

**COMPLAINT INVESTIGATION
WASHOE COUNTY SCHOOL DISTRICT
(#WA031821)
Report Issued on May 10, 2021**

INTRODUCTION

On March 18, 2021, the Nevada Superintendent of Public Instruction received a State Complaint dated January 21, 2021 from a Parent alleging violations by Washoe County School District (WCSD) in a student's special education program. The Parent indicated the student is diagnosed with attention deficit hyperactive disorder; recent evaluations indicate short-term memory deficits and dyslexia; and the student relies on an inclusion teacher to provide access to the accommodations in the student's Individualized Education Program (IEP).

The allegation in the Complaint was that WCSD failed to implement the student's September 18, 2020 with regard to providing an inclusion teacher in science class to provide the student academic support 28% of the student's school day, resulting in the denial of the student's access to accommodations for the full period or at all. The Parent notified WCSD on December 9, 2020 of this concern. The Parent's only proposed resolution was for the student to receive a passing grade in science due to the failure of school personnel to provide the accommodations set forth in the student's IEP. NDE notified the Parent at the commencement of this investigation that while NDE would order specific action to be taken if noncompliance was found, NDE did not have the authority through the State Complaint process to order a change in a student's grade.

In the March 26, 2021 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; and specifically reference the documentation provided to NDE that factually supported the denial and that a failure to do so by April 12, 2021 or an extended timeline authorized by NDE, would be considered a concession of noncompliance for purposes of this State Complaint.

WCSD timely responded and provided and identified the requested documentation. However, WCSD did not deny the alleged noncompliance, or provide a brief statement of the factual basis for a denial referencing the provided documentation. Therefore, consistent with the notice explicitly provided to WCSD, the failure of WCSD to dispute the allegations was determined to be a concession of noncompliance for purposes of this Complaint and that concession is noted in the Conclusions of Law. The documents and information provided in WCSD's response were reviewed and considered in the development of the Findings of Fact and the determination of any required corrective action.

The State Complaint, including all attachments and cited legal authority, was also reviewed and considered in its entirety in the investigation of this Complaint. The Findings of Fact cite the source of the information determined necessary to resolve the issues in this Complaint and the original source document, where available, was relied upon.

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 from September 18, 2020 through December 9, 2020 (hereafter referred to as the “relevant period.”) in the 2020/2021 school year:

Whether WCSD complied with the IDEA and NAC, Chapter 388, with regard to implementing the student’s September 18, 2020 IEP, specifically with regard to the student’s access to an inclusion teacher in science class for the required percentage of time.

FINDINGS OF FACT

General

1. The student is enrolled in WCSD and is eligible for special education under the eligibility category of specific learning disability. The student’s placement is in a combination of regular class and special education, with 40.16% of time in the special education environment. The student’s diploma option for graduation is a standard or advanced high school diploma. (September 18, 2020 IEP)
2. The student had a September 18, 2020 annual IEP in effect from September 18, 2020 through September 17, 2021. At the time this IEP was developed, the Parent’s educational concerns were with regard to student’s reading, writing and math computation levels. The Parent agreed with the components of this IEP. The September 18, 2020 IEP also noted “IEP presented to reflect current needs of Student, IEP will be re-visited no later than December 17, 2020, to reflect updated testing results.” (September 18, 2020 IEP)
3. The student’s September 18, 2020 IEP provided goals related only to performance in math, language arts and social and emotional behavior, including that the student would utilize an assistive technology device, when given grade level assignments, to ensure the student is able to comprehend and access assigned reading and writing, with 60% accuracy in two out of three classes, and that when given appropriate direction, the student will explain and apply the order of operations, including exponents with and without technology, with 60% accuracy. The Parent did not allege WCSD failed to meet any of the student’s annual goals in the September 18, 2020 IEP or that the goals were applicable to the student’s general education science class. (September 18, 2020 IEP, Complaint)
4. During the relevant period of this Complaint, the student’s September 18, 2020 IEP provides for specially designed instruction in the location of a special education class in the areas of language arts for 2,140 minutes monthly (approximately 35 hours per month), and math, for 920 minutes monthly (approximately 15 hours per month). Student also receives, as a supplementary aid and service, consultation for social and emotional behavior for 15 minutes per month in student’s special education class. The student’s science class is a general education class. The student’s IEP did not reference the services of an inclusion teacher in science class or any other general education class. (September 18, 2020 IEP)
5. The September 18, 2020 IEP provides that the student’s accommodations would be met in both general and special educational classes and the beginning date for the provision of the accommodations was September 18, 2020. The student’s IEP sets forth the following accommodations: dictation of responses to a test administrator/proctor, including allowing student

