

**COMPLAINT INVESTIGATION
WASHOE COUNTY SCHOOL DISTRICT
(#WA111320)
Report Issued on January 8, 2021**

INTRODUCTION

On November 13, 2020, the Nevada Superintendent of Public Instruction received a State Complaint dated November 9, 2020 from a Parent alleging violations by the Washoe County School District (WCSD) in a student's special education program. The Parent indicated the student is a student with blindness and significant development delays whose ability to access the curriculum relies on direct and in-person physical assistance and tactile cues along with direct verbal interaction with school staff in a classroom setting.

The allegations in the Complaint were that WCSD denied the student a free appropriate public education (FAPE) by failing to implement the student's Individualized Education Program (IEP) for 58 school days from the date school closed due to the COVID-19 pandemic in March 2020 until the end of the 2019/2020 school year and from the commencement of the 2020/2021 school year to the date of the Complaint during distance learning days due to wildfire smoke; citing the required periodic reports of the progress the student is making toward annual goals, failing to provide continued monitoring of the student's progress toward the IEP goals during distance learning; and failing to include transitional planning in the student's IEP in effect when the student turned 16 years of age. The Parent also alleged that WCSD unilaterally changed the student's placement from in-person and direct interaction to predetermined distance learning without the Parent's involvement and without making specific allowance for the provision of FAPE to the student and failed to provide a prior written notice (PWN) a reasonable time before changing the student's placement and provision of FAPE to the student through distance learning. The Parent's proposed resolution included addressing transition planning; the development of a contingency distance learning plan for future distance learning days; and monetary compensation from WCSD in lieu of compensatory services to paid directly into the student's account.

In the November 19, 2020 issue letter to the WCSD, NDE requested additional documents and information in order to investigate the State Complaint. The WCSD was notified in that same correspondence that if the 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 December 7, 2020 or an extended timeline authorized by NDE, would be considered a concession of noncompliance for purposes of this State Complaint.

The WCSD timely responded and provided requested documentation with an explanation of the submitted documentation and legal argument related to systemwide administrative decisions and alternative instructional delivery plans; however, the WCSD did not dispute the allegations of noncompliance. Therefore, consistent with the notice explicitly provided to the WCSD, the failure of the 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 WCSD's cited legal authority and all documents and information provided in the 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 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 in the 2019/2020 and 2020/2021 school years from school closure in March 2020 to the end of the school year and at the commencement of the 2020/2021 school year:

Issue One:

Whether WCSD complied with the IDEA and NAC, Chapter 388, with regard to providing the student a FAPE, specifically with regard to:

- a. The implementation of the student's IEP for 58 school days after Nevada's schools closed on March 15, 2020 and only distance learning was made available to the student;
- b. The provision of periodic reports of the student's progress toward meeting the IEP goals during distance learning; and
- c. Including postsecondary goals and transition services in the student's September 22, 2020 IEP, given the student would attain 16 years of age during the period in which the annual IEP was in effect.

Issue Two:

Whether WCSD complied with the IDEA and NAC, Chapter 388, with regard to unilaterally changing the student's placement from in-person and direct interaction to predetermined distance learning without the Parent's involvement.

Issue Three:

Whether WCSD complied with the IDEA and NAC, Chapter 388, with regard to the provision of a PWN a reasonable time before proposing to change the student's placement to, and the provision of FAPE through, distance learning.

FINDINGS OF FACT

General

1. The student is a student eligible for special education under the eligibility categories of: Multiple Impairment, Intellectual Disability, Health Impairment and Visual Impairment/Blind enrolled in a special school in WCSD with 100% of time in the special education environment. The student is considered to be legally blind with some vision in the lower left vision fields. (September 24, 2019 IEP, September 22, 2020 IEP)
2. The student requires full physical supports, including hand over hand assistance, and/or verbal prompting in all areas due to both the student's visual and physical limitations in the provision of special education and related services. The student is primarily a non-verbal communicator and accesses the environment with strong auditory skills, sense of smell, and tactile characteristics of objects. The student also requires extra processing time to better understand when one activity ends and the other begins and the student's progress in an educational program continues to depend on

direct assistance and close observations in a separate school setting. (September 24, 2019 IEP, September 22, 2020 IEP)

3. The student had a September 24, 2019 annual IEP in effect at the time of the school closure in March 2020 and the commencement of the 2020/2021 school year to September 22, 2020. The Parent agreed with the components of this IEP. Commencing September 22, 2020, the student had a September 22, 2020 annual IEP in effect and the Parent also agreed with the components of the IEP. The September 22, 2020 IEP was in effect on October 1, 2020, the last day WCSD's schools were closed due to unhealthy air quality as a result of wildfire smoke. (September 24, 2019 IEP, September 22, 2020 IEP)
4. With regard to the 2019/2020 school year and the commencement of the 2020/2021 school year up to the September 22, 2020 annual IEP, the student's September 24, 2019 annual IEP provided for specially designed instruction in the special education class in the areas of daily living skills and functional academics for 1700 minutes weekly (approximately 28 hours per week). In addition, the student's IEP required the student be provided direct speech/language therapy 120 minutes per month; direct occupational therapy 100 minutes per month; consultation in physical therapy 30 minutes per quarter; and consultation in vision impairment instruction 20 minutes per quarter. The student's specially designed instruction and all services were in the location of the special education class. The student's September 24, 2019 IEP also required additional supplementary aids and services not cited in the Complaint. The student's IEP Team determined that the student did not require extended school year services. (September 24, 2019 IEP)
5. During the relevant time period of this Complaint, the student's 2020/2021 annual IEP provided for specially designed instruction in the areas of daily living skills and functional academics for 1418 minutes weekly (approximately 23.6 hours per week). In addition, the student's IEP require the student be provided direct speech/language therapy 60 minutes per month; direct occupational therapy 90 minutes per month; consultation in physical therapy 15 minutes per quarter; direct therapeutic recreation 300 minutes weekly; and consultation in vision impairment instruction 20 minutes per quarter in the location of the special education class. The student's September 22, 2020 IEP also required additional supplementary aids and services not cited in the Complaint. The student's IEP Team again determined that the student did not require extended school year services. (September 22, 2020 IEP)
6. The student's September 22, 2020 IEP included the following new assessment results: teacher observation and the Functional Assessment and Curriculum of Teaching Everyday Routines (FACTOR); and updated physical therapy and occupational therapy reports and a visual impairment services report. The location of the student's services in the special education class and the student's placement in a special school remained unchanged from the student's September 24, 2019 IEP. (September 24, 2019 IEP, September 22, 2020 IEP)

