

**WASHOE COUNTY SCHOOL DISTRICT
COMPLAINT INVESTIGATION
(#WA111423)**

Report Issued on January 12, 2024

INTRODUCTION

On November 14, 2023, the Nevada Superintendent of Public Instruction received a Complaint from a Parent dated November 3, 2023 alleging violations of the Individuals with Disabilities Education Act (IDEA) or a provision of Chapter 388 of the Nevada Revised Statutes (NRS) or the Nevada Administrative Code (NAC) by Washoe County School District (WCSD) in the student's special education program.

The allegations in the Complaint were that WCSD failed to implement the student's Individualized Education Program (IEP) in effect in the 2023/2024 school year with regard to the provision of 60 minutes a month of occupational therapy; and that the student needs a Functional Behavioral Assessment and a Behavior Plan that meets the student's needs and adapted physical education assessments, goals, accommodations, and specially designed instruction. The Parent indicated that the current practice of the school staff is to ignore the student's inappropriate behaviors; that practice is not in alignment with best practices and does not incorporate positive behavioral supports; and the student is not making academic progress. With regard to adaptive physical education, the Parent indicated that the student's IEP Team would not document adapted physical education services.

The Parent's proposed resolution to address these allegations is for WCSD to provide compensatory occupational therapy services and begin providing monthly services of 60 minutes as identified in the student's IEP; provide individualized adapted physical education services, not based on the WCSD memorandum; address the student's behavior needs and develop a Behavior Plan; and provide services that allow for meaningful academic progress.

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 2023/2024 school year through November 3, 2023, the date of the State Complaint:

Issue One:

Whether WCSD complied with IDEA and NAC, Chapter 388, in the implementation of the student's IEP in effect in the 2023/2024 school year, specifically with regard to the provision of 60 minutes a month of occupational therapy to the student.

Issue Two:

Whether WCSD complied with IDEA and NAC, Chapter 388, and provided the student a Free Appropriate Public Education in the 2023/2024 school year; specifically, did WCSD follow procedures and apply required standards under IDEA and NAC and reach a determination that was reasonably supported by the student-specific data with regard to providing the student:

- a. A Functional Behavioral Assessment and a Behavior Plan that addresses the student's behavioral needs; and
- b. An adapted physical education assessment, goals, accommodations and specially designed instruction.

In the November 20, 2023 issue letter to WCSD, NDE specifically requested itemized documents and information to begin the investigation of the State Complaint to be received no later than December 7, 2023. WCSD was further notified 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 December 7, 2023, or an extended timeline authorized by NDE, would be considered a concession of noncompliance for purposes of the State Complaint.¹ WCSD did timely provide the an electronic and hard copy response²; conceded the related service of occupational therapy was not provided to the student in the 2023/2024 school year in conformance with the student's IEP until November 21, 2023 (Issue One); denied the alleged noncompliance with regard to Issue Two and provided the statement of the factual basis for the denial; and referenced the documentation provided.

In WCSD's concession of the failure to provide the student the related service of occupational therapy until November 21, 2023, WCSD cited the reason of a staffing shortage of occupational therapists that impacted this student and other students in WCSD. WCSD acknowledged the legal requirement to provide services as outlined in every student's IEP and that staffing shortages do not negate WCSD's responsibility to provide a Free Appropriate Education. In the response, WCSD described efforts taken by WCSD to address the shortage of occupational therapists in WCSD and to address individual student's needs through offers of compensatory education. (See further discussion in the Order of Corrective Action.)

The State Complaint and WCSD's Response, including supplemental documentation requested, were reviewed in their entirety in this investigation. The Findings of Fact cite the source(s) of the relevant information determined necessary to resolve the issues in this Complaint.

FINDINGS OF FACT

General

1. The student is a student with a disability enrolled in WCSD in the 2023/2024 school year. (May 31, 2023 IEP, State Complaint, WCSD Response)
2. The first day of school for students in the 2023/2024 school year was August 14, 2023. (WCSD 2023/2024 Balanced Calendar)

May 31, 2023 IEP

3. The student had a May 31, 2023 IEP in effect at the commencement of the 2023/2024 school year. It was developed on the last day of school in the 2022/2023 school year. The student was placed in

¹ WCSD did not provide all requested documentation in response to this State Complaint due to WCSD's interpretation that documents and artifacts only needed to be provided to NDE if the District disputed the alleged non-compliance. (WCSD Response) WCSD was responsive to NDE's request for supplemental information and NDE's clarification that the request for documents and information and the requirements if WCSD disputed the alleged noncompliance were separate requirements. As a point of clarification, even if the named public educational agency concedes all issues in a State Complaint, and WCSD did not in this case, the requested documents and artifacts may be required for NDE to address the appropriate remedy to address the needs of the student and/or the appropriate future provision of services for all students with disabilities.

