

**COMPLAINT INVESTIGATION
WASHOE COUNTY SCHOOL DISTRICT
(#WA011023)
Report Issued
on March 10, 2023**

INTRODUCTION

On January 10, 2023, the Nevada Superintendent of Public Instruction received a State Complaint from a Parent¹ alleging violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et. seq.; 34 C.F.R. Part 300, and Nevada Administrative Code (NAC), Chapter 388, by Washoe County School District (WCSD) in a student’s special education program. The allegation in the Complaint was that WCSD failed to provide the student a Free Appropriate Public Education due to a failure to identify a school for the student to attend and receive the services in the student’s Individualized Education Program (IEP). In support of this allegation, the Parent indicated that WCSD had informed the Parent that there was not a school or classroom available for the student and, as a result, the student would have to go on a waiting list, and that the wait could be extended into the 2023/2024 school year.

The Parent’s proposed resolution was for WCSD to provide a school or classroom location for the student to begin attending and receiving services; to provide compensatory services for any missed services; to use “creative means” to locate a private, charter or public school to ensure the student had the opportunity to receive services and progress on the student’s IEP goals; parents be kept aware of any proposed resolution; and WCSD address this systemic problem² of not providing services to entering three-year-old children and utilize the notification process provided to the WCSD from State Part C programs to allow for growth and engage in capacity building.

In the January 20, 2023 issue letter to WCSD, NDE requested additional documents and information in order to investigate the State Complaint. WCSD was notified in that same correspondence that if WCSD 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; reference to the provided documentation that factually supported the denial; and that a failure to do so by February 9, 2023 or an extended timeline authorized by Nevada Department of Education (NDE), would be considered a concession of noncompliance for purposes of this State Complaint. WCSD did timely respond with well-organized documents relevant to the issue in the State Complaint and conceded the sole issue that the placement in the student’s December 19, 2022 was “not made available to the student at the time of the IEP development.”

The State Complaint, including the attachments, and WCSD’s response and supplemental response, including all relevant documents submitted by WCSD in response to the issue in the Complaint, were reviewed and considered in their entirety in the investigation of this Complaint. The Findings of Fact cite the source of the information determined necessary to resolve the issue in this Complaint and the original source document, where available, was relied upon.

¹ The State Complaint was from the Parent and Grandmother; however, only the Parent signed the Complaint as the Complainant. (Complaint, December 19, 2023 IEP)

² While this proposed resolution constituted a systemic remedy, based on the stated allegation, the State Complaint was an individual student Complaint.

COMPLAINT ISSUE

The allegation in the Complaint that is under the jurisdiction of NDE to investigate through the special education complaint process raises the following issue for investigation:

Issue:

Whether WCSD complied with the IDEA and NAC, Chapter 388, and provided the student a Free Appropriate Public Education, specifically with regard to the implementation of the student's December 19, 2022 IEP in the determined placement upon turning three years of age.

FINDINGS OF FACT

1. The student participated in the IDEA Part C Early Intervention Program for Infants and Toddlers with Disabilities administered by the Nevada Department of Health and Human Services (DHHS) prior to being enrolled in WCSD. (December 19, 2022 IEP)
2. During the relevant time period, DHHS provided periodic notices to local educational agencies, including WCSD, of information on the children with disabilities who either had exited the Part C program or who were currently two years of age, but would turn three during an identified time period. While there were some gaps in the provision of these notices during the relevant time period, DHHS sent one of these periodic notices to WCSD on December 8, 2022 of children who would turn three years of age before June 30, 2023. Although requested in the course of the investigation, related information regarding WCSD's participation in the transition conference conducted by DHHS for this student in advance of the student's third birthday to discuss services was not provided to NDE and WCSD did not raise the absence of sufficient advance notice from DHHS with regard to this student. (DHHS December 8, 2022 Notification to the LEA – Children Aging out of Early Intervention, Review of the Record)
3. The student is a student with a disability of preschool age and was assessed and determined to be eligible as a student with developmental delay by WCSD on December 13, 2022. The student's initial IEP was developed on December 19, 2022 and implementation was to commence upon the student turning three years of age.³ The student's Parent agreed with the student's initial IEP and signed consent for the initial provision of special education services and related services to the student. (December 19, 2022 IEP, December 16, 2022 Notice, Complaint)
4. The student's December 19, 2022 IEP provided the following services commencing upon the student turning three years of age: specially designed instruction of specialized instruction in pre-academics for 1,460 minutes weekly and the direct related services of speech/language 160 minutes monthly and transportation for two hours per day in the location of the community. The student's placement was 100 percent in the special education environment in a self-contained program. The student's IEP Team determined that the student did not require Extended School Year services. (December 19, 2022 IEP, Complaint)

