

**COMPLAINT INVESTIGATION  
CLARK COUNTY SCHOOL DISTRICT  
(#CL101812)**

**Report Issued on 12/17/12**

**INTRODUCTION**

On 10/18/12, the Nevada Superintendent of Public Instruction received a complaint dated 10/15/12 alleging systemic violations by the Clark County School District (CCSD) with respect to its provision of services to children, ages 3-5 on the autism spectrum, specifically the provision of Applied Behavioral Analysis therapy at home (hereinafter ABA therapy at home). The provision of ABA therapy at home is also referred to as Intensive Intervention Services (IIS) by the CCSD. Since the scope of this complaint is limited to the provision of ABA therapy at home to students in this age range, the terms IIS or ABA therapy at home are used interchangeably in this report.

The Complainant alleged that the CCSD's Protocol for IIS for children on the autism spectrum has violated and continues to violate several provisions of the IDEA statute and regulations, specifically:

- 1) The CCSD's low incident disability team (DT) determines whether a student needs ABA therapy at home and the Individualized Educational Program (IEP) committee does not challenge or deviate from the recommendation of the DT;
- 2) The provision of ABA therapy at home is limited to pupils enrolled full-time in CCSD programs who attend Extended School Year (ESY);
- 3) The CCSD does not consider the provision of ABA therapy at home to be part of a pupil's free appropriate public education (FAPE);
- 4) The CCSD does not consider the option of receiving ABA therapy at home at initial IEPs;
- 5) The evaluation for the need of a pupil for ABA therapy at home is conducted after the initial evaluation and after the pupil is in school;
- 6) The evaluation for the need for ABA therapy at home is conducted by the DT rather than by the members of the original evaluation team;
- 7) The evaluation by the DT takes too long;
- 8) The recommendation by the DT that ABA therapy be provided in the home is made only at the Annual IEP;
- 9) There are no timelines from:
  - (a) The IEP committee's referral of a pupil to the DT to action by the DT;
  - (b) From the DT's initiation of evaluation to the completion of the evaluation;
  - (c) From the completion of the DT's evaluation to a recommendation to the IEP team at the Annual Review;
  - (d) From the IEP committee's inclusion of ABA therapy in the home to the initiation of those services; and

- 10) Parents must hire, train and pay for the provision of ABA therapy in the home and are reimbursed for specific amounts, often at a lower rate than what the parents must pay for the services.

It is important to note that this complaint does not include allegations and facts regarding noncompliance with respect to a specifically identified child or children; but rather alleges systemic noncompliance. (34 C.F.R. §300.153: 109 LRP 41916 (OSEP 2009)). As a systemic complaint regarding the CCSD's IIS Protocol, the scope of this investigation is limited to the issues set forth below and a determination whether the CCSD's **written** IIS Protocol and related documents (policies and procedures) are in accordance with the Individuals with Disabilities Education Act (IDEA: 20 U.S.C. §1400 et seq; 34 C.F.R. Part 300) and the Nevada Administrative Code (NAC), Chapter 388.

## **COMPLAINT ISSUES**

The allegations in this complaint, and further clarified by interviews and a review of documents raised the following issues under the jurisdiction of the NDE to investigate for the time period 10/18/11 - 10/18/12.

**Issue One: Whether the CCSD's policies and procedures with respect to the determination of the provision of IIS comply with federal and state requirements for the provision of a FAPE to pupils, specifically:**

- a) **Do the policies and procedures provide for the provision of ABA therapy at home to be part of a pupil's FAPE if a pupil requires IIS in order to receive educational benefit?**
- b) **Do the policies and procedures require the determination of whether a pupil requires ABA therapy at home to be made by the IEP committee?**
- c) **Do the policies and procedures require the decision of whether a pupil requires IIS to be individually determined or is there a pre-condition that:**
  - **Limits it to pupils who are enrolled in a full-day CCSD instructional program and attend ESY; and/or**
  - **Limits it to pupils after the initial provision of special education?**

**Issue Two: Whether the CCSD's policies and procedures comply with federal and state requirements to ensure that the evaluation/reevaluation of each pupil is sufficiently comprehensive to identify all of the pupil's special education and related services needs to, if appropriate, enable the IEP committee to determine whether the pupil requires IIS.**

**Issue Three: Whether the CCSD's policies and procedures comply with federal and state requirements with respect to timelines for the initial evaluation or reevaluation of pupils, specifically with respect to collecting information to**

assist the pupil's IEP committee in determining whether IIS must be included in the pupil's IEP.

**Issue Four:** Whether the CCSD's policies and procedures provide for the IEP committee's timely consideration of the results of any evaluation/reevaluation with respect to the need for IIS.