² While WCSD's responses were timely, the provided hard copy did not include all electronically submitted documents. The State Complaint Investigation Team relied on both versions to investigate this State Complaint.

a self-contained program and would spend 37% of the school day in the regular education environment. (May 31, 2023 IEP, 2022/2023 WCSD Balanced Calendar)

4. At the time of the development of the student's May 31, 2023 IEP, the student's IEP Team relied on the following assessments relevant to this State Complaint:
 - a. An October 13, 2022 occupational therapy assessment of the student's fine motor skills. The assessment results were that the student continued to need supports and direct occupational therapy for continued development of appropriate motor skills and to promote independence to be able to engage and participate in the student's school environment.
 - b. Teacher observation and data collection conducted on October 12, 2022 of the student's social/emotional/behavioral skills.
 - c. A physical therapy assessment of the student's gross motor skills conducted October 13, 2022. The physical therapist recommended continued participation in direct school-based physical therapy in that the student's decreased motor planning and inconsistent ability to alternate feet on the stairs impacted the student's ability to access school environments and participate in activities with the student's peers. (May 31, 2023 IEP)
5. Relevant to this State Complaint, the student's May 31, 2023 IEP provided:
 - a. Specially designed instruction for 300 minutes per week in the regular school year in social and/or behavioral skills in the location of the special education setting and 330 minutes per week in the extended school year program;
 - b. The supplemental aid/service of a token economy to reinforce desired behaviors daily in the location of both the special education and regular education settings;
 - c. The related service of direct occupational therapy 60 minutes per month in the location of the special education setting; and
 - d. The related service of direct physical therapy 60 minutes a month in the location of the special education setting. (May 31, 2023 IEP)

Occupational Therapy

6. WCSD conceded that occupational therapy services had not been provided in the 2023/2024 school year in conformance with the student's IEP until November 21, 2023 when an occupational therapist was hired and started providing services. (WCSD Response)
7. On November 15, 2023, the student's occupational therapist commenced preparation to provide occupational therapy services to the student by scheduling services and discussing goals with the student's teacher. On November 21, 2023, the occupational therapist provided direct services to the student for 30 minutes to obtain a baseline for handwriting skills. On November 28, 2023, the occupational therapist again provided direct services to the student for 30 minutes. (Excell Spread Sheet Student Service)
8. There were three school months prior to the commencement of the direct services to the student in November 2023. The student's IEP did not distinguish the required number of minutes per month for partial months or occurrence of school holidays. (2023/2024 WCSD Balanced Calendar, May 31, 2023 IEP)
9. WCSD provided the student's Parent an initial compensatory services letter on September 5, 2023 directed to "Dear Parent" informing the Parent that due to a shortage of related services personnel, specifically occupational therapists, no occupational therapist had been assigned to the student's school resulting in the student not receiving the occupational therapy in the student's IEP. WCSD committed to provided compensatory education once staff was hired and in place for the minutes

that were missed due to the staff shortage. (September 5, 2023 WCSD Notice to Parent – Missed Services)

10. Upon the hiring of an occupational therapist, WCSD sent the Parent a compensatory services letter offering 150 minutes of compensatory occupational therapy services to the Parent. The letter provided the Parent the option to either accept the offered compensatory service or to decline the compensatory service by December 21, 2023. No response from the Parent was provided to the State Complaint Investigation Team during the course of the investigation. (December 4, 2023 Compensatory Services Letter)
11. WCSD indicated the 150 minutes of compensatory occupational therapy offered to the Parent in the December 4, 2023 compensatory services letter constituted minute-for-minute compensatory services and WCSD would work with the Parent to determine the manner in which the compensatory services would be completed. (WCSD Response, December 4, 2023 Compensatory Services Letter)
12. WCSD recently took some steps to address staffing shortages in WCSD. Specifically, WCSD engaged in a Request for Proposal (RFP) process to recruit related services personnel, including occupational therapists, by contracting with outside companies; and applying for, and being awarded a grant to address recruitment and retention activities for high-need special education licensure areas. No documentation was provided in the course of the investigation of the results of these efforts on eliminating staffing shortages that directly impact students with disabilities, such as occupational therapists, after the applicable period of this State Complaint. (WCSD Response, Review of the Record)

Behavior

13. In the May 31, 2023 IEP in effect at the commencement of the 2023/2024 school year, the student's IEP Team determined that the student's behavior impeded the student's learning or the learning of others. (May 31, 2023 IEP)
14. At the time of the development of the student's May 31, 2023 IEP, the student had shown some improvement in behaviors that impacted the student's involvement in the general education classroom. These behaviors were due to distractibility, being off task, and attention seeking and examples of those behaviors included eloping and not keeping the student's hands to self. (May 31, 2023 IEP)
15. The student's May 31, 2023 IEP included one social/emotional/behavioral annual goal on the ability of the student to use communication and social skills to positively interact with others in 3/4 trials with 75% accuracy by October 16, 2023 as measured by informal observations and data collection. (May 31, 2023 IEP)
16. The student's May 31, 2023 IEP did not include the provision/implementation of a behavior implementation plan. However, in response to this State Complaint, WCSD provided a Positive Behavior Intervention Plan with the target behaviors of physical aggression and yelling/screaming "identified from" a Functional Behavioral Assessment. The provided Positive Behavior Intervention Plan included the student's name in the operational definition of the identified behaviors, but no dates or other authentication. No documentation was provided in the course of the investigation to support the implementation of the Positive Behavior Intervention Plan. (Positive Behavior Intervention Plan, Review of the Record)

