

**COMPLAINT INVESTIGATION
WASHOE COUNTY SCHOOL DISTRICT
(#WA032222)
Report Issued on May 19, 2022**

INTRODUCTION

On March 22, 2022, the Nevada Superintendent of Public Instruction received a State Complaint dated March 22, 2022 from Parents alleging violations by Washoe County School District (WCSD) in a student's special education program.

The allegations in the Complaint were that WCSD failed: to provide the student a Free Appropriate Public Education due to a failure to implement the student's finalized and agreed upon March 2022¹ initial Individualized Education Program (IEP) and placement in the preschool program on the basis that WCSD's preschool programs were full; and to provide a Prior Written Notice within a reasonable timeframe. The description of the facts relating to the provision of a Prior Written Notice indicated it was the Prior Written Notice on compensatory services that was at issue. The Parents' proposed resolution was to secure placement at a WCSD preschool for the student and for the student's March 2022 initial IEP to be implemented as soon as possible.

In the April 1, 2022 issue letter to WCSD, Nevada Department of Education (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 April 20, 2022 or an extended timeline authorized by NDE, would be considered a concession of noncompliance for purposes of this State Complaint. WCSD did timely respond and provide the requested documents and information. In WCSD's response, WCSD conceded it did not comply with the requirements of the IDEA and NAC, Chapter 388, until April 14, 2022 with regard to the implementation of the student's March 2022 initial IEP and determined placement. WCSD provided an explanation of the cause of the three-week delay and agreed with the Parents' proposed resolution. WCSD disputed the Parents' allegation of noncompliance with regard to the failure to provide a Prior Written Notice within a reasonable timeframe.

The State Complaint, including the attachment, and WCSD's responses, including all documents submitted by WCSD in response to the issues 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 issues in this Complaint and the original source document, where available, was relied upon.

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:

¹ 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 also denotes the deletion of personally identifiable information.

Issue One:

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 March 2022 initial IEP and determined placement.

Issue Two:

Whether WCSD complied with the IDEA and NAC, Chapter 388, with regard to the timely provision of a Prior Written Notice on WCSD's proposal/refusal to provide a Free Appropriate Public Education and placement to the student after the development of the student's March 2022 initial IEP.

FINDINGS OF FACT**General**

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. (Student's Individualized Family Service Plan (IFSP))
2. DHHS scheduled a Child Find transition meeting with a WCSD Child Find representative and the Parents to be conducted on November 15, 2021. The notice to the Parents explained that to further the goal of preparing the child and family to move smoothly from the IDEA Part C program to the IDEA Part B program: "When we meet with the school district, we will educate you on the following: The programs/placements that your child may be eligible for will be discussed with Child Find Representative. The difference between IFSP and IEP will be explained..." (DHHS Transition Plan)
3. A WCSD Child Find representative(s) did participate in the student's November 15, 2021 transition planning meeting with DHHS and the Parent and, at that time, the transition planning team completed a student intake form for the WCSD preschool program. (Review of the Record, WCSD Response)
4. The student turned three years of age in March 2022 and, at the time of the student's third birthday, students were not in attendance in WCSD's schools. (WCSD 2021-2022 Balanced Calendar, March 2022 IEP, Complaint, IFSP)
5. In March 2022, prior to the student's third birthday, WCSD evaluated the student and determined the student to be eligible as a student with a disability under the category of developmentally delayed. On that same day, the student's initial IEP was developed and the student's Parents provided consent for the initial provision of special education services. (March 2022 Statement of Eligibility, IEP, Parent Consent for the Initial Provision of Special Education)

Free Appropriate Public Education

6. The student's priority educational needs are in pre-academic skills and communication skills. The student's March 2022 IEP provided the following in the location of the special education class: specially designed instruction of specialized instruction in pre-academics 1,460 minutes weekly; the related service of direct speech/language 160 minutes monthly and daily transportation; and the supplementary aid and service of support for assistive technology for curriculum and learning 120

minutes weekly. 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. (March 2022 IEP)