**Issue Five:** Whether the CCSD's policies and procedures comply with federal and state requirements to provide a FAPE to pupils for whom it was determined by the IEP team that IIS was necessary, specifically with respect to CCSD's:

- a. Provision of IIS at no cost to parents and the availability and training of personnel to provide IIS; and
- b. Provision of IIS in accordance with the pupil's IEP as soon as possible following the development of the IEP.

### **PERSONS PROVIDING INFORMATION**

The investigation team reviewed information received from the following people:

- Complainant
- Compliance Officer
- DT Coordinator
- Director of Psychological Services
- School Psychologist

### **DOCUMENTS REVIEWED**

The documents reviewed by the investigation team included the following:

- CCSD's *Intensive Intervention Services Protocol* dated 7/19/12 (IIS Protocol)
- Parent Packet for IIS dated 7/19/11
- CCSD's *Special Education Procedures Manual* dated 3/21/12 (Procedures Manual)
- CCSD's *Frequently Asked Questions re: Autism Consultation Rev. 06.11*
- *Sense and Nonsense in the Behavioral Treatment of Autism: It Has to Be Said* by the Autism Partnership
- *Intensive Behavioral Treatment for Children with Autism: Four-Year Outcome and Predictors* by G. O. Sallows and T.D. Graupner
- *What Educators Need to Know About Autism-2010* paper presented by CCSD personnel

The investigation team also reviewed the following authorities:

- NAC Chapter 388
- IDEA Regulations, IDEA: 20 U.S.C. §1400 et seq; and 34 C.F.R. Part 30034 C.F.R. Part 300 and Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46540, 46549 (Aug. 14, 2006)

- Various United States Department of Education, Office of Special Education Programs (OSEP) Policy Letters cited herein: 33 IDELR 249 (OSEP 2000); 37 IDELR 126 (OSEP 2002)); 112 LRP51286 (OSEP 2012)
- Ninth Circuit Court of Appeals decisions

## **FINDINGS OF FACT**

### **General Findings of Fact**

As described by CCSD, ABA instruction is based on two principals of learning: 1) behaviors that are reinforced will increase over time, and 2) behaviors that are not reinforced will decrease over time. Discrete trial teaching (DTT) is a technique used in conjunction with ABA instruction, where complex skills are broken down into smaller parts. (*What Educators Need to Know About Autism* p. 17, VI.1)

The CCSD utilizes ABA instruction as its teaching methodology in its autism programs when the pupil does not require another method or intervention (*What Educators Need to Know About Autism* p. 17, VI.2 and Compliance Monitor). ABA instruction, ABA methodology, and ABA therapy are synonymous terms. (Compliance Monitor, Review of the documents by the Complaint Investigation team)

IIS employs the same methodology as ABA therapy in the classroom with the exception that IIS is delivered exclusively in the home and only in a 1:1 situation. (IIS Protocol, p. 1; Compliance Monitor) The CCSD's IIS Protocol for the assessment and provision of IIS that was in effect during the time period of this complaint is dated July 19, 2011.

### **Specific Findings of Fact**

#### **Issue One—FAPE, IEP Committee Determinations and Individual Determination**

The following sets forth the CCSD's policies and procedures with regard to the determination of a pupil's need for IIS:

1. "IIS is not a mandated provision of IDEA; rather it is expected that a Free and Appropriate Public Education (FAPE) will occur in the classroom with IIS being a short term, supplementary service designed to provide a significant benefit to a child in a limited amount of time." (IIS Protocol, p. 1)
2. "Upon completion of the review process [by the DT] the DT will meet with the IEP team at an Annual Review IEP to review the results and present recommendations. The IEP team may accept or decline these recommendations [of the DT]..." (IIS Protocol, p. 3)
3. "If the IEP team determines that IIS is required, they will delineate a specific number of hours per month to be completed within a 12 month time period." (IIS Protocol, p. 3)

4. Once the results of the reevaluation are available, an IEP meeting is convened and designated as the annual IEP, even if the previous annual IEP was held a month earlier. (DT Coordinator)
5. The IEP Team will "...identify the behavioral, social, and/or communication targets of IIS...." (IIS Protocol, p. 3)
6. Any changes made to IIS must be done in an Annual Review with input from the DT. (IIS Protocol, p.3)
7. The provision of IIS is written in the IEP under supplemental services. There is an asterisk next to the goals and objectives that are to be targeted during IIS. Although IIS is written in a pupil's IEP when it is determined it will be provided, the inclusion in the IEP does not connote that it is part of the pupil's FAPE. (Compliance Monitor, Director of Psychological Services)
8. In order for parents to be reimbursed for IIS, the pupil must attend a full-day CCSD instructional program and attend Extended School Year (ESY). (IIS Protocol. pp. 2 and 5). In practice, the CCSD reports it has made exceptions in the past to the requirement for full-time enrollment prior to provision of IIS. (Compliance Monitor, School Psychologist, DT Coordinator)
9. There is an exception to the mandatory DT assessment process: "A student exhibiting behaviors so extreme that they may necessitate immediate intensive intervention services for the safety of self and others may be considered for IIS prior to completion of the required initial assessment, based on recommendations from the IIS Deliberation Team." (IIS Protocol, p. 5)
10. While not specified in the policies and procedures, the CCSD stated that it would consider evaluating the need for IIS for a pupil who was not yet enrolled full time in a CCSD program. (Compliance Monitor, School Psychologist, DT Coordinator)