17. At the time of the student's May 31, 2023 IEP, the date of the student's three-year reevaluation was anticipated to be October 26, 2023. WCSD's reevaluation of the student commenced August 29, 2023, and ended October 13, 2023. In the conduct of the reevaluation, WCSD reviewed the student's previous assessment and school records; obtained Parent and student input and teacher reports; and conducted assessments that included observations, the assessment of the student's performance in the current educational setting; academic achievement; and, on September 5, 2023, the student's social and emotional condition. (May 31, 2023 IEP, October 17, 2023 Multidisciplinary Psycho-educational Team Report)
18. The reevaluation of the student with regard to the student's social and emotional condition included, the following results:
 - a. An observation from the student's teacher reporting social/emotional concerns due to the student's challenge in regulating emotions. The student often had emotional outbursts that lead to others being harmed. With regard to behaviors, the student can be aggressive towards others and the student often attempts to hit, scratch or push peers when upset.
 - b. Based on the student's Parent and special education teacher's completion of the Behavior Assessment System for Children, 3rd edition, (BASC-3) in the 2023/2024 school year, the following areas fell in the clinically significant range as reported: hyperactivity (both), aggression (both), conduct problems (special education teacher), atypicality (special education teacher), functional communication (special education teacher), activities of daily living (parent). The following areas fell in the at-risk range: conduct problems (parent), depression (both), attention problems (both), learning problems (special education teacher), atypicality (parent), withdrawal (special education teacher), adaptability (special education teacher), leadership (special education teacher), functional communication (parent).
 - c. No Functional Behavioral Assessment was conducted as part of the student's reevaluation. (October 17, 2023 Multidisciplinary Psycho-educational Team Report)
19. The student's October 17, 2023 progress report, the first quarter of the 2023/2024 school year, reported on the student's progress toward the one social/emotional/behavioral annual goal in the student's May 31, 2023 IEP to be achieved by October 16, 2023. The progress report indicated the student had not met this annual goal, but would likely meet the goal by October 17, 2024 the following year. (October 17, 2023 Progress Report)
20. Five days after the relevant period of this State Complaint, and following the reevaluation of the student, the student's IEP Team again determined that the student's behavior impeded the student's learning or the learning of others. The student's November 8, 2023 IEP included one social/emotional/behavioral annual goal, the same annual goal as in the student's May 31, 2023 IEP, except for the measurement. (November 8, 2023 IEP, May 31, 2023 IEP)
21. The student's November 8, 2023 IEP increased the student's minutes of specially designed instruction in social and/or behavioral skills in the regular school year from 300 minutes a week in the May 31, 2023 IEP to 400 minutes per week and maintained the 330 minutes in the extended school year program. The supplemental aid/service of the token economy from the May 31, 2023 IEP was retained in the special education setting, but removed in the regular education setting. An additional aid/service was added to provide the student consistent adult prompting to remain on task. The amount of time the student would spend in the regular education environment was reduced from 37% to 32% of the school day. (November 8, 2023 IEP, May 31, 2023 IEP)
22. At the student's November 8, 2023 IEP Team meeting, the Parent requested a different behavior plan since the plan did not seem to be working and wanted a behavior specialist to help with the

plan. No documentation was provided in the course of this investigation that the Parent had made that request or had requested WCSD conduct a Functional Behavioral Assessment prior to the November 8, 2023 IEP Team meeting. (Review of the Record, November 8, 2023 IEP)

23. On December 13, 2023, WCSD provided the Parent a Prior Written Notice proposing to conduct a Functional Behavioral Assessment by a Board-Certified Behavior Analyst (BCBA) based on the Parent's request and also provided the Parent a request for consent for evaluation. (December 13, 2023 Prior Written Notice)

Adaptive Physical Education

24. In the physical therapy annual report in October 2022, the student's decreased motor planning and inconsistent ability to alternate feet on the stairs was determined to impact the student's access to the school environment and participation in activities with the student's peers. (October 13, 2022 Physical Therapy Annual Report)
25. WCSD conducted a physical therapy reevaluation of the student October 11, 2023, including observing the student during recess where the student was observed to run around the playground on varying surfaces and step over the barriers without external support; to go up the stairs and down the slide independently. The physical therapist determined that the student was able to fully access and participate in the school environment without difficulty and was able to complete all school-related functional activities without limitation. (October 11, 2023 Physical Therapy Reevaluation Report)
26. In reporting period of the 2023/2024 school year, the student achieved the annual goal in the May 31, 2023 IEP to demonstrate school-based mobility, balance, and gross motor skills without loss of balance. (October 17, 2023 Progress Report)
27. At the November 8, 2023 IEP Team meeting, conducted five days after the relevant period of this State Complaint, the student's IEP Team determined that the student no longer needed direct physical therapy as a related service, but did require consultative physical therapy 30 minutes per quarter. As in the student's May 31, 2023 IEP, adaptive physical education was not provided as a related service. (May 31, 2023 and November 8, 2023 IEPs)
28. While the specially designed instruction, supplementary aids/services and/or related services in the student's May 31, 2023 IEP did not include adaptive physical education, WCSD provided adaptive physical education to all of the student's enrolled in the student's self-contained program, including the student. (May 31, 2023 IEP, WCSD Response)
29. After acknowledging the student was provided adaptive physical education on the basis that the student was enrolled in the designated placement, WCSD committed to conducting an adaptive physical education assessment, conditioned on the Parent's consent, after which the student's IEP Team would convene to consider the results and revise the IEP as necessary. Further, to ensure that staff understand the legal requirements of services in the IEP, WCSD committed to providing training to the staff at the student's school, including the adapted physical education teacher who works with the student and other students in the classroom. (WCSD Response)