School Closure

7. On March 15, 2020, Governor Sisolak announced that due to the COVID-19 pandemic school buildings statewide would be closed to students beginning March 16, 2020, at least through April 6, 2020. This Emergency Directive was extended several times and on April 28, 2020, the Governor ordered all kindergarten through 12th grade school buildings to remain closed for onsite education for the remainder of the 2019-2020 school year. (March 15, 2020 Declaration of Emergency)

Directive; Declaration of Emergency Directive 005; Declaration of Emergency Directive 014, Executive Order 015)

8. Due to the COVID-19 pandemic, distance learning began for all students on April 1, 2020 in the WCSD and the last day of school for the 2019/2020 school year for the school the student attended was June 5, 2020. (WCSD Website, WCSD 2019/2020 Balanced School Calendar)
9. On June 9, 2020, Governor Sisolak issued Declaration of Emergency Directive 022 requiring school districts and charter schools to develop plans for reopening school buildings, providing instruction, and related activities for the 2020/2021 school year based on the June 9, 2020 framework issued by NDE, Nevada's Path Forward: A Framework for a Safe, Efficient, and Equitable Return to School Buildings, and subsequent NDE guidance issued June 24, 2020. Recognizing that the circumstances regarding COVID-19 were fluid and social distancing protocols and other health and safety requirements were subject to change, the reopening plans were required to contemplate instruction offered through: in-person instruction following social distancing protocols; distance education; or a combination of distance education and in-person instruction (hybrid learning). (Declaration of Emergency Directive 022, Nevada's Path Forward: A Framework for a Safe, Efficient, and Equitable Return to School Buildings; NDE June 24, 2020 Guidance)
10. Prior to the commencement of the 2020/2021 school year, the WCSD submitted its reopening plan to NDE that had been approved by the WCSD Board of School Trustees. The plan included an in-person model with safety protocols with first priority to families with known medical, social, and academic vulnerabilities including but not necessarily limited to: students being served in self-contained special education program; students living in transition or in foster care; and students new to the country with English Learner requirements. The plan included the flexible use of fall break and up to one of the two weeks of spring break to make up for any lost instruction caused by the COVID-19 shutdown. (WCSD Reopening Plan, July 7, 2020)
11. With regard to the 2019/2020 school year, from the date of the closure of schools through the Governor's Executive Directive commencing March 16, 2020, there were 49 school days to the last day of school, with two contingency days scheduled for June 8 and June 9, 2020. (Spring break was March 16, 2020 through March 27, 2020.) On April 1, 2020, two school days after the emergency school closure, the WCSD resumed instruction on a full distance learning basis through the end of the 2019/2020 school year, a period of 47 school days. (2019/2020 and 2020/2021 School Calendars)
12. The student returned to school in August 2020 in an in-person learning model for the 2020/2021 school year. (September 22, 2020 IEP)
13. At the commencement of the 2020/2021 school year, in-person instruction was cancelled systemwide on multiple school days due to wildfire smoke. At least one of the administrative decisions to cancel in-person instruction was on the day of the cancellation. (August 28, 2020) During school closure due to the unhealthy air quality, distance learning was scheduled to be provided on the following days: August 28, 2020, September 8, 2020, September 11, 2020 and September 14-18, 2020, for a period of five consecutive school days, and October 1, 2020. September 8, 2020 was considered a day to be made up in June 2021 (contingency day). The student was absent on September 15, 2020 for a medical reason. (It was noted that there were other days WCSD schools were closed for wildfire smoke, such as August 20, 2020, and/or converted to professional development days; however, no distance learning was provided for any student on

those days and those days were not cited in this Complaint.) (WCSD Response, 2020/2021 School Calendar, Public School Closure Announcements, Student Period Attendance Detail, WCSD Contact Logs)

Distance Learning – 2019/2020 School Year and Commencement of 2020/2021 School Year

14. On March 30, 2020, the student’s case manager met telephonically with the student’s mother and the mother indicated that no supplemental aids were needed for the student as the parent already had them at home. During distance learning there were daily contacts between the WCSD personnel, including the student’s special education teacher, and the student’s mother to determine if there were any concerns or questions and Zoom curriculum meetings were conducted on some of those days. The documentation provided in the course of this investigation did not include the number of minutes of direct specially designed instruction provided by WCSD to the student, or to the mother on behalf of the student, on these distance learning days. (WCSD Contact logs, including: March 30, 2020; April 1-3, 2020, April 6-10, 2020, April 13-17, 2020, April 20-22, 2020, April 24, 2020, April 27, 2020; May 4-5, 2020, May 12, 2020, May 15, 2020, May 18-19, 2020, May 26, 2020, May 28, 2020; and June 1, 2020)

15. With regard to the provision of the student’s related services in the 2019/2020 school year after school closure and resumption of instruction on April 1, 2020:
 - a. Consultation in physical therapy: The student received consultation in physical therapy as follows: April 3, 2020-15 minutes; May 28, 2020-15 minutes; June 3, 2020-15 minutes. The consultation involved delineation of the delivery of services during social distancing; contacting the student’s mother to inquire on physical therapy issues and providing other information to the mother. As of June 3, 2020, the physical therapist had not heard from the mother regarding any physical therapy-related issued that needed to be addressed.
 - b. Direct occupational therapy: The student received direct occupational therapy as follows: May 28, 2020-60 minutes that included observing the student online during lunch using utensils and delivery of an occupational therapy packet to the student’s mother and on June 1, 2020-35 minutes of observation of the student with the student’s mother providing hand-over-hand assistance. The occupational therapist also contacted the student’s mother on April 6, 2020, April 15, 2020 and May 26, 2020 for therapy session planning.
 - c. Direct speech/language: The student received direct speech/language therapy as follows: April 14, 2020-15 minutes; May 4, 2020-15 minutes; May 15, 2020-15 minutes; May 22, 2020-15 minutes; and May 29, 2020-15 minutes.
 - d. Consultation in vision impairment instruction: The student received a consultation in vision impairment instruction on April 10, 2020 through consultation with staff. (WCSD Service Logs and Provider Information)

16. With regard to the days of distance learning due to wildfire smoke in the 2020/2021 school year on August 28, 2020, September 8, 2020, September 11, 2020, September 14-18, 2020, and October 1, 2020:
 - a. Direct speech/language therapy: The student was absent from telehealth for the 30 minutes of speech/language therapy on September 18, 2020 and 30 minutes on October 1, 2020. The student was provided direct speech language therapy for an unknown number of minutes in the month of August 2020; 115 minutes in the month of September 2020; and the student was absent for a 55-minute group session of three students on September 3, 2020.
 - b. Direct occupational therapy: While it was not delivered on these days of school closure, it was provided for 45 minutes on August 19, 2020; 20 minutes on September 30, 2020;