## **Issue Two—Comprehensiveness of Evaluations/Reevaluations with Regard to Need for IIS**

The following sets forth the CCSD's policies and procedures with regard to the conduct of evaluations and reevaluations generally and, specifically, the assessment for IIS:

11. "In conducting the evaluation, the district must, at a minimum: a. Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining: • whether the student is a student with an IDEA eligibility; and • the content of the student's IEP, including information related to enabling the student to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities)." (Procedures Manual 5.2.2.a.)

12. “When Intensive Intervention Services are requested, the IEP team will submit a referral to the Intensive Intervention Deliberation Team (DT) to document this request. The DT will consider the referral [for IIS] and determine if an assessment will be completed. Assessments may include, but is not limited to, student observations, data collection, analysis of data, and other determining educational factors impacting student acquisition of behavioral, social, and/or communication skills as deemed appropriate. Following completion of this summary, the assigned DT member will compile a report containing analysis of review results and include specific recommendations for the student. Recommendations may include referral for other services, specific programming recommendations, staff training report, or parent training in addition to recommendations for IIS.” (IIS Protocol, pp. 2-3)
13. “The DT will consider the referral [for IIS] and determine if a review of records and data will be completed. This review may include, but is not limited to, student observations, data collection, analysis of data, and other determining educational factors impacting student acquisition of behavioral, social, and/or communication skills as deemed appropriate. Following completion of this summary, the assigned DT member will compile a report containing analysis of review results and include specific recommendations for the student. Recommendations may include referral for other services, specific programming recommendations, staff training report, or parent training in addition to recommendations for IIS.” (IIS Protocol, pp. 2-3)
14. A version of the CCSD protocol on that same date uses the word “assessment” instead of review: “The DT will ... determine if an assessment will be completed. Assessments may include, but is not limited to, student observations, data collection, review and analysis of data, and other assessment as deemed appropriate. Following completion of the assessment ...the assigned DT member will compile a report containing analysis of assessment and including specific recommendations for the student.” (Variation-IIS Protocol, pp. 2-3, Complaint Attachment)
15. “As previously noted, IIS is allocated for the period of one year, from Annual Review date to Annual Review date. Any interim change in IIS reimbursement is subject to a new assessment of the student’s progress and need for supplementary services. A new assessment must be completed prior to the student’s Annual Review date.” (IIS Protocol, p. 3)

### **Issue Three -Timelines for Assessment for IIS**

The following set forth the policies and procedures with regard to timelines for assessments for the need for IIS.

16. “Both initial evaluations and reevaluations must be completed within 45 school days, from the date of securing informed parental consent (CCF 555) or Notice of No Additional Assessments Information Needed (CCF 607) , whichever is appropriate, through completion of the eligibility determination. The 45-day timeline applies to those days when the student is scheduled to attend school for a standard instructional day (i.e.,

not summer vacation, track breaks, holidays or ESY". (Procedures Manual, Section 5.4.4. a)."...Delay should only occur in exceptional cases and the documentation for the justification should conform to the codes used in the District's student information system." (Procedures Manual, Section 5.4.4. b)

17. Referrals for assessment for IIS to the DT must be submitted at the beginning of the school year for annual reviews (or in the previous year if the annual review is August – October) and by March 15 for an initial review for IIS. Other than the time period to submit a referral for assessment for IIS, there is no timeline for the completion of the assessment for IIS in the CCSD policies and procedures. (IIS Protocol, p. 4)
18. The March 15th date is chosen because any time later than the March 15th deadline prevents the reevaluation from being concluded prior to the end of the school year in the student's current setting. (Compliance Monitor, DT Coordinator)

#### **Issue Four—Timely Consideration of the Results of the Reevaluation**

19. There is no timeline in the IIS Protocol for the IEP committee to consider the results of the DT assessment for IIS within a specific number of days. (Review of the IIS Protocol by Complaint Investigation Team)

#### **Issue Five—Provision of Services**

**The following sets forth the policies and procedures with respect to the provision of IIS to the student, specifically with regard to providing services at no cost to the parents and with regard to the timing of the provision of services.**

20. "If the IEP Team determines that IIS is warranted, only a CCSD-approved provider will be subject to reimbursement. CCSD will provide parents with a list of CCSD-approved providers. Parents bear the responsibility of making arrangements to implement IIS with the provider. Working with the provider, the parents are obligated to hire and train all staff working in their student's IIS, and be present or have a designee present during all intervention sessions:

Upon the approval of a home program component of IIS, parents will:

- a. Receive a list of approved providers from the Office of Compliance and Monitoring
- b. "Contact agency providers to discuss their abilities to meet their child's needs
- c. Select an agency and notify the school upon their selection and acceptance
- d. Advertise, interview,
- e. Schedule tutors, initial workshop, and related meetings.
- f. Submit receipts for reimbursements to the Office of Compliance and monitoring no later than 90 days after services received.