CONCLUSIONS OF LAW

Issue One:

Whether WCSD complied with IDEA and NAC, Chapter 388, in the implementation of the student's IEP in effect in the 2023/2024 school year, specifically with regard to the provision of 60 minutes a month of occupational therapy to the student.

The requirements of the provision of a Free Appropriate Public Education to students with disabilities under IDEA and NAC, Chapter 388, necessitate that special education and related services and supplemental aids and services be made available to the student in conformity with an IEP. 34 C.F.R. §§300.17(d), 300.101, 300.323(c); NAC §388.281(6)(e); *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).³ In this case, the student had a May 31, 2023 IEP in effect during the relevant period of this State Complaint. (Finding of Fact (FOF) #3)

The student's May 31, 2023 IEP included the related service of direct occupational therapy 60 minutes per month in the location of the special education setting. (FOF #5) As indicated in the introduction, WCSD conceded this Issue by acknowledging it failed to comply with IDEA and NAC, Chapter 388, to provide the student the related service of 60 minutes per month of direct occupational therapy in the student's IEP until November 21, 2023, when an occupational therapist was hired and started providing services to the student. (FOF #7) There were three school months prior to the provision of the required 60 minutes a month of occupational therapy to the student in the month of November 2023. (FOFs, #6, #8)

Therefore, WCSD failed to comply with IDEA and NAC, Chapter 388, in the implementation of the student's IEP in effect in the 2023/2024 school year, specifically with regard to the provision of 60 minutes a month of occupational therapy to the student for the months of August, September, and October 2023.

Issue Two:

Whether WCSD complied with IDEA and NAC, Chapter 388, and provided the student a Free Appropriate Public Education in the 2023/2024 school year; specifically, did WCSD follow procedures and apply required standards under IDEA and NAC and reach a determination that was reasonably supported by the student-specific data with regard to providing the student:

- a. A Functional Behavioral Assessment and a Behavior Plan that addresses the student's behavioral needs; and
- b. An adapted physical education assessment, goals, accommodations and specially designed instruction.

“We believe that an SEA, in resolving a complaint challenging the appropriateness of a child's educational program or services or the provision of FAPE, should not only determine whether the public agency has followed the required procedures to reach that determination, but also whether the public agency has reached a decision that is consistent with the requirements in Part B of the Act in light of the individual child's abilities and needs. *Discussion in the 2006 IDEA regulations: Federal Register / Vol. 71, No. 156 / Monday, August 14, 2006 / Rules and Regulations, Page 46601.* Citing the Federal Register, the United States Department of Education, Office of Special Education Programs (OSEP), indicated that: “The SEA may find that the public agency has complied with Part B requirements if the evidence clearly demonstrates that the agency has followed required procedures, applied required standards, and reached a determination that is reasonably supported by the child-specific data.” (*OSEP Memorandum 13-08: Dispute Resolution*)

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

Procedures Under Part B of the Individuals with Disabilities Education Act (Part B), 61 IDELR 232 (OSEP July 23, 2013)⁴

“The appropriateness of a determination regarding a student’s eligibility should be assessed in terms of its appropriateness at the time of the child’s evaluation and not from the perspective of a later time with the benefit of hindsight.” *L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 68 IDELR 121 (9th Cir. 2016), citing *Adams v. Oregon*, 31 IDELR 130 (9th Cir. 1999). Likewise, in this case, the determination whether WCSD provided the student a Free Appropriate Public Education in the 2023/2024 school year with regard to providing the student: a Functional Behavioral Assessment and a Behavior Plan that addressed the student’s behavioral needs; and an adapted physical education assessment, goals, accommodations and specially designed instruction will be based on the data available to WCSD at the time.

Behavior

In accordance with IDEA, 34 C.F.R. §300.324(a)(2)(i) and (b)(2), and NAC §388.284, in the case of a student whose behavior impedes the student’s learning or that of others, the student’s IEP Team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. NAC, Chapter 388, further requires that if the IEP Team determines that the behavior of the pupil impedes the learning of the student or other students, positive behavioral strategies, supports and interventions, or other strategies, supports and interventions must be included in the student’s IEP. NAC §388.284. NAC §388.077 defines positive behavioral strategies, supports and intervention as a process for integrating behavior analysis with person-center planning to design individualized interventions for students which focus on promoting positive changes in behavior and enhancing the overall quality of life for students in schools, homes and community environments without the use of negative or aversive means.