- attempted for a scheduled time of 30 minutes on September 2, 2020 and 15 minutes on September 10, 2020; provided for 30 minutes on September 21, 2020; and 30 minutes on September 24, 2020.
- c. Physical therapy consultation: While it was not delivered on these days of school closure, it was provided on August 18, 2020 for 15 minutes; September 10, 2020 for 15 minutes; and on September 22, 2020 for an IEP consult for 15 minutes.
 - d. Specially designed instruction:
 - i. On September 11, 2020 and September 14, 2020 and October 1, 2020 specially designed instruction was offered, but student's mother declined. The student's mother indicated she was not comfortable with virtual learning due to the student's visual impairments. Manipulatives and binder activities for the student to work on with the mother were provided on September 11, 2020 and again on September 16, 2020. (WCSD Contact Logs, Student Period Attendance Detail)
 - ii. On September 18, 2020, instructional materials were delivered to the home, some of which were created expressly for the student. (WCSD Contact Log, Documentation of Services Delivered)

Transition

- 17. The student's 16th birthday was the first week of December 2020. Barring a subsequent IEP revision, the student's September 22, 2020 annual IEP was the IEP in effect on the date the student turned 16 years of age. (September 22, 2020 IEP)
- 18. With regard to a transition assessment, the only documented transition assessment in the student's September 22, 2020 IEP was teacher observation in the category of "other". The assessment results provided that the student requires full physical supports and/or verbal prompting in all areas due to the student's visual and physical limitations. The effects of these results on the student's involvement and progress in the general education curriculum were that the student required a functional academics curriculum. (September 22, 2020 IEP)
- 19. The statement of measurable postsecondary goals in the student's September 22, 2020 IEP, for training/education and employment provided that they were unknown at this time. There was no content for the measurable postsecondary goal of independent living skills. In the statement of transition services, the student's IEP provided: instruction – vocational activities as well as functional academics will continue to remain the student's curriculum; related services - the school will continue to provide speech/language therapy, occupational therapy and physical therapy; community experiences – student will continue to participate in community based instructional activities, whether within the classroom or outside of the school. For employment and other post-school adult living objectives, the IEP included a statement that it was unknown at this time and there was no content for acquisition of daily living skills and functional vocational evaluation (if appropriate). (September 22, 2020 IEP)
- 20. One of the student's independent functioning goals in the September 22, 2020 IEP provided that the goal supported the postsecondary goals of training/education and employment and independent living. The student's curriculum and learning environment goal in functional literacy and mathematics provided that the goal supported the postsecondary goals in training/education and employment. (September 22, 2020 IEP)
- 21. On the same day this Complaint was filed, WCSD case manager, principal and dean met with the student's Parent to discuss the Parent's concerns for transition planning. The discussion included the need for addition assessments in order to appropriately address post-secondary goals and the

services need to work toward the attainment of the goals. The Parent was to provide possible meeting dates/times to revise the student's IEP with a case worker from Sierra Regional Center present. After the informal meeting on November 13, 2020, an IEP revision meeting was scheduled, including a case worker from the Sierra Regional Center, for the purpose of revising the transition section of the student's IEP. The PWN regarding the IEP meeting for this purpose was dated December 2, 2020 and no documentation was provided that the IEP meeting took place prior to the student's birthday. (December 2, 2020 PWN, WCSD Response, WCSD Contact Logs)

Progress Report

22. The method for reporting the student's progress toward meeting the annual goals in the student's September 24, 2019 IEP for independent functioning was IEP goal pages and specialized progress reports based on teacher observation and performance demonstration; in curriculum and learning the method was specialized progress report and district report card based on teacher observation and performance demonstration; in fine motor skills the method was IEP goal pages and specialized progress reports based on documented therapist observation; in curriculum and learning the method was specialized progress report and district report card based on teacher observation and performance demonstration; and in functional communication the method was a specialized progress report based on documented therapist observation. (September 24, 2019 IEP)
23. The method for reporting the student's progress toward meeting the annual goals in the September 22, 2020 IEP in independent functioning and curriculum and learning was IEP goal pages and specialized progress reports. Specialized progress report was the method for reporting the student's progress toward meeting the communication goal. The evaluation procedures for fine motor skills in independent functioning added the procedures of documented therapist observation and informal observation and, for functional communication, clinician tallies and informal assessment were added. (September 24, 2019 and September 22, 2020 IEPs)
24. WCSD issued a June 3, 2020 specialized progress report that was delivered to the Parent. No district report card was provided in the course of this investigation with regard to the student's curriculum and learning goal, but the specialized progress report included a report on this goal. For grading period four in the 2019/2020 school year, the June 3, 2020 specialized progress report on the student's progress toward the student's annual goals provided that the student made insufficient progress with regard to functional academics (the same level for grading periods 2 and 3); occupational therapy was not yet addressed (down from some progress in grading periods 2 and 3); the student made some progress on the transitional opportunities goal (same as grading period 3 and up from grading period 2); and functional communication was not yet addressed (down from some progress in grading periods 2 and 3). (June 3, 2020 IEP Specialized Progress Report)
25. The comments for all of the student's goals in the June 3, 2020 specialized progress report cited closure of school in March 2020 through the Governor's Emergency Declaration and the enrollment of all students in distance learning. The student's IEP was implemented to "the greatest extent practicable" through distance learning and that specially designed instruction occurred; "however, due to the prohibition of in-person instruction and interaction with school peers in a school building setting, the traditional collection of data on progress toward goals and objectives was limited and adjustments were made on progress reporting. For your child, certain goals could not be tracked at all given the inability to observe in-person and the inability for students to interact with adults and peers in a school setting. As such, the specialized progress report reflects that the goal has not been addressed during this quarter. Upon the return to brick and mortar schools, the team will collect data on progress towards goals and objectives and the team can reconvene to discuss current levels for future progress reporting." (June 3, 2020 IEP Specialized Progress Report)