- g. Supply school with monthly workshop reports from private providers
- h. Supply private providers with all current IEPs.
- i. Parent or designee (adult 18 years or older, not a tutor working with the student) must be present in the home during all sessions.”

(IIS Protocol Manual pp. 5-6 and Parent Packet, p. 1)

- 21. In practice, the CCSD makes provisions, upon parental request, to provide and pay for the providers directly, using their own teachers. (Compliance Monitor) This is not reflected in the IIS Protocol.
- 22. There is no timeline in the IIS Protocol for the commencement of services once IIS is designated as a service in the IEP. (Review of the IIS Protocol by Complaint Investigation Team)
- 23. As soon as an IEP is completed, the CCSD sends the information to the parents on the provision of IIS and the “pace” of implementation is “then determined by parents” so the commencement of services varies. (DT Coordinator)

### **CONCLUSIONS OF LAW AND REASONS**

As a preliminary matter, it must be noted that throughout this investigation, CCSD personnel cited practices that were exceptions to some of the policies in the IIS and related documents. While these practices are noted in the discussion below, as stated previously, this complaint and investigation are with regard to the CCSD’s written policies and procedures, and the conclusions of law reflect that scope.

**Issue One: Whether the CCSD’s policies and procedures with respect to the determination of the provision of IIS comply with federal and state requirements for the provision of a FAPE to students, specifically:**

- a) **Do the policies and procedures provide for the provision of ABA therapy at home to be part of a student’s FAPE if a student requires IIS in order to receive educational benefit?**
- b) **Do the policies and procedures require the determination of whether a student requires ABA therapy at home to be made by the IEP committee?**
- c) **Do the policies and procedures require the decision of whether a student requires IIS to be individually determined or is there a pre-condition that:**
  - **Limits it to students who are enrolled in a full-day CCSD instructional program and attend ESY; and/or**
  - **Limits it to students after the initial provision of special education?**

**a. IIS part of a student’s FAPE?**

This complaint concerned an allegation that the CCSD does not consider the provision of IIS to be part of a student's FAPE.

The term "FAPE" means special education and related services that have been provided at public expense; under public supervision and direction and without charge; meet the standards of State Educational Agency; include an appropriate preschool, elementary or secondary school education; and are provided in conformity with IEP. (34 C.F.R. §300.17)

It is uncontested that the CCSD's policies and procedures regarding the provision of IIS at issue in this complaint exclude the provision of IIS as an aspect of any student's FAPE. (Finding of Fact numbers 1, 2, and 7). In accordance with the IDEA and the NAC, the determination of the specific special education and related services and supplementary aids and services a student requires must be made on an individual basis by an IEP committee. (NAC §388.284(1)(c); 34 C.F.R. §300.320(a)(4)). This individualized determination is based on the child's unique needs. (58 IDELR 168 (OSEP 2011); 33 IDELR 249 (OSEP 2000); 37 IDELR 126 (OSEP 2002); Final Rule, Analysis of Comments and Changes, Federal Register / Vol. 71, No. 156 / Monday, August 14, 2006 / Rules and Regulations, pp. 46540, 46549)

Consistent with these requirements, "...decisions regarding the provision of services that are appropriate for an individual child must be based on the child's unique needs, and not on the disability category in which the child is classified." (33 IDELR 249 (OSEP 2000); 37 IDELR 126 (OSEP 2002) Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46540, 46549 (Aug. 14, 2006)). Therefore, the provision of IIS may be required for one student on the autism spectrum as a part of the student's FAPE, but the determination of whether a child requires it to receive educational benefit may also not be based on the child's disability category.

The blanket exclusion in the CCSD's policies and procedures regarding the provision of IIS as an aspect of a student's FAPE inhibits an IEP committee's full consideration of the educational needs of each child with disabilities and is a facial violation of the IDEA's individualization requirement. (17 EHLR 419 (OSEP 1990); Hoeft v. Tucson Unified School District (967 F.2d 1298; 19 IDELR 1 (9th Cir. 1992))

*Therefore, the complaint investigation team concluded that the CCSD's policies and procedures fail to comply with federal and state individualization requirements due to the blanket exclusion of IIS as a required service if a student requires IIS in order to receive FAPE.*

#### **b. Determination of need for IIS by the IEP committee?**

This complaint included an allegation that the DT determines whether a student needs IIS and the IEP committee does not challenge or deviate from the recommendation of the DT.