7. Post-COVID 19 pandemic, WCSD had a shortage of certified teachers. At the student's IEP Team meeting, the student's Parents were notified that the student would not be registering at a WCSD program at the time: "WCSD's preschool programs are full at this time, parents will receive a PWN (Prior Written Notice) explaining that a response will be issued in 10 school days from WCSD." "Once [] is registered at the school this IEP will be implemented." The student's Parents were provided a copy of the WCSD notes reflecting this information. (WCSD Initial IEP Notes, WCSD Response, Complaint)
8. On April 11, 2022, WCSD notified the student's Parents that another licensed certified teacher had been secured for the early childhood program. The Parents enrolled the student with a start date of April 14, 2022 and the student was admitted and began attending the WCSD preschool program. (March 2022 IEP, WCSD 2021-2022 Balanced Calendar, Complaint, WCSD Response, April 15, 2022 Prior Written Notice)
9. For the 2021/2022 school year, WCSD had 22 Early Childhood Special Education Developmental Pre-K Program Sites; 18 Early Childhood Special Education Inclusive/Integration Pre-K Program Sites; and 14 Early Childhood Special Education Strategies Pre-K Program Sites. (WCSD 2021/2022 Staff Directory)

Prior Written Notice

10. WCSD provided a Prior Written Notice to the Parent on the proposal to provide the student a Free Appropriate Public Education on the same day the student was determined to be eligible as a student with a disability and the student's initial IEP was developed and placement determined. The Prior Written Notice included the following description of the proposed WCSD's action and explanation:
WCSD has developed an IEP for the student and intends to implement the student's IEP within 10 school days of the date of the notice. The student has been found eligible for special education services and the Parents signed the consent for the initial provision of services. (March 2022 Prior Written Notice)
11. On April 6, 2022, eight school days after school recommenced for students after Spring break and 10 school days after the development of the student's March 2022 IEP, WCSD issued a letter to "Dear Parent" explaining that:
"Across the country school districts are experiencing a shortage of school personnel and Washoe County School District (WCSD) is no exception. The WCSD is experiencing a shortage of teachers, specifically early childhood special education teachers. At this time, there are no openings in an early childhood classroom for your child. child (sic) will be offered compensatory education for the minutes in your child's Individualized Education Plan (IEP) that were missed due to staff shortage. The compensatory services will take place once we have staff hired and in place. If the IEP for your child has related services, arrangements can be made to provide those services through the zoned school or a telehealth platform." (April 2022 WCSD "Dear Parent" Letter)
12. WCSD enclosed an April 6, 2022 Prior Written Notice to the Parents with the "Dear Parent" letter on the proposal to provide the student a Free Appropriate Public Education through compensatory services for the specially designed instruction outlined in the student's March 2022 IEP. The

explanation indicated: “Currently, as is 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 the parent a formal compensatory services letter with options for the parent so that services can be made up.” (April 6, 2022 Prior Written Notice)

13. On April 15, 2022, WCSD issued another Prior Written Notice to the Parents on WCSD’s proposal to provide the student a Free Appropriate Public Education through specific compensatory services. WCSD provided an explanation in the Prior Written Notice of the number of school days from the student’s third birthday to the date services were made available to the student, April 15, 2022² and referenced the accompanying letter with the specifics of the compensatory services owed: 160 minutes of speech and language and 4,380 minutes of pre-k academics in specially designed instruction. “These services will be provided by WCSD staff in collaboration with the parent.” (April 15, 2022 Prior Written Notice)
14. The April 14, 2022 letter to the Parent accompanying the April 15, 2022 Prior Written Notice offered the compensatory services: 160 minutes of speech language services and 4,380 minutes (or 73 hours) of pre-academic skills (specially designed instruction). The compensatory minutes were calculated through April 19, 2022, the first full day of instruction, and were required to be completed by April 14, 2024. The letter requested the Parents indicate how they were interested in receiving the compensatory services: virtually; summer break (excluding Extended School Year (ESY); winter break: Fall break; or hybrid (virtually and in-person). The letter also provided a place for the Parents to indicate whether they wished their child to receive the compensatory services; or did not wish to receive the compensatory services. (April 14, 2022 Letter to Parents)
15. The student’s Parents accepted WCSD’s offer of compensatory services set forth in WCSD’s April 14, 2022 letter and indicated an interest to receive the compensatory services during summer break, excluding ESY. (April 20, 2022 Parent Acceptance Letter, WCSD Response, Parents’ Response)