Relevant to this case, a Functional Behavioral Assessment and a Behavior Intervention Plan are only expressly required in the context of disciplinary removals that constitute a change of placement. 34 C.F.R. §300.530(f). That is not the case here; however, a school can elect to conduct a Functional Behavioral Assessment at any time. While the United States Department of Education declined to require positive behavioral interventions and supports be based on a Functional Behavioral Assessment, OSEP noted that a Functional Behavioral Assessment typically precedes developing positive behavioral intervention strategies.⁵

In this case, the student’s IEP Team determined that the student’s behavior impeded the student’s learning or the learning of others at the time the student’s May 31, 2023 IEP was developed. (FOF #13) The student’s May 31, 2023 IEP included a social/emotional/behavioral annual goal and specially designed instruction in the special education setting in social and/or behavioral skills during the regular and extended school year program; and the supplemental aid/service of a token economy daily to reinforce the student’s desired behaviors in both the regular and special education environment. (FOFs #5, #15)

The student’s May 31, 2023 IEP did not include the provision/implementation of a Behavior Implementation Plan. (FOFs #5, #16) However, in response to this State Complaint, WCSD provided a Positive Behavior Intervention Plan for the student. Notwithstanding the Parent’s reference to the existence of a behavior plan at the November 8, 2023 IEP Team meeting, the provided Positive Behavioral Intervention Plan was determined to lack credibility given the absence of authentication; the Plan’s reliance

⁴ This policy letter is publicly available at:

https://sites.ed.gov/idea/files/policy_speced_guid_idea_memosdcltrs_acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf

⁵ *Discussion of the IDEA regulations*: Federal Register /Vol. 71, No. 156 /Monday, August 14, 2006 /Rules and Regulations, Pg. 46683).

on a Functional Behavioral Assessment that had not been administered; and the absence of documentation that the Plan had been implemented. (FOFs #16, #22)

Documentation provided in the course of the investigation shows that by October 17, 2023, social/emotional concerns had arisen due to the student's challenge in regulating emotions, including harmful emotional outbursts with aggressive conduct towards others and frequent attempts to hit, scratch or push peers when upset. In line with these concerns, by the end of the first quarter of the 2023/2024 school year, the student had not made progress on the social/emotional/behavioral annual goal that was to be achieved in October 2023. (FOFs #18, #19)

As discussed above, the appropriateness of WCSD's determination in this State Complaint must be assessed in terms of its appropriateness at the time, rather than from the perspective of a later time with the benefit of hindsight. *L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 68 IDELR 121 (9th Cir. 2016). Therefore, it is the appropriateness of the student's May 31, 2023 IEP at the time it was developed and what WCSD did upon the escalation of the student's behaviors of concern and lack of progress in the first quarter of the 2023/2024 school year that are determinative.

On the last day of the 2022/2023 school year, the day of the development of the student's May 31, 2023 IEP, the student had shown behavioral improvement in behaviors that impacted the student's involvement in the general education classroom. (FOFs #3, #14) Upon consideration of the student-specific facts at that time, the State Complaint Investigation Team determined the IEP Team's determination to provide the student specially designed instruction in social and/or behavioral skills and the strategy of a token economy to reinforce appropriate behaviors to promote positive change, NAC §388.077, were reasonably supported by the data to address the student's social/emotional/behavioral needs (FOFs #6, #7), even though hindsight reveals it was not.

The 2023/2024 school year started August 14, 2023 (FOF #2) and, at some point, during the first quarter of the school year, things changed for the student behaviorally. While it may have only been due to the happenstance of the three-year reevaluation of the student, WCSD did take action commencing the reevaluation of the student August 29, 2023 and conducted assessments of the student, including the student's social and emotional condition on September 5, 2023. (No documentation was provided in the course of the investigation that the student's Parent requested WCSD conduct a Functional Behavioral Assessment as part of the reevaluation of the student and no Functional Behavioral Assessment was done.) (FOFs #17, #18, #22)

After the relevant time period of this State Complaint, WCSD completed the student's reevaluation and convened the student's IEP Team on November 8, 2023 to consider the results of the reevaluation, including the assessment of the student's social and emotional needs. (FOFs #20 - #22) At the November 8, 2023 IEP Team meeting, the student's Parent requested WCSD conduct a Functional Behavioral Assessment and provide the services of a behavior specialist to assist with a behavior plan. In response, WCSD provided the Parent a Prior Written Notice proposing the requested assessment be done by a BCBA and requesting parental consent. (FOFs # 22, #23)

The State Complaint Investigation Team determined that, while the student-specific data supports the Parent's concerns regarding the student's need for additional/different positive behavioral strategies, supports and interventions during the first quarter of the 2023/2024 school year, WCSD evaluation of the student's social/emotional/behavioral needs before considering and determining additional/different behavioral strategies, supports and interventions to address the student's behavioral needs was reasonably supported by the student-specific data. Further, while it may be typical to conduct a Functional Behavioral Assessment prior to the development of positive behavioral intervention strategies, it was not required to

be done in addition to the assessments WCSD conducted. 34 C.F.R. §§300.303, 300.530(f); *Discussion of the IDEA regulations: Federal Register /Vol. 71, No. 156 /Monday, August 14, 2006 /Rules and Regulations, Pg. 46683.*

Adaptive Physical Education

In accordance with IDEA, 34 C.F.R. §300.17, a Free Appropriate Public Education requires special education and related services to be provided in conformity with an IEP that meets the requirements of 34 C.F.R. §§300.320 through 300.324.