State regulations at NAC §388.281(2) state that "The individualized educational program for a student must be developed, reviewed and revised by a committee..." (See also 34 C.F.R. §§300.320 – 300.321)

In this case, the CCSD's policies and procedures regarding the provision of IIS provide for the DT to bring the results and recommendations to the IEP committee and for the IEP team to accept or decline the recommendations. (Finding of Fact number 2) If the IEP committee determines that IIS is needed, the IEP team determines the specific number of hours per month to be provided to the student. (Findings of Fact number 3) There was no documentation presented by the Complainant to support the allegation that the IEP committee does not make the determination whether a student requires IIS.

*Therefore, the CCSD's policies and procedures are in compliance with federal and state law with respect to the obligation of the IEP team to determine whether a student needs IIS.*

### **c. Provision of IIS individually determined or pre-conditions?**

This complaint concerned allegations that the provision of IIS was limited to students enrolled full-time in CCSD programs who attend ESY and would not be considered at an initial IEP meeting. While the Complainant indicated in the facts and argument related to this allegation that full-time instructional programs for children on the autism spectrum is always a self-contained classroom in the CCSD, this issue is not before the complaint investigation team.

It is uncontested that the CCSD's policies and procedures regarding the provision of IIS require a student to attend a full day CCSD instructional program and attend ESY to be considered for IIS. (Finding of Fact number 8) It is also uncontested that the CCSD's policies and procedures do not allow for the consideration of a student's need for IIS at a student's initial IEP meeting even if the IEP committee determines that the student needs ABA therapy both at school and at home. (Findings of Fact numbers 4-6) While the CCSD indicated that it would consider evaluating the need for IIS for a pupil prior to full time enrollment (Finding of Fact number 10), this exception is not included in the IIS policies and procedures. The CCSD also indicated that it has provided IIS in the past to students who were not enrolled full-time. (Finding of Fact number 8) However, no documentation was provided to support these practices, and it is counter to the CCSD's written IIS policies and procedures.

As discussed above, the determination of the specific special education and related services and supplementary aids and services a student requires and the student's goals must be made on an individual basis by an IEP committee. (NAC §388.284(1)(c); 34 C.F.R. §300.320(a)(4); 58 IDELR 168 (OSEP 2011)) It is the child's unique needs that are the basis for an IEP committee's decisions regarding the provision of services that are appropriate for an individual child. (33 IDELR 249 (OSEP 2000); 37 IDELR 126 (OSEP 2002) Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46540, 46549 (Aug. 14, 2006)).

The CCSD's policies and procedures regarding the provision of IIS that establish an eligibility condition of enrollment in a full-day instructional program and ESY and the exclusion of IIS at the initial provision of special education are categorical exclusions that violate the individually-oriented requirement in the IDEA and NAC. (NAC §388.284(1)(c); 34 C.F.R. §300.320(a)(4); 58 IDELR 168 (OSEP 2011))

*Therefore, the complaint investigation team concluded that the CCSD's policies and procedures*

*failed to comply with federal and state requirements in that the provision of IIS to students is limited to students enrolled in full-day instructional programs and ESY and exclude the provision of IIS at the initial provision of special education and related services rather than requiring the decision of whether a student requires IIS to be individually determined.*

**Issue Two: Whether the CCSD’s policies and procedures comply with federal and state requirements to ensure that the evaluation/reevaluation of each student is sufficiently comprehensive to identify all of the student’s special education and related services needs to, if appropriate, enable the IEP committee to determine whether the student requires IIS.**

**The discussion relevant to Issue Two has been consolidated with the discussion of Issue Three below.**

**Issue Three: Whether the CCSD’s policies and procedures comply with federal and state requirements with respect to timelines for the initial evaluation or reevaluation of students, specifically with respect to collecting information to assist the student’s IEP committee in determining whether IIS must be included in the student’s IEP.**

This complaint concerned an allegation that the evaluation for the need of a student for IIS is conducted after the initial evaluation and after the student is in school and is conducted by the low incident disability team (DT) rather than by the members of the original evaluation team. In addition, the complaint included an allegation that the evaluations were not completed in a timely manner.

NAC §388.340(1)(a) and (b) requires that, in conducting an evaluation, the public agency shall “...use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information concerning the student, including, without limitation, information provided by the parent that may assist in determining: (a) Whether the student is a student with a disability; and (b) The educational needs of the student and the content of the student’s individualized educational program, including, without limitation, information related to enabling the child to be involved in and progress in the general education curriculum or, for preschool children, to participate in appropriate activities.” (In accord: 34 C.F.R. §300.304(b)(1)(ii)) NAC §388.387 includes additional provisions for the assessment of students with autism for purposes of eligibility).

