

COMPLAINT INVESTIGATION
WASHOE COUNTY SCHOOL DISTRICT
(#WA101316)

Report Issued on December 2, 2016

INTRODUCTION

On October 13, 2016, the Nevada Superintendent of Public Instruction received a Complaint dated October 11, 2016 from a Grandparent (hereinafter, Complainant) of a student with a disability alleging violations in the special education program of a student with a disability attending school in the Washoe County School District (WCSD). The Complainant alleged violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq., 34 C.F.R. Part 300, or Chapter 388 of the Nevada Revised Statutes and the Nevada Administrative Code (NAC), specifically with regard to the WCSD's failure to implement the student's Individualized Education Program (IEP) with regard to the provision of Occupational Therapy services after the 2015/2016 school year. As a proposed remedy, the Complainant requested one and one half times the compensatory Occupational Therapy services missed due to the student's regression as a result of this alleged noncompliance.

Pursuant to the IDEA, 34 C.F.R. §§300.151(a)(1) and 300.153, and NAC §388.318, the Nevada Department of Education (NDE) has jurisdiction through its special education complaint process to investigate a signed written Complaint filed by an organization or individual who is not the student's parent. While there are some additional procedures the NDE must take when an individual other than the child's parent files a student specific Complaint to ensure confidentiality, the complaint procedures are otherwise the same.¹ In this case, the NDE was provided consent from the student's Parent to disclose personally identifiable information to the Complainant as it related to the issue in the Complaint and as required by the NDE to conduct the investigation, up to and including the issuance of the Complaint Report.

All documents submitted by the Complainant and the WCSD relevant to the issue in the Complaint were reviewed in their entirety in this investigation. The Complaint Investigation Team also received, collected and reviewed additional information as needed during the investigation. The Findings of Fact cite the source of the information determined necessary to resolve the issues in this Complaint.

COMPLAINT ISSUE

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

¹ See *Memorandum to Chief State School Officers*, 34 IDELR 264 (OSEP, July 17, 2000). This memorandum is publicly available at: www2.ed.gov/policy/speced/guid/idea/letters/2000-3/osep0020.71700safeguards.3q2001.doc

Issue:

Whether the WCSD complied with the IDEA and the NAC, Chapter 388, in the implementation of the Occupational Therapy services in the student's June 7, 2016 IEP after the end of the 2015/2016 school year to October 11, 2016.

FINDINGS OF FACT

1. The 2015/2016 school year ended on June 9, 2016 and the 2016/2017 school year began on August 8, 2016. (WCSD Calendar)
2. The student had a June 7, 2016 IEP in effect during the time period of this Complaint with an annual review date of September 28, 2016. While the WCSD conducted an IEP meeting on September 23, 2016, the annual IEP was not finalized until the week of November 14, 2016. The expiration of the duration of services in the student's June 7, 2016 IEP was not an issue in this Complaint. (IEP, WCSD Response)
3. The student's progress report by the Occupational Therapist dated May 6, 2016 indicated that the student would benefit from continued direct Occupational Therapy services for further refinement and mastery of skills gained that year and to prevent regression as the student transitioned to the middle school environment. It was discussed at the IEP meeting that the Occupational Therapy services would be reevaluated at the student's annual IEP meeting and might be changed to consult, depending on the student's needs in middle school. (IEP)
4. The student's June 7, 2016 IEP provided the Related Service of Occupational Therapy from September 28, 2015 to September 28, 2016. The frequency of the service was 60 minutes per month. (IEP)
5. The provision of Occupational Therapy in the June 7, 2016 IEP was to support the student's measurable annual goal and short-term objectives to increase the student's self-care skills. This goal was not identified by the student's IEP Team as a goal to be addressed during Extended School Year Services. (IEP)
6. The student was provided Extended School Year services in the June 7, 2016 IEP, but not for Occupational Therapy services. (IEP)
7. The 2016/2017 school year began with the WCSD being without five Occupational Therapists to provide all required services. (WCSD Response)
8. The WCSD conceded the failure to provide the student 120 minutes of Occupational Therapy services for the first nine weeks of school, from the beginning of the 2016/2017 school year until October 17, 2016 when the provision of Occupational Therapy services commenced for the student. The Complaint Investigation Team confirmed the amount of missed Occupational Therapy. (WCSD Response, Occupational Therapist Log, Prior Written Notice)