CONCLUSIONS OF LAW

Issue One:

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 March 2022 initial IEP and determined placement.

IDEA Part C includes a number of requirements regarding the transition of a toddler with disabilities sufficiently in advance of the toddler’s third birthday to ensure a smooth transition to preschool or other programs, as appropriate. If the toddler 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 toddler resides and, not fewer than 90 days prior to the toddler turning three years of age, the conduct

² The date of April 15, 2022 in this document is inconsistent with the majority of other documents provided in the course of this investigation that the student commenced attendance in a WCSD pre-school program on April 14, 2022.

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; 34 C.F.R. §300.800 et seq.

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.

When planning this student's transition from IDEA Part C, DHHS determined the student was potentially eligible for IDEA Part B and scheduled a transition planning conference to be conducted on November 15, 2021 by a team that included DHHS, the Parent, and WCSD's IDEA Part B Child Find representative. A WCSD Child Find representative(s) did participate in the student's November 15, 2021 transition planning meeting and the team completed an intake form for the WCSD preschool program. (Finding of Fact (FOF): FOFs #1 – 3)

In March 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. (FOFs #4, #5) As such, upon turning three, WCSD was required to admit the student to WCSD's early childhood program and implement the student's IEP. NRS §388.435; NAC §388.281(1); 20 U.S.C. §1419.

IEPs are binding under the IDEA and a school is obligated to provide services "in conformity with" the student's IEP. *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995); *Van Duyn v. Baker School Dist.*, 502 F. 3d 811 (9th Cir. 2007); 34 C.F.R. §§300.17(d), 300.101; NAC §388.281(6)(e). 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 March 2022 initial IEP and determined placement until April 14, 2022, a three-week period.

The reason for WCSD's failure to implement the student's IEP on the student's third birthday was due to a shortage of early childhood special education teachers and the absence of any openings in an early childhood classroom at the time the student turned three years of age. (FOFs #7, #11, #12) However, neither the IDEA nor NRS/NAC, Chapter 388, provide these exceptions to the right of the student to have been admitted to WCSD's early childhood program with the student's IEP implemented by the student's third birthday. NRS §388.435; NAC §388.281(1); 20 U.S.C. §1419. On the contrary, the transition requirements discussed above in advance of the student turning three were designed to ensure WCSD had sufficient notice so that the student would have a smooth transition from the IDEA Part C Early Intervention Program for Infants and Toddlers with Disabilities to the WCSD's IDEA Part B program.

Therefore, WCSD failed to comply with the IDEA and NAC, Chapter 388, and provide the student a Free Appropriate Public Education, specifically with regard to the implementation of the student's March 2022 initial IEP and determined placement from the date the student turned three years of age until April 14, 2022.

Issue Two:

Whether WCSD complied with the IDEA and NAC, Chapter 388, with regard to the timely provision of a Prior Written Notice on WCSD's proposal/refusal to provide a Free Appropriate Public Education and placement to the student after the development of the student's March 2022 initial IEP.

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).³ Of relevance to this Complaint, a Prior Written Notice must be given to a Parent a reasonable time before the LEA implements the proposed action, but after the agency's decision on the proposal or refusal has been made." (Emphasis added.) *Letter to Helmuth*⁴, 16 IDELR 550 (OSEP 1990).