As described in the introduction, IIS is the provision of ABA therapy in the home. Therefore, relative to the evaluation or reevaluation of a student, the focus is whether the evaluation/reevaluation process is sufficiently comprehensive to enable the IEP committee to determine whether the content of the IEP must include the provision of ABA therapy in the location of the student’s home.

CCSD’s general evaluation provisions are consistent with the NAC and the IDEA with regard to the use of a variety of assessment tools and strategies to gather relevant functional,

developmental, and academic information about the student that may assist in determining the content of the student's IEP. (Finding of Fact number 11) However, the CCSD has a separate assessment process to determine whether the content of the IEP must include the provision of ABA therapy in the location of the student's home. (Findings of Fact 12-15) It is that process that is at issue in this complaint.

As discussed in Issue One, the CCSD does not allow for the provision of IIS until after the development of the student's initial IEP. The IIS assessment process is consistent with that pre-condition; that is, the student must be in a full-day instructional program and ESY to be considered for an assessment for IIS. As such, CCSD has an impermissible pre-condition on the assessment of a student at the initial evaluation that is contrary to the requirement that the initial evaluation be a full and individual evaluation. (34 C.F.R. §300.301)

While the several versions of the CCSD protocol on July 19, 2011 utilize varying terms to describe the IIS assessment process after the initial assessment, it is not the terms, but rather the process of data collection that is definitive. (Findings of Fact 13 and 14) Specifically, does the IIS assessment process constitute a reevaluation of the student?

In accordance with IDEA, 34 C.F.R. §300.304(b)(1), evaluation procedures use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, that may assist in determining the content of the child's IEP. As part of a reevaluation, the IEP committee reviews existing data and determines the need to collect additional data. (NAC §388.336; 34 C.F.R. §300.305). If additional data is necessary to determine the educational needs of the child, including whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP, the agency must administer such assessments and other measures to produce the data. (NAC §388.336; 34 C.F.R. §300.305)

The CCSD's policies and procedures regarding the provision of IIS provide that when there is a request for IIS, the IEP committee will refer this request to the DT. (The complaint investigation team did note the limited exception to the mandatory IIS assessment process for students with extreme behaviors that raise issues of safety. (Finding of Fact number 9)

After the IEP committee's referral, the DT will review existing data and collect additional data if the DT determines it necessary. (Finding of Fact numbers 12-14) While it is within the CCSD's discretion to determine which qualified personnel conduct the assessment to collect data to assist the IEP committee to determine whether a student's IEP should be amended to include ABA therapy in the student's home, this collection of data by the DT is a reevaluation. As such, the reevaluation for IIS must comply with all of the procedures in the NAC and the IDEA and the IIS Protocol and related documents do not evidence this requirement.

NAC §388.337(a) states that an initial evaluation shall be conducted within forty-five school days after the parent provides informed written consent. As described above, the CCSD has an impermissible blanket pre-condition that does not permit the assessment of a student at an initial evaluation in accordance with the individualized evaluation procedures under the NAC and the IDEA. The conduct of the initial evaluation of a student to collect data for the IEP committee to

determine whether the student's IEP should include the provision of ABA therapy in the home would be subject to the timeline in NAC §388.337.

Neither the IDEA nor the NAC provide a specific timeline for the conduct of reevaluations. The OSEP generally provides guidance on IDEA required processes without a timeline as being required to be completed in a reasonable period of time. (See for example: Final Rule, Analysis of Comments and Changes, Federal Register / Vol. 71, No. 156 / Monday, August 14, 2006 / Rules and Regulations, p. 46728) The CCSD's local procedures include the same timeline for initial evaluations and reevaluations: 45 school days. (Finding of Fact number 16) Therefore, the absence of a timeline alone in the CCSD's IIS policy does not violate the IDEA and the NAC since the CCSD's general procedures, including the cited timeline would apply to the evaluation/reevaluation of a student to determine the contents of the student's IEP, specifically whether ABA therapy should be provided in the students' home.

However, the CCSD's policies and procedures regarding IIS also limit the referral for assessment to specific times of the year without consideration of the unique needs of a child. The CCSD reported that the March 15<sup>th</sup> date was to allow for the conduct of the evaluation in the child's current setting (Finding of Fact numbers 17-18). However, the complaint investigation team was not provided any other information to support the establishment of the blanket rule on dates for the initiation of an evaluation that would be permissible under the IDEA or NAC (such as requiring assessments to be conducted in accordance with the instructions of the producer of the assessments (34 C.F.R. §300.304). As discussed previously, the establishment of this blanket rule runs counter to the individualization requirement in the IDEA and the NAC and is impermissible.