9. The student was provided 60 minutes of Occupational Therapy in October 2016 and as of November 1, 2016, 30 minutes of Occupational Therapy had been provided to the student. (Occupational Therapist Logs)
10. In addition to the concession with regard to this Complaint, the WCSD conceded that in the 2015/2016 school year, the student was also not provided with all of the student's required Occupational Therapy services. In the absence of documentation to verify otherwise, the WCSD determined, and the Complaint Investigation Team confirmed, the student was not provided 145 minutes of Occupational Therapy. (WCSD Response, Occupational Therapy Log)
11. While the WCSD did monitor the student's progress toward the IEP goal and objectives for which the student was provided Occupational Therapy services during the time period of this Complaint, the WCSD did not conduct an assessment of the student to determine whether the student regressed in the absence of the required Occupational Therapy services. The student's last Occupational Therapy assessment of fine motor skills was dated September 28, 2015. (IEP, WCSD Response)
12. After the filing of this Complaint, the WCSD offered the Parent one-for-one compensatory education of the Occupational Therapy services set forth in the student's IEP for the missing 145 minutes of Occupational Therapy in the 2015/2016 school year and the 120 minutes in the 2016/2017 school year. The timeline for the compensatory services was determined by the Parent and the WCSD and the compensatory Occupational Therapy services are scheduled to be provided to the student during the 2016/2017 Extended School Year. (October 26, 2016 and November 14 and 21, 2016 Correspondence with the Parent, Prior Written Notices, WCSD Response)
13. After the filing of this Complaint, the WCSD instituted a new logging and reporting system for direct supervisors of Related Services to review service logs on a biweekly basis and document action taken if services are not provided as required by students' IEPs. The new logging system permits site principals to view logs to determine whether services have been provided as required; a "prescribed vs. delivered" report that is student specific and compares what should have been delivered and what was actually delivered; and a quarterly logging report for all service providers run by the WCSD Office of Student Services and distributed to all direct supervisors. The WCSD is also in the process of hiring a program services technician whose responsibility will include issuing reports on a weekly basis to provide data on missing services or documentation of services. (WCSD Response, WCSD Screen Shots)
14. In addition to the newly instituted logging system, the WCSD will conduct training for all Related Service providers on November 30, 2016 to ensure all providers are aware of the requirement to document the provision of services as specified in IEPs. The WCSD has also revised its process for hiring Occupational Therapists to facilitate recruiting and retaining Occupational Therapists. (WCSD Response)

CONCLUSION OF LAW

Issue:

Whether the WCSD complied with the IDEA and the NAC, Chapter 388, in the implementation of the Occupational Therapy services in the student's June 7, 2016 IEP after the end of the 2015/2016 school year to October 11, 2016.

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 are provided in conformity with an IEP. (NAC §388.281(6)(g), 34 C.F.R. §§300.17(d) and 300.101)

In this case, the student's IEP provided the Related Service of Occupational Therapy from September 28, 2015 to September 28, 2016. The frequency of the service was 60 minutes per month and the service was not required to be provided during Extended School Year Services. (FOFs #2, #4, #5, #6)

The WCSD conceded the failure to provide the student Occupational Therapy services for the first nine weeks of school from the beginning of the 2016/2017 school year until October 17, 2016 when the provision of Occupational Therapy services commenced for the student. (FOFs #1, #7, #8, #9) The WCSD also conceded the failure to provide the student with Occupational Therapy services in the 2015/2016 school year in the amount of 145 minutes. (FOF #10) Given the limited scope of jurisdiction in this Complaint to the 2016/2017 school year, the NDE will address the provision of the required Occupational Therapy services in the 2015/2016 school year to this student and other students, as needed, outside this Complaint investigation as part of its general supervision responsibilities pursuant to the IDEA, 34 C.F.R. §300.149.

Therefore, the Complaint Investigation Team determined that the WCSD failed to comply with the IDEA and the NAC, Chapter 388, in the implementation of the Occupational Therapy services in the student's June 7, 2016 IEP after the end of the 2015/2016 school year to October 11, 2016.

ORDER FOR CORRECTIVE ACTION

The WCSD is required to take corrective action to address the violation found in this Complaint investigation, specifically the WCSD's failure to provide the student with the Occupational Therapy services in the student's June 7, 2016 IEP after the end of the 2015/2016 school year to October 11, 2016.

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

“As the parents note, there are cases in other circuits in which courts have rotely awarded a block of compensatory education equal to time lost while a school district denied a free, appropriate public education to a handicapped child. See, e.g., *Valerie J. v. Derry Cooperative School District*, 771 F.Supp. 483 (D.N.H.1991); *Burr by Burr v. Ambach*, 863 F.2d 1071 (2nd Cir.1988), vacated and remanded, 492 U.S. 902, 109 S.Ct. 3209, 106 L.Ed.2d 560, reaff'd on recons., 888 F.2d 258 (1989) (awarding one and one-

half years of compensatory education to student who was unable to attend school at all due to state errors and procedural delays). These cases do not contradict a court's power, when considering an equitable remedy, to apply a fact-specific analysis, as the district court did here . . . [T]here is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.”