26. For the first grading period in the 2020/2021 school year, the October 24, 2020 specialized progress report provided that the student made adequate progress with regard to functional academics and daily living skills and some progress in functional communications and occupational therapy. The comments in the progress report noted that the reflected progress was with regard to the new goals/objectives in the September 22, 2020 IEP. There was no documentation that the Parent received a copy of this progress report. (October 24, 2020 IEP Specialized Progress Report)
27. The student's September 22, 2020 IEP included the following progress determinations with regard to the student's measurable annual goals:
 - a. The student's functional academics and transitional opportunities goals were continued and included the comment that the student had made great progress prior to summer break, however after returning to a brick-and-mortar school setting the student required partial physical assistance to regain progress;
 - b. The student's fine motor skills goal was continued and included the comment that the student has made some gains toward improving fine motor skills and given the progress needs to continue working toward the stated goals;
 - c. The student's functional communication skills goal was continued and included the comment that the student is making slow progress toward functional communication goals/objectives. (September 22, 2020 IEP)
28. While the Parent characterized the allegation regarding WCSD's failure to provide periodic reports on the progress the student made toward the student's annual IEP goals, no documentation or information was provided on the impact of this alleged failure on the provision of a FAPE to the student. (Complaint)

Prior Written Notice

29. WCSD resumed instruction on April 1, 2020 on a full distance learning basis through the end of the 2019/2020 school year. As previously discussed, the WCSD did not refute the Parent's allegation that the WCSD failed to provide a PWN a reasonable time before proposing to change the student's placement to, and the provision of FAPE through, distance learning. The WCSD did, however, in the response to this Complaint assert the WCSD provided a March 30, 2020 PWN to the Parent informing the Parent of the mandatory systemwide school closure and the proposal to implement the student's IEP to the greatest extent practicable during the school closure through distance learning and provided a copy of the referenced PWN. (WCSD Response, March 30, 2020 PWN)
30. March 30, 2020 was the first day of school after Spring break. WCSD's proposal set forth in the March 30, 2020 PWN to provide FAPE to the student was to implement the student's most recent IEP to the greatest extent practicable through distance learning during the mandatory quarantine of all students and staff and school building closure as a result of COVID-19. The explanation of the proposal in the PWN provided that because the school in which the student is currently enrolled "...is under a mandatory closure due to COVID-19 and given the Governor's Emergency Declaration stating that all students will be automatically enrolled in distance learning, and given that staff are temporarily unable to provide in-person direct special education services, service minutes in the IEP will be temporarily provided using online and/or other platforms, as available and the greatest extent possible. When the mandatory quarantine is lifted and services return to the classroom setting, IEP teams can meet to review progress." (March 30, 2020 PWN)

31. On September 20, 2020, WCSD issued another PWN of WCSD’s proposal to provide FAPE to the student. WCSD offered to provide the student the services in the IEP through in-person instruction in brick-and-mortar school buildings, a hybrid learning model, or full distance learning settings, with the in-person instruction being the optimum choice to enable all services and supports in the student’s IEP to be implemented as written. The explanation of the proposal in the PWN provided the student’s parents elected to have the student participate in-person and, if the WCSD shut down for any reason, including poor air quality days, the parents had refused a virtual learning platform due to the student’s visual impairments. The PWN indicated that if the WCSD shut down for any reason the student would be provided a virtual learning platform and the teacher would provide at home academic materials and would work with the parent(s) to assist them in specially designed instruction in a distance learning model. (September 20, 2020 PWN)

32. In the response to the Complaint, the WCSD indicated that prior to the filing of this Complaint: “As a way in which to both repair the relationship between the school and family and redress any potential regression or missteps that may have occurred during the mandatory school closure, the District offered compensatory services for the student. The District offered to reimburse the parent for summer camp that occurred Summer 2020, provide compensatory services to the student during winter and spring break, and provide payment or reimbursement for Summer camp for Summer 2021.” To the date of the response, the WCSD indicated the Parent had not informed the WCSD of the number of hours they were seeking to compensate for any regression during school closures. (WCSD Response)

CONCLUSIONS OF LAW

Issue One:

Whether the WCSD complied with the IDEA and NAC, Chapter 388, with regard to providing the student a FAPE, specifically with regard to:

- a. The implementation of the student’s IEP for 58 school days after Nevada’s schools closed on March 15, 2020 and only distance learning was made available to the student;
- b. The provision of periodic reports of the student’s progress toward meeting the IEP goals during distance learning; and
- c. Including postsecondary goals and transition services in the student’s September 22, 2020 IEP, given the student would attain 16 years of age during the period in which the annual IEP was in effect.

Implementation of the Student’s IEP

COVID-19 has caused an unprecedented national health and safety crisis of enormous proportions that has impacted on-site instruction at school for all students for an extended period of time and caused inestimable stress to all involved. However, this recognition and the fact that the circumstances were caused by unavoidable external events does not alter each student with a disability’s right to a FAPE, including the requirement that the provision of a FAPE necessitates that special education and related services and supplemental aids and services are provided in conformity with an IEP. 34 C.F.R. §§300.17(d), 300.101; NAC §388.281(6)(e). (*Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, (OSEP March 21, 2020); NDE March 2020 Guidance¹ -*COVID-19 and Students with Disabilities; COVID-19 Questions & Answers*:

¹ Policy rulings by the United States Department of Education or NDE interpreting IDEA are informal guidance only and are merely persuasive authority. It should be noted that although courts are not bound by agency interpretations of statutes and regulations, they generally give them deferential consideration.

Implementation of IDEA Part B Provision of Services, (OSEP September 28, 2020; Cited in NDE Guidance-*COVID-19 and Students with Disabilities* (November 10, 2020))²

IEPs are clearly binding under the IDEA and a school is obligated to provide services "in conformity with" student's IEPs. *Van Duyn v. Baker School Dist.*, 502 F. 3d 811 (9th Cir.³. 2007).⁴ (*Van Duyn*); 34 C.F.R. §§300.17(d), 300.101; NAC §388.281(6)(e). Accordingly, notwithstanding the health and safety concerns that caused school building closures for all students in WCSD and the provision of distance learning to the student rather than in-person instruction in the 2019/2020 and 2020/2021 school years, WCSD was not relieved of the obligation to provide FAPE to this student under the IDEA and Nevada law and regulations. *COVID-19 Questions & Answers: Implementation of IDEA Part B Provision of Services*, (OSEP September 28, 2020).⁵

Does the fact that the closure of school buildings was systemwide and affected all students' access to in-person instruction diminish the impact of a failure to provide the services in a student's IEP? Addressing a claim for "stay put" under the IDEA, 34 C.F.R. §300.518, in the context of the State of Hawaii's systemwide furloughs, the Ninth Circuit Court of Appeals determined: "When Congress enacted the IDEA, Congress did not intend for the IDEA to apply to system wide administrative decisions. Hawaii's furloughs affect all public schools and all students, disabled and non-disabled alike. An across the board reduction of school days such as the one here does not conflict with Congress's intent of protecting disabled children from being singled out. In comparison to cases in which a child is singled out in relation to her peers, the furlough days do not remove the plaintiffs from the regular classroom setting any more than they do the other children. Disabled children are not singled out for furlough days." The Court clarified, however, that the conclusion did not ". . . leave the parents of disabled children with no means of redress. N.D.'s claim is more properly characterized as a "material failure to implement the IEP." (*Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2007)) A school district's failure to provide the number of minutes and type of instruction guaranteed in an IEP could support a claim of material failure to implement an IEP." *N.D. v. Hawaii Dept. of Education*, 600 F.3d 1104, 54 IDELR 111 (9th Cir. 2010).