³ Dates related to the student's birthdate or other personal characteristics/information that would make it possible to identify the child with reasonable certainty have been deleted. 34 C.F.R. §300.32. The use of [] in this Report denotes the deletion of personally identifiable information.

5. At the time of the student's IEP Team meeting, WCSD did not have a placement available in the preschool/early childhood program. Three days prior to the student's IEP Team meeting, WCSD provided a notice to the Parent proposing to implement the student's initial IEP (that had yet to be developed) with the following explanation:

“The IEP team has met and agreed upon a plan. WCSD intends to implement the IEP within 10 school days. Currently there is not a space available and WCSD will follow up with family to determine status of waitlist for services.” (December 16, 2022 Parental Prior Notice - Proposed Meeting Arrangement Notice to the Parent Notice)
6. On January 18, 2023, WCSD provided the Parent another notice on the provision of compensatory education for the specially designed instruction in the student's IEP. The Notice provided an explanation that “...Currently, as the case nationwide, there is a significant shortage of qualified teachers within the WCSD. As a result, at this time there are limited early childhood special education placement options within the district. The district is working to open new programs with teachers and [] will be immediately placed into the program once a program is opened. With the delay in placement, the district is prepared to offer compensatory services to the student to help minimize the gap in services. Upon placement of the student, the district will provide to the parent a formal compensatory services letter with options for the parent so that services can be made up.” (January 16, 2023 Parental Prior Notice - Proposed Meeting Arrangement)
7. The first day of school in the 2022/2023 school year after the student turned three years of age was January 10, 2023. There were two months with six school weeks (comprised of 28 school days) from when the student turned three years of age up to the day the student was enrolled in and attended the preschool program, February 21, 2023.⁴ (2022/2023 WCSD Balanced Calendar, Email Communications, Student Enrollment History, WCSD Response)
8. On February 13, 2023, WCSD offered the Parent 320 minutes of compensatory speech and language services and 5,400 minutes (or 90 hours) of compensatory specially designed instruction in the area of pre-academic skills with the explanation that due to a staffing shortage that WCSD was unable to immediately implement the student's IEP resulting in the student missing speech and language therapy minutes and specially designed instruction. In the same notice, WCSD informed the Parent that WCSD was willing to look at other compensatory options such as reimbursement for the private preschool the student had been attending. (In this case, there was no documentation that the student attended a private preschool during the interim from the date the student turned three years of age to the date the student began attending school.) (WCSD's February 13, 2023 Compensatory Services Offer to Parent, Review of Record)
9. On February 14, 2023, the student's Parent contacted WCSD by email correspondence and asked whether the Parent could be compensated for daycare costs for the student from when the student turned three years of age until the date the student started at the WCSD placement. WCSD revised its compensatory education offer of specially designed instruction from 90 hours of pre-academic skills to 130 hours and, in the course of this investigation, reported that the student's Parent accepted the revised offer of 130 hours of compensatory specially designed instruction. However, neither a signed settlement agreement nor a withdrawal of this Complaint was received prior to the

⁴ There was documentation provided in the course of the investigation that a placement for the student may have become available on February 10, 2023; however, February 21, 2023 was the day the student was enrolled in and attended the preschool program. There was no explanation provided on the delay and, given WCSD offered compensatory services from the date the student turned three years of age up to February 21, 2023, this time period has been adopted as the applicable time period for purposes of compensatory education.