At the time of the development of the student's May 31, 2023 IEP, the student displayed decreased motor planning and an inconsistent ability to alternate feet on the stairs that impacted the student's ability to access school environments and participate in activities with the student's peers. The student's IEP included the related service of 60 minutes a month of direct physical therapy, but not adaptive physical education. (FOFs #4, #5, #24) Inconsistently, the student was provided adaptive physical education in the 2023/2024 school year for the reported reason that the adaptive physical education teacher provided it to all of the students in the student's designated placement. (FOF #28)

The student's progress in motor planning and the ability to alternate feet on stairs in the first quarter of the 2023/2024 school year had improved to such an extent that the student achieved the annual goal in the May 31, 2023 IEP addressing mobility, balance, and gross motor skills. The student was determined to fully access and participate in the school environment without difficulty and was able to complete all school-related functional activities without limitation. (FOFs #25, #26) As such, the data did not evidence the need for additional or different services to address the student's mobility, balance, and/or gross motor skills during the relevant time period of this State Complaint. Soon after the relevant time period of this State Complaint, it is of note that the student's IEP Team consistently determined that the student no longer needed direct physical therapy as a related service, but only as a consultative service, and, once again, determined the student did not require the related service of adaptive physical education. (FOF #27)

It is well-established that the determination of the special education and related services a student requires to receive a Free Appropriate Public Education is the responsibility of the student's IEP Team, including the Parent, not one individual. 34 C.F.R. §§300.321, 300.324; NAC §§388.281, 388.284. As discussed above in determining whether WCSD provided the student a Free Appropriate Public Education in the 2023/2024 school year with regard to providing the student adaptive physical education, NDE must consider whether WCSD followed procedures and applied the required standards under IDEA and NAC and reached a determination that was reasonably supported by the student-specific data with regard to providing the student.

While adaptive physical education is a service identified by the Parent in this State Complaint as required to provide the student a Free Appropriate Public Education, the Parent also recognized it was an IEP Team determination that must be documented. Whether the student required/requires adaptive physical education was/is an IEP Team decision to be reached through the review and revision of the student's IEP based on the student's present levels of academic achievement and functional performance. In this case, it was not an IEP Team decision based on the student's unique needs, but a unilateral decision made by a provider on the basis of the student being a member of a class of students in a designated placement. (FOF #29)

Therefore, WCSD did follow procedures with regard to the student's IEP Team's determination whether the student needed the related service of adaptive physical education in the development of student's May 31, 2023 IEP. However, WCSD did not follow procedures in the 2023/2024 school year by the provision of adaptive physical education to the student without reconvening the student's IEP Team to determine on

an individual basis whether the student required the related service. 34 C.F.R. §§300.17, 300.321, 300.324; NAC §§388.281, 388.284.

The State Complaint Investigation Team commends WCSD's inferred recognition of noncompliance in this regard in the Response to this State Complaint, as well as the voluntary commitment to follow standard procedures to determine if the student requires adaptive physical education and to provide training to staff at the student's school to ensure staff understands the legal requirements of services in an IEP. (FOF #29) (See further discussion in the Order of Corrective Action.)

Therefore, with regard to whether WCSD complied with IDEA and NAC, Chapter 388, and provided the student a Free Appropriate Public Education in the 2023/2024 school year; specifically, did WCSD follow procedures and apply required standards under IDEA and NAC and reach a determination that was reasonably supported by the student-specific data:

- a. *In the absence of a requirement to provide the student a Functional Behavioral Assessment and a Behavior Plan, WCSD complied with regard to addressing the student's behavioral needs.*
- b. *With regard to the related service of adaptive physical education, WCSD complied with these requirements in most regards, but not with following required procedures in the provision of a service that was not in conformity with the student's IEP.*

ORDER OF CORRECTIVE ACTION

WCSD is required to take corrective action to address the violations found in this State Complaint investigation. Specifically, WCSD's conceded failure to provide the student the related service of 60 minutes of occupational therapy for the months of August, September and October 2023 and the failure to follow required procedures with regard to the provision of the related service of adaptive physical education.

In accordance with IDEA, 34 C.F.R. §300.151(b), in resolving a State Complaint in which the State Education Agency has found a failure to provide appropriate services, the agency, pursuant to its general supervisory authority under IDEA Part B must address: (1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and (2) appropriate future provision of services for all children with disabilities.