In this case, WCSD provided three Prior Written Notices to the Parents:

1. A Prior Written Notice to the Parent on the proposal to provide the student a Free Appropriate Public Education on the same day the student was determined to be eligible as a student with a disability and the student's initial IEP was developed and placement determined. (FOF #10)
2. Eight school days after school recommenced for students after Spring break, WCSD provided an April 6, 2022 Prior Written Notice to the Parents on the proposal to provide the student a Free Appropriate Public Education through compensatory services for the specially designed instruction outlined in the

³This letter from the United States Department of Education, Office of Special Education (OSEP) can be found publicly at: <https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/letters/2010-3/atkinslieberman080510pwr3q2010.pdf>

This letter is not publicly available. Therefore, the relevant paragraphs are provided in their entirety for context: "The purpose of the written notice required under EHA-B is to inform parents of an agency's final action on a proposal or refusal to initiate or change the identification, evaluation, educational placement, or the provision of a FAPE to a particular child. In general, such notice must be given to parents a reasonable time before the agency implements that action, but after the agency's decision on the proposal or refusal has been made. 34 CFR § 300.504(a). The provisions at 34 CFR § 300.505(a)(2) and (a)(4)---requiring the notice to include a description of the agency's action and the options the agency considered or rejected, as well as other factors relevant to the agency's proposal or refusal---clarify that written notice under EHA-B is notice of a public agency's final decision on a proposal or refusal.

Following the receipt of the prior written notice, and before the agency's action would be implemented on the proposal or refusal to initiate or change the identification, evaluation, educational placement, or the provision of a FAPE to a child, a parent or a public educational agency has the right to request an impartial due process hearing "on any of the matters described in 34 CFR § 300.504(a)(1) and (2)." 34 CFR § 300.506(a). Thus, the written notice that constitutes the basis for a parent's hearing request must include the agency's final action, or decision, on the proposal or refusal." *Letter to Helmuth*, 16 IDELR 550 (OSEP 1990)

student's March 2022 IEP. WCSD indicated that upon placement of the student, the district would provide the Parents a formal compensatory services letter. (FOF #12)

3. On April 15, 2022, a day after student began school, WCSD issued another Prior Written Notice to the Parents on WCSD's proposal to provide the student a Free Appropriate Public Education with specifically described compensatory services for the failure to timely implement the student's March 2022 initial IEP and determined placement. (FOF #13)

With regard to WCSD's proposals to provide the student compensatory services:

- a. Consistent with WCSD's commitment at the March 2022 IEP meeting, the April 6, 2022 Prior Written Notice was provided the Parents 10 school days after the development of the student's March 2022 IEP and school recommenced for students after Spring break. (FOF #7) While the decision to provide the student compensatory education was a final decision, the nature and amount of the compensatory services were not included in the Prior Written Notice. (FOF #12)
- b. The April 15, 2022 Prior Written Notice was provided to the Parents one day after the student was placed in the WCSD preschool program and the student's IEP was implemented. (FOF #13)

While the Parent understandably would have liked to have known WCSD's proposal to provide the specific compensatory services to the student sooner, until the period of noncompliance ended on April 14, 2022, the specific amount and nature of compensatory services required to provide the student the educational benefits that likely would have accrued from the special education services⁵ were not known. The day after the period of noncompliance ended with the implementation of the student's IEP and placement, WCSD issued a Prior Written Notice with specifically described compensatory services. Based on the dates that WCSD made the decision on the above three proposals to provide the student a Free Appropriate Public Education, the Parents were provided Prior Written Notices a reasonable period of time after the WCSD's decision on the proposals to provide the student a Free Appropriate Public Education and prior to the implementation of the proposals.

Therefore, WCSD complied with the IDEA and NAC, Chapter 388, with regard to the timely provision of a Prior Written Notice on WCSD's proposal/refusal to provide a Free Appropriate Public Education and placement for the student after the development of the student's March 2022 initial IEP.