issuance of this Report. (February 14, 2023 Email Correspondence, WCSD Supplemental Response, Review of Record)

10. No documentation was provided in the course of the investigation that the student was provided speech and language services in the month of February 2023 after the student's first day of school on February 21, 2023. (WCSD Supplemental Response, Review of Record)
11. In response to NDE's request for documentation of any new public and private options available and/or utilized in the 2022/2023 school year to ensure previously determined noncompliance in school year 2021/2022 had been corrected and every eligible student with a disability's IEP was implemented by the student's third birthday, WCSD cited only the provision of some itinerant special education services to some students as an additional option provided by WCSD to correct the noncompliance. WCSD persistently cited IDEA 34 C.F.R. §§300.130 – 300.144 and related interpretative sources regarding parentally placed students with a disability as prohibiting WCSD's placement or referral of a student with a disability with a right to a Free Appropriate Public Education in a private for-profit school when WCSD did not have a Free Appropriate Public Education available for the student. (WCSD Response, WCSD Supplemental Response⁵)
12. WCSD was determined to be out of compliance in two prior State Complaints in the 2021/2022 school year due to the failure of WCSD to have a placement available in the preschool program for two other students with a disability upon turning three years of age. NDE ordered systemic Corrective Action Plans to ensure a sufficient number of licensed certified teachers and classrooms for WCSD early childhood programs to avoid the reoccurrence of the determined violation in subsequent school years. (State Complaints #WA032222 and #WA033022)
13. Related to the issue in this State Complaint, during a recent special on-site monitoring conducted by NDE of WCSD's preschool Child Find system, NDE determined, and WCSD concurred, that there was, and continues to be, a systemic failure to timely place students with a disability in accordance with their IEPs upon turning three years of age. NDE issued an Order of Corrective Action to address this systemic failure. (State Complaint #WA120822, March 2023 WCSD IDEA Part B Preschool Special Monitoring - Order of Corrective Action)

CONCLUSIONS OF LAW

Issue:

Whether WCSD complied with IDEA and NAC, Chapter 388, and provided the student a Free Appropriate Public Education, specifically with regard to the implementation of the student's December 19, 2022 IEP in the determined placement upon turning three years of age.

⁵ Given the request from NDE to WCSD for supplemental information/clarification expressly excluded documentation regarding the unrelated requirements related to a parentally-placed students with a disability in an elementary school pursuant to 34 C.F.R. §300.130 - 300.144 and NAC §388.219, the documentation provided by WCSD on that unrelated requirement was determined to be gratuitous and not relevant to this investigation and will not be included in the administrative record of this State Complaint. If WCSD wants these documents to be included in the administrative record of the State Complaint for some other purpose, WCSD may mail a copy of the documentation to NDE for that sole purpose within ten days of the receipt of this Report.

IDEA Part C includes a number of requirements regarding the transition of a child with a disability sufficiently in advance of the child's third birthday to ensure a smooth transition to preschool or other programs, as appropriate. If the child may be eligible for preschool services under IDEA Part B, these IDEA Part C requirements include an advance notice to the local educational agency in the area in which the child resides and, not fewer than 90 days prior to the toddler turning three years of age, the conduct of a transition conference with the lead agency, the family, and the local educational agency to discuss services. 34 C.F.R. §303.209. While these responsibilities under IDEA Part C are those of the lead agency, DHHS, there are corresponding requirements regarding transition that involve the local educational agency for the area in which the toddler resides, including the local educational agency's participation in the transition planning conferences arranged by DHHS. NAC §388.281(1); 34 C.F.R. §§300.124, 300.321(f), 300.800 et seq. WCSD was, at minimum, provided an advance notice dated December 8, 2022 with information on the children with disabilities who were currently two years of age, but would turn three before June 30, 2023 and did not raise the absence of sufficient advance notice from DHHS with regard to this student. (Finding of Fact (FOF) #2)

These transition requirements are essential to ensure a local educational agency makes a Free Appropriate Public Education available to all IDEA Part B eligible children with disabilities, upon turning three years of age:

“The determination of whether a toddler with a disability is “potentially eligible” for services under part B of the Act is critical under both parts C and B of the Act. It is the first step in ensuring a smooth transition for that toddler and family to services under part B of the Act. When the LEA receives notice from the lead agency or an EIS provider that a specific toddler with a disability who has been receiving services under part C of the Act may be eligible for services under part B of the Act, the LEA must treat this as a referral and provide parents with the procedural safeguards notice under 34 CFR 300.504(a)(1) and determine if an evaluation for eligibility must be conducted under part B of the Act.” Federal Register / Vol. 76, No. 188 / Wednesday, September 28, 2011, pg. 60174.