*Therefore the complaint investigation team concluded that with respect to collecting information to assist the IEP committee in determining whether IIS must be included in the IEP:*

- *the CCSD's policies and procedures failed to comply with federal and state requirements with regard to the conduct of initial evaluations and reevaluations; and*
- *the CCSD's policies and procedures failed to comply with federal and state requirements with respect to the timeline for the reevaluation of a student for that purpose due to the blanket exclusion on the date to commence the reevaluation process for IIS, and associated timelines.*

**Issue Four: Whether the CCSD's policies and procedures provide for the IEP committee's timely consideration of the results of any evaluation/reevaluation with respect to the need for IIS.**

This complaint concerned allegations that the results of the DT evaluation and any recommendation by the DT that IIS be provided are made only at the Annual IEP and that there are no timelines from the completion of the DT's evaluation to a recommendation to the IEP committee at the Annual Review.

Pursuant to the IDEA and NAC, each public agency must ensure that a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services. (34 C.F.R. §300.323(c); NAC§388.281(13)(a))

As discussed above, the CCSD's blanket rule prohibiting the consideration of IIS at the initial IEP is impermissible as contrary to the required individualized consideration of a student's needs in the IEP procedures under the NAC and the IDEA. The timeline for the convening of the initial IEP meeting after the conduct of the initial evaluation of a student to, as appropriate, collect data to allow the IEP committee to determine whether the student's IEP should include the provision of ABA therapy in the home would be subject to this timeline.

In accordance with the IDEA, 34 C.F.R. §300.324(b), a student's IEP committee must review a student's IEP periodically, but not less than on an annual basis to determine whether the annual goals for the child are being achieved. In addition, the IEP committee must revise the IEP, as appropriate, to address any lack of expected progress toward the annual goals and the results of any reevaluation. While there is no timeline in the IDEA or NAC for the convening of the IEP committee to review the results of the reevaluation, as discussed previously, OSEP has interpreted such an action as requiring its completion in a reasonable period of time.

It is recognized that the CCSD's practice is to conduct any review of an IEP for the determination of the need for IIS as an "Annual Review", and this Annual Review IEP meeting can even occur shortly after the regularly occurring annual review of a student's IEP. (Finding of Fact number 4) However, as stated previously, this investigation is with regard to the CCSD's policies and procedures.

The IIS Protocol neither defines this term "Annual Review" consistent with the periodic review cited in the practice nor otherwise establishes a timely review after a reevaluation. The IIS Protocol includes non-specific timelines for the convening of the IEP committee in the interim period, such as "once the results of the reevaluation are available" and "upon completion of the review process" by the DT. (Findings of Fact numbers 2-6) In addition, some aspects of the IIS Protocol conflict with the stated practice. (Findings of Fact number 15)

Therefore, notwithstanding the CCSD's practice of conducting IEP meetings prior to the original annual review date, the IIS Protocol does not reflect this practice. Further, the IIS Protocol does not otherwise establish a timeline for the IEP committee to timely determine the need for IIS in accordance with the periodic review requirement in 34 C.F.R. §300.324(b) after the conduct of a reevaluation for that purpose. (Finding of Fact number 19)

*Therefore, the complaint investigation team concluded that the CCSD's policies and procedures failed to comply with federal and state requirements with regard to the IEP committee timely considering the results of an evaluation/re-evaluation with respect to the need for IIS.*

**Issue Five: Whether the CCSD's policies and procedures comply with federal and state requirements to provide a FAPE to pupils for whom it was determined by the IEP team that IIS was necessary, specifically with respect to CCSD's:**

- a. Provision of IIS at no cost to parents and the availability and training of personnel to provide IIS; and**
- b. Provision of IIS in accordance with the pupil's IEP as soon as possible following the development of the IEP.**

### **Cost, Availability of Personnel and Training, and Timely Initiation of Services**

This complaint concerned allegations that parents must hire, train, and pay for the provision of IIS and are reimbursed for specific amounts (often at a rate lower than what the parents must pay for the services), and the services are not timely initiated.

As discussed above, the CCSD's policies impermissibly exclude IIS as being a service to provide a student a FAPE. If IIS is required in order to provide a student a FAPE, the services must be provided at no cost to the parents and the timely implementation of the service, including the provision of qualified personnel is the responsibility of the CCSD, not the parent. (34 C.F.R. §§300.156 and 300.201)

Notwithstanding the CCSD's blanket exclusion of IIS as a service to provide a student a FAPE, the CCSD includes IIS in a student's IEP under 'supplemental services' when it is determined the student will receive IIS. The designation of the IIS also denotes the targeted goals and objectives. (Finding of Fact number 7) This designation of the goals and objectives is consistent with 34 C.F.R. §300.324(a)(4) that requires the IEP to include the statement of the special education and related services and supplementary aides and services that will be provided to enable the student to advance appropriately toward attaining the annual goals.