CORRECTIVE ACTION

Student-Specific Remedy

As previously discussed, during the course of this investigation, the student was admitted to the WCSD pre-school program and the student's IEP and placement are now being implemented. However, WCSD's failure to implement the student's March 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. (FOF #5, FOF #8) *Van Duyn v. Baker School District*, 502 F.3d 811, 107 LRP 51958 (9th Cir. 2007). As such a student-specific remedy is required.

⁵ *Parents of Student W. ex rel. Student W. v. Puyallup School Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994)

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. *Parents of Student W. ex rel. Student W. v. Puyallup School Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994). The Parents and WCSD are commended for working together and reaching an agreement on a compensatory services remedy during the course of the investigation to meet the student’s priority educational needs. (FOFs #6, #13 - #16) The investigation team adopts this agreed upon compensatory services remedy as the corrective action to address the needs of the student resulting from the failure of WCSD to timely provide the student appropriate services and placement. 34 C.F.R. §300.151. Therefore: WCSD must provide the student the following compensatory services: 160 minutes of speech language services and 4,380 minutes (or 73 hours) of pre-academic skills (specially designed instruction) to be completed by April 14, 2024.⁶ These services are to be provided by WCSD staff (unless agreed otherwise in writing by WCSD and the Parents) and must be provided in collaboration with the Parents. (FOFs #13 - #15)

Systemic Remedy

In addition to the student-specific remedy of compensatory services, given the nature of this noncompliance and the possibility of reoccurrence in the future, NDE has determined that a systemic remedy is required to address the appropriate future provision of services for all children with disabilities. 34 C.F.R. §300.151.

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. The CAP must be approved by NDE prior to implementation and include:

1. The identification of all students referred to WCSD and determined to be a student with a disability under IDEA Part B and NAC, Chapter 388, prior to, or upon turning three years of age, from the commencement to the end of the 2021/2022 school year whose IEP and placement in WCSD were not timely implemented in accordance with the students’ IEPs; the determination of the time period from the date each 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; and WCSD’s proposed and/or implemented voluntary corrective action, to address the needs of each student as a result of the failure to provide appropriate services.
2. Upon receiving notice from DHHS that a toddler with a disability who resides in WCSD may be eligible for preschool services under IDEA Part B upon reaching the age of eligibility for services. 34 C.F.R. §303.209, WCSD’s plan, including procedures, to treat this advance notice as a referral;

⁶ 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). However, given WCSD and the Parents have agreed that this is the appropriate remedy to meet the needs of the student, NDE has determined the agreed-upon timeline is appropriate in this case.

“The one-year timeline for the correction of noncompliance in 34 CFR § 300.600(e) is not intended to limit an SEA's authority or flexibility to determine the appropriate remedy or corrective action necessary to resolve a complaint in which the SEA has found that the public agency has failed to provide appropriate services to a child or group of children with disabilities. We recognize that in some circumstances providing the remedy ordered in the SEA's complaint decision could take more than one year to complete (e.g., the SEA orders an action, such as compensatory services, the provision of which, will extend beyond one year; the corrective action timeline is extended because the parent or adult student fails to take action that is essential to implementation of the SEA's decision; the parties mutually agree to extend the timeline for implementation).” *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/>

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 IDEA Part B and NAC, Chapter 388. *Federal Register* / Vol. 76, No. 188 / Wednesday, September 28, 2011, pg. 60174.

3. WCSD's plan to avoid the reoccurrence of the violation identified in this State Complaint in subsequent school years, including procedures to anticipate the number of potentially eligible and eligible students with disabilities who will turn three prior to or during the school year and the corresponding procedures to ensure a sufficient number of licensed certified teachers and classrooms for WCSD early childhood programs. (FOF #8, #10) At WCSD's discretion, this plan may include the use of other public and private providers to ensure every eligible student with a disability's IEP will be implemented by the student's third birthday in WCSD's early childhood program. NRS §388.435; NAC §388.281(1); 20 U.S.C. §1419.

Documentation of the completion of the approved CAP must be provided to NDE within 14 days of its completion.