Likewise, in this case, the delivery of the student's special education and services through distance learning rather than in-person in the face of COVID-19 and, in the 2020/2021 school year unhealthy air quality due to wildfire smoke, was caused by a systemwide determination. The focus in this State Complaint is to determine whether WCSD provided the individually designed services determined by the student's IEP Team to provide educational benefit to the student and if not, whether this was a material failure and a student-specific corrective action is appropriate to address the needs of the student. 34 C.F.R. §300.151(b).

It is uncontested that, given the student's educational needs, the student's progress in an educational program depends on direct assistance, including hand over hand assistance and/or verbal prompting in all

² The OSEP memorandum is publicly available at:

<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf> NDE Guidance is available at: http://www.doe.nv.gov/home/COVID_Resources/

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

⁴ The United States District Court, District of Nevada, recently cited the N.D. case in an order denying a Motion for Preliminary Injunction based on Clark County School District's decision to reopen public schools only "in a digital format": "It is true that the scenarios are not perfectly analogous: the length of the student's deprivation of services is much longer here. . . . Hawaii presents a clearly applicable point of law to CCSD's current policy: the existing systemwide changes apply to both "disabled and nondisabled children alike." *Id.* at 1108. In fact, the school district's response to a pandemic is arguably greater reason for the Ninth Circuit's rule than a school district's response to financial difficulties. *C.M., individually and as parent to D.M., et al., v. Jesus Jara, et al.*, Case No. 2:20-CV-1562 JCM -BNW, (U.S.D.C. NV (November 19, 2020)).

⁵This memorandum is publicly available at: <https://www2.ed.gov/policy/speced/guid/idea/memosdcltr/qaprovision-of-services-idea-part-b-09-28-2020.pdf>

areas, and close observation in a separate school setting. (Finding of Fact (FOF) FOFs #1-2) Given the student's visual impairment, limited cognitive abilities, developmental delay, and physical limitations that include being primarily a non-verbal communicator, the student accesses the environment through auditory skills, sense of smell, and tactile characteristics of objects and requires extra processing time. In response to this Complaint, the WCSD did not refute the Parent's assertion that the alternative delivery method of distance learning to implement the student's IEP did not provide the student a FAPE, and the determined facts in this investigation support the student's need for in-person specially designed instruction and the designated direct related services in order to be provided educational benefit.

In this case, there were two annual IEPs in effect during the time period of this Complaint. The student's September 24, 2019 annual IEP was in effect for all of the cited days of distance learning in this Complaint but one. (The September 22, 2020 IEP was in effect for only the last day of school closure in the 2020/2021 school year for wildfire smoke and the student's mother declined distance learning on that day.) (FOFs #5, #11, #13, #16) Given the WCSD's determined concession of this issue; the fact that the frequency of related services in the student's September 22, 2020 IEP was monthly or quarterly; the frequency of specially designed instruction was weekly; and the student's mother declined the available specially designed instruction on the last cited day of school closure, this analysis focuses on the student's September 24, 2019 IEP. (FOFs #5, #13, #16)

With regard to the 2019/2020 school year and the commencement of the 2020/2021 school year up to the September 22, 2020 annual IEP, the student's September 24, 2019 annual IEP provided specially designed instruction in the special education class in the areas of daily living skills and functional academics for 1700 minutes weekly (approximately 28 hours per week). (FOF #2) There is extensive documentation of the WCSD's efforts to implement the student's IEP through the alternate service delivery method of distance learning during the systemwide school closures at the end of the 2019/2020 school year and the commencement of the 2020/2021 school year. (FOFs #14-16) However, there is no documentation of the number of minutes of direct specially designed instruction provided to the student, or to the student's parent(s) on behalf of the student on the distance learning days (FOF #14) to inform the corrective action in this case.

The student's IEP required the student be provided the following related services in the location of the special education class: direct speech/language therapy 120 minutes per month; direct occupational therapy 100 minutes per month; consultation in physical therapy 30 minutes per quarter; and consultation in vision impairment instruction 20 minutes per quarter. (FOF #4) In the last quarter of the 2019/2020 school year during distance learning, the student did receive consultation in physical therapy services for 45 minutes; 95 minutes of direct occupational therapy; 75 minutes of direct speech/language therapy; and a consultation in vision impairment instruction for an unknown number of minutes. (FOF #15)

At the commencement of the 2020/2021 school year, the student was provided:

- a. Direct speech language therapy for an unknown number of minutes in the month of August 2020 and 115 minutes in the month of September 2020. The student was absent for a 55-minute group session of speech/language therapy with three students on September 3, 2020 and was provided 30 minutes on October 1, 2020;
- b. Direct occupational therapy for 45 minutes in the month of August 2020; for 90 minutes in the month of September 2020; and attempted on two additional occasions for a total of 45 minutes in the month of September; and
- c. Physical therapy consultation for 15 minutes in August 2020 and 30 minutes in September 2020. (FOF #16)

The determination of the time period of noncompliance for purposes of this Complaint, however, is a bit complicated. In the March 2020 Questions and Answers on Providing Services to Children with Disabilities

During the Coronavirus Disease 2019 Outbreak, the OSEP provided the following guidance with regard to the closure of elementary and secondary school buildings for an extended period of time due to exceptional circumstances:

“The IDEA, Section 504, and Title II of the ADA do not specifically address a situation in which elementary and secondary schools are closed for an extended period of time (generally more than 10 consecutive days) because of exceptional circumstances, such as an outbreak of a particular disease. If an LEA closes its school [buildings] to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time. Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child’s individualized education program (IEP) or, for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504....If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. (34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA) SEAs, LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under IDEA, or a plan developed under Section 504. (34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504)).”⁶

With regard to the school closure in the WCSD and the commencement of distance learning instruction: April 10, 2020 is ten school days after school closure on March 16, 2020. However, distance learning began for all students in WCSD on April 1, 2020. Therefore, the time period of noncompliance for purposes of this Complaint in the 2019/2020 school year with regard to distance learning commenced April 1, 2020 and ended June 5, 2020, a period of 47 school days. (FOF #8)

With regard to school closure in the 2020/2021 school year due to wildfire smoke, the days of school closure and distance learning were for 10 non-consecutive days, one of which the student was absent for medical reasons and one that is scheduled to be made up in June 2021. (FOF #13) As such, relevant to this Complaint, there were eight school days that the student was provided distance learning for the time period of noncompliance in the 2020/2020 school year.