While the Ninth Circuit Court of Appeals² has determined that there is no obligation for day-for-day compensation for time missed after the filing of this Complaint, the WCSD offered the Parent one-for-one compensatory education of Occupational Therapy services set forth in the student's IEP for the missing 145 minutes of Occupational Therapy in the 2015/2016 school year and the 120 minutes in the 2016/2017 school year. The timeline for the compensatory Occupational Therapy services was determined by the Parent and the WCSD and the compensatory services are scheduled to be provided during the 2016/2017 Extended School Year. (FOF #12)

Notwithstanding the impermissible failure to provide the student the required Occupational Therapy services during the first nine weeks of the 2016/2017 school year, the WCSD is to be commended for its efforts to remediate the failure to provide the student this service in both the 2015/2016 and 2016/2017 school years and to change the systemic infrastructure that permitted the failure to provide services to go unnoticed for a lengthy period of time. (FOFs #8, #10, #12, #13, #14) In this case, the NDE accepts the 120 minutes of compensatory Occupational Therapy services for this student for the nine weeks of missed services in the 2016/2017 school year and the WCSD's systemic remedy to ensure the appropriate future provision of services for all students with disabilities as an appropriate remedy for this Complaint. (34 C.F.R. §300.151(b), NAC §388.318(7)) Accordingly, these remedies as prescribed (FOFs #12, #13, #14) are adopted as the NDE's enforcement mechanisms to correct the noncompliance identified in this Report. (34 C.F.R. §300.600)

Directed Action Plan

1. Within 15 school days of providing the student the 120 minutes of compensatory Occupational Therapy services in the 2016/2017 Extended School Year, the WCSD must provide the NDE written documentation of the completion of the delivery of this compensatory education within 15 school days of its completion.
2. Given the Occupational Therapist's concern regarding preventing regression and the absence of a recent Occupational Therapy assessment of the student to determine if the missed services caused regression for the student (FOFs #3 #11), unless the student's Parent does not consent to an Occupational Therapy reevaluation, within three months of the provision of the 120 minutes of the compensatory services in the 2016/2017 Extended School Year, the WCSD must conduct an Occupational Therapy assessment and, if any regression is determined as a result of the assessment, the student's IEP Team must review the student's self-care or other related goal(s) and short term objectives and the amount and frequency of Occupational Therapy services. (If applicable, pursuant to the IDEA, 34 C.F.R. §300.324(a)(4), the Parent and the WCSD may agree not to convene an IEP Team meeting for the purpose of making agreed upon changes.) If the Parent and the WCSD cannot reach agreement as to whether regression has occurred and/or the revision of the student's IEP with regard to the amount and frequency of Occupational Therapy services and/or related goal(s) and short term objectives, either the

² The State of Nevada is in the United States Court of Appeals, Ninth Circuit.

Parent or the WCSD can file a due process complaint to resolve any such disagreement through an evidentiary hearing or access the State IEP Facilitation or mediation processes.

3. With regard to the systemic remedy, the WCSD must provide documentation to the NDE of the implementation of the WCSD's newly initiated logging and reporting system and training of Related Service providers as follows:

- a. No later than November 1, 2017, for the time period from the commencement of the 2017/2018 school year to October 15, 2017, the "prescribed vs. delivered" report for the provision of Occupational Therapy services to this student, if the student's IEP still includes the service, and any other student whose IEP included Occupational Therapy in the student's school that was the subject of this Complaint during this time period. (The NDE may request additional verification documentation, such as the relevant IEPs.)
- b. If there is any instance of a failure to provide Occupational Therapy services from the commencement of the 2017/2018 school year to October 15, 2017 to this student or other student(s) whose IEP included Occupational Therapy in the student's school that was the subject of this Complaint, the WCSD must provide documentation of the offer of compensatory services to the Parent of the individual student(s) and, if appropriate, an explanation of why the newly initiated system failed to timely identify and cause correction of the absence of required services. (Upon the review of the offer of compensatory services to the identified student(s), the NDE may order an additional student specific compensatory remedy and/or a systemic remedy to ensure the appropriate future provision of Occupational Therapy services to all WCSD students with disabilities in accordance with their IEPs.)
- c. No later than December 22, 2016, documentation of the conduct of WCSD's training for all Related Service providers on the requirement to document the provisions of services as specified in IEPs.