to provide responses to test and quiz questions orally; whenever possible, teachers and staff will attempt to pull the student aside to provide correction, refraining from correcting student in front of peers; in the case of a substitute teacher being assigned to a class, student will be provided a copy of the work for the day, and student will go to a Social Intervention Program classroom to complete the assignment; in the case of district mandated "Digital Days," classroom teachers will provide copies of the lesson to student via direct email, phone call, or text message; student will not be asked or made to read out loud during class or in front of other students; Text To-Speech: oral delivery of test items, questions, and answer choices (e.g. for MAP), all tests and quizzes are to be read aloud to the student; allow student to use calculators; student will utilize assistive technology device to access assignment that require reading; read test directions to student; modify or reduce lengthy assignments while still showing mastery; extra time for classroom assignments: one extra class period; use graphic organizers for assignments; small group testing; and one page of student generated notes, teacher approved, for use on class tests. (September 18, 2020 IEP)

6. While the student did not receive any specially designed instruction in the general education science class and an inclusion teacher was not a designated service in the student's IEP, the student's science class had a co-teacher that WCSD described as the student's inclusion teacher. (WCSD Service Logs and Student Schedule, September 18, 2020 IEP)
7. The Parent contacted WCSD on November 16, 2020 with concerns about the student not being provided assignments in the appropriate format as per the IEP. The Parent again contacted WCSD on December 1, 2020, noting that student was not being provided accommodations by the inclusion teacher in science class, and then followed up again on December 13, 2020 seeking a response to her inquiry. (WCSD Contact Logs)
8. The student's science class met a total of 25 times from September 18, 2020, through December 9, 2020, with the inclusion teacher absent six out of the 25 periods or 24% of the time. (When calculated from the first science class in the 2020/2021 school year reported in the WCSD's documentation, the inclusion teacher was absent for 20% of the time.) (WCSD Service Logs and Provider Information)
9. While WCSD provided a report detailing the inclusion teacher's present and absent days during the relevant period, the documentation did not include the requested time and minutes that the inclusion teacher was available during the 19 classes the documentation lists her as present. The reason for the absence of the inclusion teacher, for at least a period of the relevant time period, was documented as: "Inclusion teacher absent from work; position not picked up by a substitute or internal site-based prep period coverage unavailable." (WCSD Service Logs and Provider Information)
10. For the first semester of the 2020/2021 school year, the student received failing grades in the student's only two general education classes of science and military history, and one A and two C grades in the special education classes of social studies, english and math. (WCSD Semester Grade Report August 10, 2020 - December 17, 2020)
11. Student also received a failing grade in the first semester science class during the 2019/2020 school year, and a D grade for the second semester, which earned student a half credit towards graduation. (WCSD Semester Grade Reports: August 12, 2019 – December 19, 2019, January 6, 2020 – June 5, 2020)

12. The method for reporting the student's progress toward meeting the annual goals in the student's September 18, 2020 IEP was IEP goal pages and specialized progress reports based on teacher observation and performance demonstration. Given there was no annual goal in the area of science, no specialized progress report was required. (September 18, 2020 IEP)
13. As of the date of student's January 15, 2021 Psycho-Educational Team Report, student had completed 7.5 credits towards the 22.5 credits required for graduation. (January 15, 2021 Psycho-Educational Team Report)

CONCLUSIONS OF LAW

Issue:

Whether WCSD complied with the IDEA and NAC, Chapter 388, with regard to implementing the student's September 18, 2020 IEP, specifically with regard to the student's access to an inclusion teacher in science class for the required percentage of time.

Implementation of the Student's IEP

In this case, there was a single IEP in effect during the time period of this Complaint, the student's September 18, 2020 annual IEP. (Finding of Fact (FOF) #2) The determination of the time period of noncompliance for purposes of this Complaint was September 18, 2020, through December 9, 2020.