In December 2022, prior to the student's third birthday, WCSD evaluated the student; determined the student was eligible as a student with a disability under the category of developmentally delayed; and the student's IEP Team developed the student's initial IEP. (FOF #3) Upon turning three, WCSD was required to admit the student with a disability to WCSD's early childhood program and make special education and related services “available” to the student in accordance with the student's IEP. 20 U.S.C. §1419; 34 C.F.R. §§300.101, 300.323(c); NRS §388.435; NAC §388.281.

As indicated in the introduction, WCSD conceded this issue by acknowledging it failed to comply with the IDEA and NAC, Chapter 388, with regard to the implementation of the student's December 19, 2022 initial IEP and determined placement upon the student turning three years of age. From the date the student turned three years of age and the first day of attendance on February 21, 2023, the student missed 28 school days. (FOF #7)

The reason for WCSD's failure to implement the student's IEP on the student's third birthday was that due to a shortage of early childhood special education teachers there were limited early childhood special education placement options within the district. (FOFs #5, #6, #8) However, neither the IDEA nor NRS/NAC, Chapter 388, provide this exception to the right of the student to be admitted to WCSD's early childhood program with the student's IEP implemented by the student's third birthday. 20 U.S.C. §1419; NRS §388.435; NAC §388.281(1). On the contrary, the transition requirements from the IDEA Part C Early Intervention Program for Infants and Toddlers with Disabilities to the IDEA Part B program are designed to ensure local educational agencies have sufficient notice so that eligible students with a disability

have a smooth transition to IDEA Part B programs upon turning three years of age and, in this case, the student did not.

Therefore, WCSD failed to comply with IDEA and NAC, Chapter 388, and provide the student a Free Appropriate Public Education, specifically with regard to the implementation of the student's December 2022 initial IEP and determined placement from the date the student turned three years of age until February 21, 2023.

CORRECTIVE ACTION

Systemic Remedy

As part of its general supervisory responsibilities, a State Education Agency is required to ensure that when it identifies noncompliance with the IDEA requirements by a local educational agency, the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance. 34 C.F.R. §300.600(e). In May 2023, it will be one year since NDE identified and notified WCSD of noncompliance of the very issue in this State Complaint in State Complaints #WA032222 and #WA033022 and ordered a systemic remedy to address the appropriate future provision of services for all children with disabilities to ensure every eligible student with a disability's IEP would be implemented by the student's third birthday (FOF #12). NRS §388.435; NAC §388.281(1); 20 U.S.C. §1419; 34 C.F.R. §300.151(b)(2). The reoccurrence of the previously identified noncompliance in the 2022/2023 school year in this State Complaint evidences a continued failure of WCSD to timely place preschool-aged students with a disability by their third birthday.

In addition, during a recent special on-site monitoring of WCSD's Child Find system and preschool program conducted by NDE during the course of this investigation, NDE determined, and WCSD concurred that there was, and continues to be, a systemic failure in WCSD to timely place students with a disability in accordance with each student's IEP upon turning three years of age. The systemic exclusion of students with disabilities who had a right to a FAPE upon turning three years of age is a significant violation of IDEA and NRS/NAC, Chapters 388. Therefore, NDE determined additional enforcement mechanisms with technical assistance and support from NDE were necessary to remedy the identified systemic noncompliance. Accordingly, NDE issued an Order of Corrective Action to WCSD to address the systemic failure reflected in this State Complaint. (FOF #13) This Order of Corrective Action is determined sufficient to provide a systemic remedy for this State Complaint to address the appropriate future provision of services for other preschool-aged students with disabilities in WCSD.