Therefore, WCSD failed to comply with the IDEA and NAC, Chapter 388, with regard to providing the student a FAPE, specifically with regard to the implementation of the student’s IEP for 47 school days in the 2019/2020 school year and eight school days in the 2020/2021 school year when distance learning was provided to the student rather than the required direct assistance, including hand over hand assistance and/or verbal prompting in all areas, and close observation.

Progress Reports

A student’s IEP must include a description of how the student’s progress toward meeting the annual IEP goals described will be measured and when periodic reports on the progress the student is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. 34 C.F.R. §300.320(a)(3); NAC §388.284(1)(h). The methods for reporting the student’s progress toward meeting the annual goals in the student’s September 24, 2019 and September 22, 2020 IEPs were IEP goal pages and specialized progress reports and, in the case of the curriculum and learning goal in the student’s September 24, 2020 IEP, the method was specialized progress report and district report card. (FOF #22)

⁶ This policy guidance is publicly available at: <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>

The evaluation procedures for measuring the student's progress toward meeting the annual goals in both the September 24, 2019 and the September 22, 2020 IEPs included teacher or therapist observation, performance demonstration and in the case of functional communication and fine motor skills for independent functioning, the additional evaluation procedures of clinician tallies and informal assessment/observation. (FOFs #22, #23)

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 with regard to the provision of quarterly progress reports as set forth in the student's IEP. However, it was noted that WCSD did attempt to implement this responsibility by issuing a June 3, 2020 specialized progress report that was delivered to the Parent and an October 24, 2020 specialized progress report that may or may not have been delivered to the Parent. The progress reports did include a rating for each of the student's annual goals for the grading periods relevant to this Complaint. The June 3, 2020 progress report expressly acknowledged that certain goals could not be tracked given the inability to observe in-person and the inability for students to interact with adults and peers in a school setting and, for those goals, the specialized progress report reflects that the goal has not been addressed during the quarter. The student had two annual goals in this progress report that included that rating. (FOFs #24-#25)

With regard to the October 24, 2020 progress report, the report only addressed the annual goals reflected in the student's September 22, 2020 IEP, not the period from the commencement of the 2020/2021 school year up to that date. It was noted that the student's September 22, 2020 IEP did include some additional progress determinations with regard to the student's measurable annual goals and the student's Parent did receive that information. (FOFs #26-#27)

It is recognized that given the mandatory closure of school buildings for all students and the alternative delivery method of distance learning, the evaluation procedures set forth in the student's IEP were difficult, at best, to implement and while the reports did not meet the requirements of the IEP, the WCSD did issue quarterly progress reports for the periods of distance learning in the 2019/2020 and 2020/2021 school years. However, WCSD remained responsible for complying with the IDEA and NAC, Chapter 388, and did not in this regard.

Therefore, the WCSD failed to comply with the IDEA and NAC, Chapter 388 with regard to providing quarterly progress reports as set forth in the student's IEP.

Transition at Age 16

In accordance with the IDEA, 34 C.F.R. §300.320(b) and NAC §388.284(1)(f), beginning not later than the IEP to be in effect when the student turns 16, and updated annually, thereafter, the student's IEP must include appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills; and transition services, including, without limitation, the courses of study needed to assist the student in reaching those goals.

In this case, the student's 16th birthday was the first week of December 2020 and the student's September 22, 2020 IEP was the IEP in effect on that day. (FOFs #17, #21) The documented transition assessment conducted in advance of this IEP meeting was only a teacher observation related to education. (FOF #18) The student's September 22, 2020 IEP did not include any postsecondary goals and the statement of transition services was limited to instruction and continued provision of the student's related services and

continued participation in community based instructional activities, whether within the classroom or outside of the school. (FOFs #18-#20)

As set out in the Introduction to this Report, WCSD is determined to have conceded this issue by its failure to deny the alleged noncompliance with regard to postsecondary transition goals and services. It was noted that on the same day this Complaint was filed, WCSD met with the student's Parent to discuss the Parent's concerns for transition planning. The discussion included the need for additional assessments in order to appropriately address postsecondary goals and the services need to work toward the attainment of the goals. After the informal meeting on November 13, 2020, an IEP revision meeting was scheduled, including a case worker from the Sierra Regional Center, for the purpose of revising the transition section of the student's IEP. The PWN regarding the IEP meeting for this purpose was dated December 2, 2020 and no documentation was provided that the IEP meeting took place prior to the student's birthday. (FOF #21)

Therefore, WCSD failed to comply with the IDEA and NAC, Chapter 388, with regard to including postsecondary goals and transition services in the student's September 22, 2020 IEP, given the student would attain 16 years of age during the period in which the annual IEP was in effect.

Issue Two:

Whether the WCSD complied with the IDEA and NAC, Chapter 388, with regard to unilaterally changing the student's placement from in-person and direct interaction to predetermined distance learning without the Parent's involvement.⁷

WCSD is determined to have conceded this issue by its failure to deny the alleged noncompliance with regard to predetermination of the provision of distance learning to the student without the Parent's involvement. The facts are clear however that any such "predetermination" was a systemwide administrative determination for all students with and without disabilities. Therefore, the determination of WCSD's concession of this issue does not preclude the need for further analysis.

As discussed previously, neither the IDEA nor the NRS/NAC Chapter 388 specifically address a situation in which elementary and secondary schools are administratively closed for an extended period of time because of exceptional external circumstances, such as the COVID 19 pandemic. The previously cited Ninth Circuit Court of Appeal's decision, *N.D. v. Hawaii Dept. of Education*, made it clear that "[W]hen Congress enacted the IDEA, Congress did not intend for the IDEA to apply to system wide administrative decisions."