A student's IEP describes his/her individual needs and sets out the proper placement. *Schaffer v. Weast*, 546 U.S. 49 (U.S. 2005); 44 IDELR 150. Once an IEP is developed for a student, the public agency is obligated to provide services "in conformity with" students' IEPs. *Van Duyn v. Baker School Dist.*, 502 F.3d 811 (9th Cir.¹ 2007) (*Van Duyn*); 34 C.F.R. §§300.17(d), 300.101; NAC §388.281(6)(e). In this case, the student's IEP Team determined that, given the student's educational needs, the student's progress in both general and special education classes required accommodations, including the direct assistance of multiple types of orally delivered accommodations and the modification or reduction of lengthy assignments. (FOFs #2, #5)

Courts have found that in addition to setting out a student's needs, the IEP serves as a communication tool through the mechanism of parental participation, which includes not just the parents participating in the development/revision of their child's IEP, but also allows parents to monitor and enforce the services that an IEP Team has decided are appropriate to provide to the student. "The IEP is a 'formal, written offer [that] creates a clear record that will do much to eliminate troublesome factual disputes... about when placements were offered, what placements were offered, and what additional education assistance was offered to supplement a placement, if any.'" *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 117 LRP 21748 (9th Cir. 2017), (internal citations omitted).

Relevant and persuasive policy guidance from the United States Department of Education, Office of Special Education Programs (OSEP), also provides that: "The IEP Team meeting serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to make joint informed decisions regarding services that are necessary to meet the unique needs of the child" (*Letter to*

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

Richards, 55 IDELR 107, (OSEP 2010)) and the IEP must include sufficient specificity that “the level of the agency's commitment of resources is clear” *Letter to Carroll*, 72 IDELR 74 (OSEP April 19, 2018).²

Here, we find a lack of clarity in the student’s September 18, 2020 IEP regarding the issue in this Complaint. Specifically, the student's IEP does not include the service of an inclusion teacher in the general education science class (FOF #4). However, WCSD responded to the Complaint as though an inclusion teacher was a service in the student’s IEP to be provided to the student in science class. (FOF #6) Likewise, the premise of the Parent’s allegation is based on a belief that the student would have the IEP accommodations met in science class through the assistance of an inclusion teacher. (FOF #7)

As a result, the student's IEP does not provide the clear record required for purposes of monitoring and enforcement to eliminate this “troublesome factual dispute” (MC), including in this Complaint investigation. The difference between what the student's IEP says, or more on point does not say -- and what is uncontested with regard to the required provision of an inclusion teacher for student’s science class -- presents a unique quandary in the resolution of this State Complaint.

As set out in the Introduction to this Report, WCSD is determined to have conceded this issue by the failure to deny the alleged noncompliance. Given WCSD did not dispute the Parent's assertion that the student's IEP included the required service of an inclusion teacher in science, but rather responded in a manner that supported this as a required service, it is determined that there must have been another communication vehicle relied upon between the Parent and school personnel that established that those IEP accommodations applicable to student’s general education classes would be implemented in the science class by the service of the inclusion teacher. While such an external communication vehicle to set forth the required components of an IEP is not consistent with the requirements of the IDEA, (M.C.; *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, 69 IDELR 174 (2017), given the determination that WCSD conceded the issue and the facts of this case, it is determined that the WCSD failed to provide the accommodations in the student’s science class to be implemented by an inclusion teacher 24% of the required time from September 18, 2020 through December 9, 2020. (FOFs #5, 8-9)

Therefore, WCSD failed to comply with the IDEA and NAC, Chapter 388, with regard to implementing the student’s September 18, 2020 IEP, specifically with regard to the provision of an inclusion teacher to implement the student’s accommodations in science class 24% of the time from September 18, 2020 through December 9, 2020.

Corrective Action

The determination of noncompliance with regard to WCSD’s failure to implement the student’s IEP by having an inclusion teacher available to implement the student’s accommodations in science class does not end the inquiry. The next inquiry is whether a student-specific corrective action is required to address the needs of the student. 34 C.F.R. §300.151(b). This is an individualized determination. Whether the failure to provide the services in a student’s IEP is a minor failure or a material failure (*Van Duyn*) is relevant to the determination whether a student-specific corrective action is required to address the needs of the student. 34 C.F.R. §300.151(b).