WCSD recognizes that staffing shortages do not negate the District's responsibility to provide the services determined by students' IEP Teams to be required to provide each student a Free Appropriate Public Education. WCSD is commended for proactively offering this student and, reportedly, other students impacted by the shortages of occupational therapists compensatory education services and for taking steps to eliminate the acknowledged shortages for all related service personal by engaging in recruitment efforts. These efforts were cited as WCSD's engagement in an RFP process to recruit all related services personnel, including occupational therapists by contracting with outside companies; applying for, and being awarded a grant to address recruitment and retention activities for high-need special education licensure areas. (FOF #12) However, due to a recurrent pattern of staff shortages⁶ impacting students with disabilities in WCSD a systemic remedy is still required to address the appropriate future provision of services for all children with disabilities.

⁶ State Complaints WA092123A and WA092123C involved the shortages of personnel to provide a one-to-one aide/adult support to the named students. The NDE March 10, 2023 Order of Corrective Action and October 10, 2023 Order of Enforcement involved WCSD's continued failure since the 2022/2023 school year to timely provide preschool students with a disability a Free Appropriate Public Education due to a shortage of staffing and resources.

In determining the appropriate remedy to provide the educational benefits that likely would have accrued to the student from the provision of the required occupational therapy and the continued shortage of personnel impacting students with disabilities in WCSD, the State Complaint Investigation Team considered the Parent’s proposed resolution and WCSD’s offered compensatory services to the student and recruitment efforts undertaken to address the shortage of related service personnel.

In accordance with NRS §385.175(6), NDE requests a plan of corrective action (CAP) from WCSD within 25 WCSD business days of the date of this Report on WCSD’s plan to implement the ordered actions below, including the timeline. WCSD’s CAP must be approved by NDE prior to implementation and documentation of the completion of the approved CAP must be provided to NDE within 14 days of its completion. **(Note that the student-specific corrective action in the area of adaptive physical education includes timelines prior to the submission of the CAP that do not require approval prior to implementation.)**

Student-Specific Remedy

1. Occupational Therapy

Whether the failure to provide the services in a student’s IEP is a minor discrepancy or a material failure 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). This is an individualized determination: “A material failure to implement an IEP occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP...” and the services “...a school provides to a disabled child fall significantly short of the services required by the child’s IEP.” The student’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided. *Van Duyn v. Baker School District*, 502 F.3d 811, 107 LRP 51958 (9th Cir. 2007).

In this case, WCSD acknowledged the failure to provide the student the minutes of occupational therapy in the student’s IEP required the provision of compensatory education and committed to doing so even before the filing of this State Complaint. (FOFs #9, #10) WCSD is commended for taking that initiative and, consistently, the State Investigation Team determined that WCSD’s failure to provide 60 minutes a month of occupational therapy services to the student for three months constituted a material failure, rather than a minor shortfall. *Van Duyn v. Baker School District*, 502 F.3d 811, 107 LRP 51958 (9th Cir. 2007). As such, a student-specific remedy is required.

Compensatory education is designed to provide the educational benefits that likely would have accrued to the student from special education services if they had been supplied in the first place. This is a fact-specific determination. *Parents of Student W. ex rel. Student W. v. Puyallup School Dist.* No. 3, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994); *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005).

In compensatory education awards, there is no obligation to provide a day-for-day compensation for time missed. *Parents of Student W.* This approach for determining compensatory education is considered ‘qualitative’ in nature, rather than strictly ‘quantitative’ and requires that a compensatory education award be made not merely by establishing the amount of services which were not provided, but that an analysis be done to establish what may make the student whole for the denial of services. In this case, WCSD determined minute-for-minute compensatory services were warranted.

Unless an alternative student-specific remedy is otherwise agreed to in writing by WCSD and the Parent⁷, the CAP must provide for the following student-specific directed action and provide the timeline to enable the completion of all the action as soon as possible, but no later one year from the date of this Report: The provision of 180 minutes⁸ of direct occupational therapy services to the student.

This compensatory education/service must be in addition to the services in the student's IEP and must be provided during school breaks or before or after school. At WCSD's discretion, all or part of the compensatory service may be provided by a qualified private provider.

In the development of the CAP to be provided to NDE within 25 WCSD business days of the date of this Report, WCSD must consult with the student's Parent(s) on the appropriate means to provide this ordered compensatory education/service to meet the student's educational needs and must consider any concerns of the Parent and/or proposals.

In addition to the above required documentation of completion, WCSD is required to send documentation of the progress toward the provision of the ordered compensatory education/service to the student **no later than May 22, 2024**, unless the ordered compensatory education was previously completed and documentation provided to NDE of that completion prior to that date.