Similarly, the closure of WCSD schools and the administrative decision to offer distance learning during the health and safety crisis of COVID-19 and unhealthy air quality caused by wildfire smoke were systemwide administrative determinations that impacted both students with and without disabilities. (FOFs #7-#13) The question posed by this issue is whether the right of parents of a student with disabilities to be afforded an opportunity to participate in meetings with respect to the educational placement of their child and the provision of FAPE to their child provides additional rights to parents of students with disabilities, notwithstanding this Ninth Circuit Court of Appeals decision on systemwide administrative decisions. 34 C.F.R. §300.501; NAC §388.302.

It is determined that the provisions in the IDEA, 34 C.F.R. §§300.116, 300.322, and 300.501, and NAC §388.302 with regard to a parent(s) right to participate in meetings with respect to the identification, evaluation, and educational placement of their child; and the provision of FAPE to their child do not alter

⁷ The characterization of this change to distance learning in Issue Two and Three being a change in placement/FAPE is that of the Parent's, not NDE's. See the discussion under Issue Three.

the conclusion that the IDEA was not intended to address systemwide determinations. Consistently, the significant cases in the Ninth Circuit Court of Appeals on predetermination pointedly address fact-specific situations where the alleged predetermination involved an educational agency independently making its determination prior to the individual student's IEP or placement meeting, resulting in the student being provided or placed in a preexisting, predetermined program. (*K.D. v. Department of Education, State of Hawaii*, 665 F.3d 1110, 58 IDELR 2 (9th Circuit 2011, *H.B. v. Las Virgenes Unified School District* 239 F. App'x 342, 48 IDELR 31, (9th Cir. 2007) Unpublished., *Deal ex rel Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109, 392 F.3d 840 (6th Cir. 2004)) That is not the situation in this case.

Therefore, WCSD complied with the IDEA and NAC, Chapter 388, with regard to the systemwide change from in-person and direct interaction for the student to distance learning without the Parent's involvement.

Issue Three:

Whether the WCSD complied with the IDEA and NAC, Chapter 388, with regard to the provision of a PWN a reasonable time before proposing to change the student's placement to, and the provision of FAPE through, distance learning.

Both the IDEA, 34 C.F.R. §300.503, and the NAC §388.300(8) require a public agency to provide the parents of a student with a disability a prior written notice within a reasonable time before any proposed or refused action regarding the placement of the student; the identification or evaluation of any special educational needs of the student; or the provision of a FAPE to the student.

Once again, neither the IDEA nor the NRS/NAC Chapter 388 specifically address the obligation to provide a PWN in a situation in which elementary and secondary schools are closed systemwide for an extended period of time because of exceptional external circumstances. As school building closures occurred nationwide at the commencement of the pandemic in March 2020, the United States Department of Education, Director of the Office of Special Education Programs (OSEP), consistently provided guidance in scheduled Webinars⁸ that if the move to online or virtual instruction is part of the school closure recommendation, students' IEPs did not have to be revised to address it, rather it was considered an alternate mode of instructional delivery. In subsequent written guidance, OSEP indicated that: "The determination of when prior written notice is required depends on the particular facts and circumstances, but OSEP encourages public agencies to ensure that parents are fully informed of how their child's special education and related services needs are addressed during remote learning."⁹ On September 28, 2020, the United States Department of Education, Office of Civil Rights (OCR) addressed the issue with regard to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sections 705, 794, 794a, 794b; 34 C.F.R. Part 104, in a consistent manner: "Placement decisions and educational settings in effect at the time that a school suspends in-person instruction in response to concerns over COVID-19 do not need to be changed or updated solely to reflect a temporary shift to distance learning. However, State and local decisions that

⁸ See for example: March 19, 2020 Webinar – Laurie Vanderploeg- OSEP Director, Question 29. "If we're considering moving services to virtual online learning will IEPs need to be amended to reflect this? Is meeting with the parent and providing an outline in writing, how services will be provided sufficient?" "If the move to online or virtual is part of the school closure recommendation, we are not requiring you to go back into the IEP to address it. This is going to be considered an alternate mode of instructional delivery. If you're looking at virtual or online learning as part of the students' daily instruction once they returned to school, then the IEP team would have to take into consideration how they construct that within the IEP."

⁹This policy memorandum is publicly available at: <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-procedural-safeguards-idea-part-b-06-30-2020.pdf>

require schools to limit or suspend in-person instruction do not relieve school districts of the obligation to provide a FAPE to students with a disability...”¹⁰

The previously cited case in the Ninth Circuit Court of Appeals, *N.D. v. Hawaii Dept. of Education*, that addressed the systemwide administrative decision to shut down public schools due to furloughs provides some insight on whether the provision of instruction through distance learning was a proposal to change the student’s placement or provision of a FAPE to the student. The Court decided that Hawaii’s teacher furloughs and concurrent shut down of public schools was not a change in the educational placement of disabled children: “...the children here stay in the same classification, same school district, and same educational program. The children have not been reclassified with different handicaps. The children continue to attend the same school, have the same teachers, and stay in the same classes. The educational setting of the disabled children remains the same post-furloughs...”

Similarly, during distance learning, the student’s IEP was not revised, the location of the student’s services in the student’s IEP remained in the special class, and the student’s placement designation remained in a special school. (FOF #6) Distance learning for the student was to be a temporary alternative mode of instructional delivery and, post-distance learning, the student again receives in-person instruction in the designated location of the special class in the special school placement.¹¹ It is not necessary to reach a legal conclusion in this case regarding the PWN relative to the provision of distance learning in the 2019/2020 school year. The WCSD did provide a March 30, 2020 PWN to the Parent informing the Parent of the mandatory systemwide school closure and the proposal to implement the student’s IEP to the greatest extent practicable during the school closure through distance learning. (FOFs #29-30)¹²

With regard to the provision of distance learning at the commencement of the 2020/2021 school year due to wildfire smoke, WCSD did not issue a PWN to the student’s Parent prior to the systemwide determination to move to distance learning for all students due to unhealthy air quality and did not refute the Parent’s allegation of the failure to do so. (FOF #31) However, neither the Parent nor WCSD assert the days of school closure for this purpose were other than a temporary change in the mode of instructional delivery. The facts that at least one of the school closure decisions came the day of the closure and that all students returned intermittently to in-person instruction during this time period support the temporary nature of the decision to provide distance learning to the student. (FOF #13) As such, there was no proposal to change the student’s placement or provision of FAPE and no PWN was required for the temporary change to distance learning days when WCSD schools were closed due to unhealthy air quality.