“A material failure occurs when the services a school provides to a disabled child fall significantly short of the services required by the child's IEP.” “[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it,

² These policy letters are publicly available at: <https://www2.ed.gov/policy/speced/guid/idea/letters/2010-1/richards010710iep1q2010.pdf> <https://sites.ed.gov/idea/idea-files/osep-letter-april-19-2018-to-brian-carroll/>

may be probative of whether there has been a significant shortfall in the services provided.” *Van Duyn*. This materiality standard was considered in the determination whether a student-specific corrective action was required to address the needs of the student.

In this case, determining whether the services WCSD provided to the student through the relevant period in science class fell “significantly short of the services required by the child’s IEP” is complicated by the lack of goals or specially designed instruction in the student’s IEP in the area of science. (FOFs #3-4) However, the student’s September 18, 2020 IEP provides for a host of accommodations (FOFs #5) that WCSD was required to implement in both the student’s general and special educational settings, including, as previously determined, by the student’s inclusion teacher during science. The acknowledged absence of the inclusion teacher for 24% of the time (FOF #8) during the relevant period of three months, without documentation that the accommodations were otherwise provided during that period, is more than a minor or de minimis failure to implement the student’s IEP.³

With regard to the student’s “educational progress, or lack of it” during the relevant period of this Complaint, the only documentation provided by WCSD in the course of the investigation with regard to the student’s progress in science, was the student’s report card reporting that the student received a failing grade in science in the first semester of the 2020/2021 school year. (FOF #10) While it is acknowledged that the student also received a failing grade the first semester of the 2019/2020 school year, the student achieved a passing grade in the more recent Spring 2020 semester, receiving a half-credit towards graduation requirements. (FOF #11) Given these and other student-specific facts set forth in this Complaint, it has been determined that the failure to implement the student’s IEP in this regard is a material failure warranting corrective action. *Van Duyn*.

Directed Action

WCSD is required to take corrective action to address the violation of the IDEA and the NAC found in this Complaint, specifically the provision of an inclusion teacher to implement the student’s accommodations in science class for a material percentage of time. The determination of the appropriate remedy in this case is as perplexing as the investigation given the absence of an explicit requirement to provide an inclusion teacher in the student’s science class. Upon consideration of the nature of the noncompliance with regard to the provision of accommodations during science class periods that have already taken place and the fact that the Parent did not propose the educational remedy of compensatory education available under the IDEA and the NAC to address the noncompliance, NDE has determined that a prospective student-specific remedy is appropriate in this case. The prospective remedy is designed to ensure the level of the agency’s commitment of resources in the student’s IEP is clear to the student’s Parent and other IEP Team members.

Therefore, unless the scheduled revision of the student’s IEP no later than December 17, 2020 (FOF #2) fulfilled this ordered action or WCSD and the Parent agree to an alternative remedy, the student’s IEP must be reviewed by the student’s IEP Team prior to the commencement of the 2021/2022 school year, and revised as appropriate, to address the provision of accommodations in the student’s general education classes in a manner that communicates the level of the agency’s commitment of resources so it is clear to the Parent and other IEP Team members whether the accommodations must be implemented by other than the general education teacher.

Accordingly, WCSD is ordered to provide the Parent a meeting notice in accordance with NAC §388.281(8) prior to the commencement of the 2021/2022 school year and schedule an IEP Team meeting to review and revise the student’s IEP, as appropriate, within 30 days of the Parent’s receipt of the IEP meeting notice

³ Given the absence of documentation, it is also unknown whether the inclusion teacher was available throughout the science class for each of the 19 class periods when the teacher was marked as present. (FOF #9)

and agreement to a date for the conduct of the IEP meeting. In recognition that precautions may still remain in place due to the Covid-19 pandemic, WCSD may conduct this IEP meeting in any manner authorized under the IDEA and the NAC, Chapter 388. WCSD must provide the NDE documentation of the completion of this directed action within 30 days of its completion.

If the Parent and WCSD agree the IEP revised by December 17, 2020 IEP fulfilled this ordered action or agree to an alternative remedy, this written agreement can be submitted to the NDE in lieu of the ordered meeting. Documentation of the completion of the CAP must be provided to NDE within 14 days of its completion.