Student-Specific Remedy

As previously discussed, during the course of this investigation, the student was admitted to the WCSD preschool program and the student's IEP and placement are now being implemented. However, WCSD's failure to implement the student's December 19, 2022 IEP and placement from the date the student turned three years of age, and school was in session, to the date of admission and implementation of the student's IEP and placement constitutes a material failure to implement the student's IEP. *Van Duyn v. Baker School District*, 502 F.3d 811, 107 LRP 51958 (9th Cir. 2007). As such a student-specific remedy is required.

Compensatory education is designed to provide the educational benefits that likely would have accrued to the student from special education services if they had been supplied in the first place. This is a fact-specific determination. (*Parents of Student W. ex rel. Student W. v. Puyallup School Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994); *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C.

Cir. 2005)) In compensatory education awards, there is no obligation to provide a day-for-day compensation for time missed. *Parents of Student W*. This approach for determining compensatory education is considered ‘qualitative’ in nature, rather than strictly ‘quantitative’ and requires that a compensatory education award be made not merely by establishing the amount of services which were not provided, but that an analysis be done to establish what may make the student whole for the denial of services. In this case, given the age of the student and the absence of the required “smooth and effective transition” for the student from IDEA Part C to IDEA Part B, preschool program (34 C.F.R. §§300.124(a), 300.321(f)), it is determined that a day-for-day compensation for time missed is appropriate. *Parents of Student W*.

The Parents and WCSD are commended for working together on the determination of an appropriate compensatory education/services remedy during the course of the investigation (FOFs #8, #9) and are encouraged to continue to work together throughout this corrective action process. WCSD’s compensatory service offers and the Parent’s responses were considered in NDE’s determination of the corrective action appropriate to meet the student’s needs resulting from the failure to timely implement the student’s IEP.

In accordance with NRS §385.175(6), NDE requests a plan of corrective action (CAP) from WCSD within 20 WCSD business days of the receipt of this Report on the provision of compensatory education/services to the student. **Unless otherwise agreed to in writing by WCSD and the Parent**⁶, the CAP must provide for the following student-specific directed actions and provide the timelines for each to enable the completion of all of the actions as soon as possible, but no later than August 1, 2024⁷:

1. 320 minutes of speech language services;
2. 8760 minutes (146 hours) of pre-academic skills (specially designed instruction). (FOFs #4, #7)

This compensatory education/service must be in addition to the services in the student’s IEP and must be provided during school breaks or Extended School Year (FOF #4) or before or after school. At WCSD’s discretion, all or part of the compensatory education/services may be provided by a qualified private provider.

WCSD must consult with the student’s Parent(s) on the appropriate means to provide this ordered compensatory education/service to meet the student’s educational needs and must consider any concerns of the Parent and/or proposals in the development of the compensatory education/services plan.

The CAP must be approved by NDE prior to implementation and documentation of the completion of the approved CAP must be provided to NDE within 14 days of its completion.

⁶This exception includes if WCSD and the Parent signed a written settlement agreement on WCSD’s compensatory education/services offer prior to the issuance of the Report and failed to provide NDE a copy of this signed settlement agreement. If the settlement agreement was not signed prior to the issuance of the Report, this corrective action order supersedes any conceptual prior agreement, including written communications of the discussions, unless WCSD and the Parent agree otherwise after the issuance of the Report.

⁷ Notwithstanding, the previously cited requirement that noncompliance must be corrected as soon as possible, and in no case later than one year after the State’s identification of the noncompliance (34 C.F.R. §300.600(e)), given the number of hours and the age of the student it is recognized that it may take longer than one year to appropriately provide the ordered compensatory education and compensatory service to the student. NDE has determined the August 1, 2024 timeline is appropriate in this case. *Letter to Zirkel*, 68 IDELR 142 (OSEP August 22, 2016). This letter is publicly available at: <https://sites.ed.gov/idea/idea-files/policy-letter-august-22-2016-to-perry-zirkel/>