Therefore, WCSD complied with the IDEA and NAC, Chapter 388, in the provision of a PWN in March 2020 and there was no requirement to provide a PWN a reasonable period of time before a temporary change in the mode of instructional delivery to distance learning at the commencement of the 2020/2021 school year.

¹⁰ While this memorandum addresses Section 504, not the IDEA, students’ IEPs under the IDEA are also referenced. This policy memorandum is publicly available at: https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

¹¹ Note that the issue of whether a PWN was legally required is separate and apart from the issue whether the provision of distance learning provided the student a FAPE.

¹² While WCSD did not refute the Parent’s allegation in the response to this Complaint that the WCSD failed to provide a PWN a reasonable time before proposing to change the student’s placement to, and the provision of FAPE through, distance learning, it is determined given the facts of this case that the provision of the March 30, 2020 PWN suffices to counter a determined concession.

Corrective Action

In this case, WCSD failed to implement the student's IEP during distance learning with regard to direct assistance and close observation and the provision of the reports of the student's progress toward the annual goals; and failed to include postsecondary goals and transition services in the student's IEP in effect when the student turned 16 years of age.

A finding of noncompliance through the state complaint process for the failure of a local educational agency to implement a student's IEP 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, 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, the services WCSD provided to the student through the period of distance learning fell significantly short of the services required by the student's IEP, particularly given the student's progress in an educational program depends on direct assistance and close observation. (FOF #2) The progress data, when taken as a whole (FOFs #24-28), reflect that the student did not make the expected progress toward annual goals during the implementation of distance learning in the absence of this assistance/observation. 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 these regards is a material failure warranting corrective action. *Van Duyn*. Therefore, a corrective action, including compensatory education, is necessary.

Corrective Action Plan

WCSD is required to take corrective action to address the violations found in this Complaint. As previously indicated, compensatory education is required given WCSD did not provide the direct assistance and close observation upon which the student's progress toward the IEP annual goals depended during the implementation of distance learning. However, the data provided in the course of this investigation were insufficient to ascertain whether the student also lost any skills during the provision of distance learning and whether the student has recouped these lost skills upon the return to in-person learning in the 2020/2021 school year, and, if not, whether an additional remedy is warranted.

In accordance with NRS §385.175(6), NDE requests a plan of corrective action (CAP) from WCSD within 14 WCSD business days of the receipt of this Report. The CAP must be approved by NDE prior to implementation. **Unless agreed to otherwise in writing by WCSD and the Parent**, the CAP must provide for the following student-specific directed action, including the timeline within which it will be implemented:

A. Compensatory Education

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. v. Puyallup*. 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.

Unless agreed to otherwise in writing by the WCSD and the Parent(s), the CAP must provide the following consistent with the student’s IEP to be completed no later than one year from the date of this Report. 34 C.F.R. §300.164(e):

- a. 160 additional minutes of direct speech/language therapy and 104 minutes of direct occupational therapy over the amount to be provided in the student’s September 20, 2020 IEP.¹³
- b. 112 hours of specially designed instruction over the amount to be provided in the student’s September 20, 2020 IEP.¹⁴

WCSD is commended for its attempt to resolve this matter informally with the Parent prior to the filing of this Complaint. (FOF #32) The WCSD and the Parent(s) are encouraged to continue to work together throughout this process. WCSD must consult with the student’s Parent(s) on the appropriate means to provide this ordered compensatory education to meet the student’s educational needs and must consider any concerns of the Parent(s) and/or proposals in the development of the compensatory education plan. This compensatory education must be in addition to the services in the student’s IEP and, as such, must be provided during school breaks or before or after school, which may include the flexible use of Fall break and up to one of the two weeks of Spring break to make up for any lost instruction caused by the COVID-19 shutdown as set forth in WCSD 2020/2021 school year reopening plan, other than the previously considered contingency day in June 2021. (FOFs #10-#11)

B. Data Collection: Data collection in the goal areas set forth in the student’s September 22, 2020 IEP must commence within 15 school days of the date WCSD receives NDE’s approval of the CAP and include the collection of data to allow the student’s IEP Team to determine whether the student lost any skills during the provision of distance learning and, if so, whether the student recouped any lost skills upon the return to in-person learning in the 2020/2021 school year up at least December 1, 2020. The CAP must include the time period of the data collection.

C. IEP Team Meeting: The student’s IEP Team must convene no later than 10 school days¹⁵ after the completion of the data collection to consider:

- a. Whether the student lost any skills during the provision of distance learning in the 2019/2020 and 2020/2021 school years and, if so, whether the student has recouped any of the lost skills and to determine whether additional compensatory education, if any, over

¹³ This amount of compensatory services included consideration of the therapy provided during distance learning and/or made available to the student and the required number of minutes in the student’s IEP.

¹⁴ This amount includes consideration of the number of distance learning days (taking into consideration known student absences and contingency days) in the 2019/2020 and 2020/2021 school years; the commencement of distance learning in advance of the extended period of time determined by OSEP to be in excess of 10 instructional days; the number of instructional minutes in the student’s IEP; the requirement that these compensatory services be in addition to the services set forth in the student’s current IEP; and, given, the noncompliance must be corrected no later than one year after the date of this Report, ensuring the compensatory education is capable of being implemented in that time period. This represents approximately four weeks of additional specially designed instruction.

¹⁵ If the student’s parents are unavailable to participate in the student’s IEP meeting within that timeframe, the documentation provided to NDE upon completion of the CAP must include that documentation.

the levels set forth above is necessary to provide the educational benefits that the student would have likely received, but for the disruption to in-person instruction.

- b. Whether an alternative instructional delivery contingency plan should be developed to address the student's needs in the event a systemwide school closure occurs again during the time period of the IEP and in-person instruction is not permitted.

D. Transition Services

If the additional transition related assessments have not been conducted and the student's IEP has not yet been revised to include postsecondary goals and transition services (FOF #21), the CAP must provide for the assessment of the student for purposes of transition in accordance with the IDEA and the review and revision of the student's IEP to include the mandatory contents for transition set forth in the IDEA. 34 C.F.R. §300.320(b), and NAC §388.281(2)(f).

Nothing in this CAP shall be interpreted to constitute a limitation on the Parent(s)' or WCSD's rights under the IDEA or NAC to access the alternative dispute resolution processes if the Parent(s) and WCSD do not agree on the determination of the student's IEP Team whether the student lost and/or recouped any skills during the provision of distance learning and/or whether additional compensatory education is necessary for that reason or the appropriateness of the transition postsecondary goals and transition services.

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