2. Adaptive Physical Education

WCSD's student-specific corrective action proposed in response to this State Complaint with regard to adaptive physical education is accepted⁹, with the addition of time periods to complete the proposed corrective action. Therefore, WCSD's CAP must include:

- a. If not already done, the issuance of a Prior Written Notice no later than 10 WCSD business days after the date of this State Complaint Report with WCSD's proposal to conduct an adaptive physical education assessment and a request for parental consent;
- b. If the Parent consents to the conduct of the adaptive physical education assessment, the conduct of the assessment no later than 20 school days after WCSD's receipt of the Parent's consent; and
- c. Convening the student's IEP Team after the completion of the adaptive physical education assessment to consider the results and revise the IEP, as necessary, no later than 15 school days after the completion of the assessment, unless another date is otherwise mutually agreed upon by the Parent and WCSD in writing.

Systemic Remedy

1. Staff Shortage

⁷ If WCSD and the Parent agree to an alternative student-specific remedy, including if the Parent agreed to the December 4, 2023 offer of compensatory services prior to the date of this Report, that written agreement must be submitted with the CAP and all required documentation in this Order applies to the implementation of the agreed-upon alternative remedy. If the written agreement was not signed by both parties prior to the issuance of the Report, this corrective action order supersedes any conceptual prior agreement, unless WCSD and the Parent agree otherwise after the issuance of the Report

⁸ The 180 minutes is based on the number of minutes the student was not provided the 60 minutes per month of direct occupational therapy for the months of August, September, and October 2023. While WCSD's offer of compensatory services to the Parent was for 150 minutes, the equivalent of two-and one-half months of occupational therapy, the student's IEP did not distinguish the required number of minutes per month for partial months or occurrence of school holidays. (FOFs #8, #11)

⁹ Based on the student's progress in mobility, balance, and gross motor skills (FOFs #25, #26), the State Complaint Investigation Team determined this student-specific corrective action is appropriate to address the needs of the student. 34 C.F.R. §300.151(b).

In the recent WCSD State Complaint Reports on WCSD's determined failure to provide one-to-one aide/adult support services in the student's IEPs due to a shortage of personnel, WCSD was ordered to revise the WCSD's policies and procedures in WCSD's Special Education Services Manual section to include the mandate to implement students' IEPs with fidelity; the procedures for schools to follow upon a determination that a shortage of personnel may prevent any service in a student with a disability's IEP to be implemented, including written notification to WCSD's special education department for assistance when the school does not have the resources to implement a student's IEP; and in the event a shortage of personnel may prevent any service in a student with a disability's IEP to be implemented, the school's consideration of all related aspects of a student's IEP. Notably, this State Complaint and the cited recent State Complaints WA092123A and WA092123C all involved staffing shortages at the commencement of the school year.

As previously discussed, WCSD has undertaken some efforts to address the personnel shortages of related services personnel, including occupational therapist, and other high-need special education licensure areas. (FOF #16) If WCSD has determined that these identified efforts will address staffing shortages of occupational therapists, NDE accepts these systemic efforts as WCSD's plan of corrective action to be included in the required CAP to correct WCSD's acknowledged shortage of occupational therapists in this State Complaint. NRS §385.175(6). If WCSD has determined additional action must be taken to address the acknowledged staffing shortage of occupational therapists, the CAP must address the plan to do so.

In order to ensure the appropriate future provision of services for all students with disabilities, 34 C.F.R. §300.151(b), and pursuant to NDE's general education supervision responsibilities, 34 C.F.R. §§300.149, 300.151(b), 300.600, corrective action is also required to verify occupational therapists and, based on the previously cited State Complaints in the 2023/2024 school year, one-to-one aides/adult support are in place for students with disabilities whose IEPs require these services at the commencement of the 2024/2025 school year. WCSD's CAP must also include:

No later than each of the following dates, September 17, 2024; October 15, 2024, and December 17, 2024, WCSD must either provide a signed statement from the Director of WCSD Office of Special Education - Office of School Leadership Student Services that any or all of the below described notices for the 2024/2025 school year have not been provided to WCSD or issued by WCSD or provide documentation as follows:

- a. Copies of any written notices provided to WCSD's Office of Special Education that a school does not have the staff resources of occupational therapists or one-to-one aide/adult support to implement a student's IEP and how each staff shortage was corrected;
- b. Copies of WCSD's written notice to any parent, with personally identifiable information of the name of the student and parent(s), of the inability of WCSD to implement a student's IEP due to personnel shortages of occupational therapists or one-to-one aide/adult support; and/or
- c. Copies of WCSD's written compensatory education/service notice(s) to any parent, with personally identifiable information of the name of the student and parent(s), of the offer of compensatory education/service due to personnel shortages of occupational therapists or one-to-one aide/adult support.

2. Adaptive Physical Education

WCSD's systemic corrective action proposed in response to this State Complaint with regard to adaptive physical education is accepted, with the addition of time periods to complete the proposed corrective action. Therefore, WCSD's CAP must include:

- a. The provision of training to the staff at the student's school, including the adapted physical education teacher who worked with the student and other students in the classroom, on the requirement to provide the individually-determined services to each student with a disability in conformity with the student's IEP. This training must include the procedures to follow if a staff member believes additional special education, related services and/or supplemental aids/services should be provided to a student with a disability; and
- b. The timeline to provide that training to be conducted as soon as possible, but no later than the end of the 2023/2024 school year.