to provide the parent sufficient time to consider the proposal or refusal and respond prior to implementation of the proposed action, or in response to a refusal to take a requested action. In

order for the parent to make his or her decision, she or he must be clear on the action being proposed or refused....” *Letter to Atkins-Lieberman*, 56 IDELR 141 (OSEP August 5, 2010).<sup>4</sup>

Having established that SPCA’s decision not to follow instructions/procedures with regard to the Connect Clip for the student constituted a failure to comply with the IDEA and NAC Chapter 388, the issue of Prior Written Notice takes on a distinctly different role. While the failure to implement a student’s IEP is violative of the IDEA and the NAC, the noncompliance did not trigger a Prior Written Notice. However, it was the expectation of the Parent that SPCSA was required to issue a Prior Written Notice when SPCSA refused to replace the parentally provided Connect Clip that was lost as a result of the failure to implement the student’s IEP.

The Parent repeatedly requested SPCSA/ISMV either locate the parentally provided Connect Clip or cover its replacement cost and SPCSA and ISMV were clear in their consistent refusal to do so. (FOFs #15, #16) While the Parent did indicate in the requests for reimbursement that the student needed the parentally provided device to be successful in school and in the community, the Parent did not assert, as set forth in this State Complaint, in those requests for reimbursement that the Connect Clip, a personal device used by the student both in school and in the community, was a device required in order to provide the student a Free Appropriate Public Education. Federal Register / Vol. 71, No. 156 / Monday, August 14, 2006, pg. 46581. The Parent also did not either request the responsibility of the provision of the Connect Clip device generally be changed from a parentally provided device, as set forth in the student’s IEP, to a SPCSA-provided device or otherwise use language that could reasonably be interpreted that the Parent was making that proposal because the Connect Clip device was *required* for the student to receive “educational benefit” or to “make progress” appropriate to the student's circumstances. *Board of Education of the Hendrick Hudson Central School District, Westchester County, Et. Al v. Rowley*, 458 U.S. 176 (1982); *Andrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

Deferring to the school’s student handbook regarding lost personal items, SPCSA refused to replace the missing Connect Clip device on the basis that the parentally provided device was a missing personal item. (FOF #16) This refusal in response to the Parent’s requests to either locate the parentally provided Connect Clip lost at school or cover its replacement cost, was neither a proposal or refusal to initiate or change the provision of a Free Appropriate Public Education to the student.

*Therefore, in the absence of a requirement to do so, SPCSA complied with the IDEA and NAC, Chapter 388, with regard to the provision of a Prior Written Notice to replace the student’s missing Connect Clip for the student’s Oticon Hearing Aid, on or after March 11, 2021.*

### **Order of Corrective Action**

According to the IEP, student’s teachers were to wear the Connect Clip either clipped to their clothing, or on a lanyard around their neck. Instead, on the day the Connect Clip went missing, the teacher assigned to student in the resource room had the student wear the lanyard throughout the day. (FOFs #2, #14) It has been determined that the failure of SPCSA to implement the student’s IEP with regard to following instructions procedures for the Connect Clip resulted in the loss of the Connect Clip, and a remedy is required. 34 C.F.R. §300.151(b).

The determination with regard to whether the remedy in this case requires the Parent’s proposed resolution of compensatory education is complicated. SPCSA’s failure to implement the student’s

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<sup>4</sup> This policy letter from the United States Department of Education, Office of Special Education Programs is publicly available at: <https://sites.ed.gov/idea/policy-guidance/> .

IEP was not with regard to the provision of the device, but rather the failure to follow instructions for the parentally provided device. Was this failure a “material failure” that constituted a denial of a Free Appropriate Public Education? *Van Duyn*.

The Connect Clip device was to provide the student “additional support” to help direct auditory input to the student’s hearing aid technology, the Oticon device, to process sound more efficiently in school and in the community. (FOF #9) The student continued to have the parentally provided Oticon device in school during the relevant period of this State Complaint as well as a number of other supplementary aids and services in the student’s February 1, 2021 IEP relevant to the student’s ability to process sounds, including a one-to-one aide in the general education classroom. None of these are at issue in this State Complaint. (FOFs # 4 - #7)

As discussed previously, the student’s IEP Team did not determine either the Oticon or the Connect Clip devices were required in order to provide the student a Free Appropriate Public Education and even the student’s own audiologist did not assert otherwise. (FOFs #7, #9, #10) *Board of Education of the Hendrick Hudson Central School District, Westchester County, Et. Al v. Rowley*, 458 U.S. 176 (1982); *Andrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988, (2017). As such, the failure of SPCSA to follow the instructions for the devices is determined not to be a “material failure” to provide the student a Free Appropriate Public Education. Therefore, the provision of the compensatory education proposed by the Parent is not warranted.

#### **Student-Specific Remedy - Cost for Replacement of the Connect Clip**

The cost of a new Connect Clip, tax included, is \$325.14. (FOF # 18) As soon as possible, but no later than **15 business days** of the SPCSA’s receipt of the Parent’s proof of payment for a replacement Connect Clip from an authorized provider (to be submitted by the Parent to SPCSA no later than 90 days of the Parent’s receipt of this Report), SPCSA must either ensure a payment is made or make a payment to the Parent in the amount set forth on the proof of payment, not to exceed the amount of \$325.14. (If payment is mailed to the Parent, it must be mailed on or before 12 business days to the address of residence on the State Complaint and that action will satisfy the 15-business day requirement.) SPCSA must provide NDE documentation of the completion of this directed action within 15 business days of its completion.