It is well established that "...entitlement to FAPE under the Act includes the provision of special education and related services in accordance with an IEP." (Final Rule, Analysis of Comments and Changes, Federal Register / Vol. 71, No. 156 / Monday, August 14, 2006 / Rules and Regulations, p. 46664). Further, the NAC §388.281(6)(g) requires a public agency to "provide the services and instruction deemed necessary for the pupil by the [IEP] committee." In accordance with the NAC §388.281(6)(g) and the IDEA, regardless of the intent of the CCSD, CCSD's inclusion of IIS in the student's IEP triggers the requirement of the CCSD to provide the services in accordance with the IDEA and NAC.

Pursuant to the NAC §388.281(6)(g), the CCSD must provide the services and instruction deemed necessary for the pupil by the committee. It is uncontested that the CCSD's IIS Protocol requires the parents of a student receiving IIS to make all arrangements for the provision of IIS, including locating and selecting the providers of IIS, scheduling the providers, and ensuring the providers have all required information. The parents are also responsible for the payment to the providers of IIS and are later reimbursed by the CCSD for approved costs. (Finding of Fact number 20) (The complaint investigation team was not provided any student specific facts regarding the alleged detrimental impact of the standard of "approved costs".)

In practice, the CCSD makes provisions, when requested, to provide and pay for the providers directly, using their own teachers. (Findings of Fact number 21) This is not reflected in the IIS

Protocol. As discussed above, the IIS Protocol puts the onus on the parents to make the arrangements and implement the service. Even if the CCSD has a practice that allows a parent to request assistance from the CCSD in the provision of services, the initiative is impermissibly on the parents and, further, the IIS Protocol and related documents do not reflect this practice. (Findings of Fact numbers 21-23) The CCSD's policies and procedures are not consistent with the requirement under the IDEA and the NAC that the public agency provide the services and instruction in accordance with the student's IEP and at no cost.

As soon as possible following development of the IEP, special education and related services must be made available to a student in accordance with the student's IEP. (34 C.F.R. §300.323(c); NAC§388.281(13)(a)). After the conduct of an initial evaluation of a student to collect data for the IEP committee to determine whether the student's IEP should include the provision of ABA therapy in the home, the timeline for the initiation of services following the initial IEP meeting would be subject to this timeline. In addition, the NAC §388.281(6)(e) requires not only the initial IEP to be implemented as soon as possible after the IEP meeting consistent with the IDEA, 34 C.F.R. §300.323(c), but requires that all (emphasis added) IEPs be implemented as soon as possible following the IEP meeting.

The CCSD's policies and procedures do not include a timeline for the commencement of services once IIS is designated as a service in the IEP. (Finding of Fact number 20) On the contrary, the implementation of IIS designated in a student's IEP is determined by the "pace" of the parent's commencement of the service. (Finding of Fact number 23). As such, the CCSD does not have policies and procedures in place to ensure that when the IEP committee includes IIS in a student's IEP, the services are implemented as soon as possible after the IEP meeting.

*Therefore, the complaint investigation team concluded that the CCSD's policies and procedures failed to comply with federal and state requirements that when IIS is designated as a service in a student's IEP that the service will be provided at no cost to the parents and as soon as possible following a student's IEP meeting.*

## **ORDER FOR CORRECTIVE ACTION**

CCSD is required to take corrective action to address the violations found in this complaint investigation. Specifically, the CCSD's policies and procedures failed to comply with federal and state requirements as follows:

1. Having a blanket exclusion of IIS as a required service if a student requires IIS in order to receive FAPE.
2. Limiting the provision of IIS to students enrolled in full-day instructional programs and ESY and excluding the provision of IIS at the initial provision of special education and related services rather than requiring the decision of whether a student required IIS to be individually determined.
3. Conducting initial evaluations and reevaluation with respect to the need for IIS.
4. Timely considering the results of an evaluation/re-evaluation with respect to the need for IIS as well as its establishing a blanket exclusion on the date to commence a reevaluation

of the need for IIS and associated timelines.

5. Providing IIS as soon as possible following a student's IEP meeting and at no cost to the parents.

### **Professional Development/Training**

Within 30 days of the receipt of this report, the district must develop and submit to the NDE a proposed Correction Action Plan (CAP). The proposed CAP must:

1. Include a **timeline and plan** to review and revise, as necessary, district policies and procedures with regard to providing IIS to students to make those policies consistent with the findings of this Complaint Investigation
2. Provide professional development on the revised policies and procedures referenced in #1 above to the teachers and administrators in the district who are involved in assessing students who might need IIS and providing services to those students who are determined to need IIS.

The CAP must be approved by the NDE prior to implementation. Following adoption of the revised policies as referenced above, a copy must be provided to the NDE within 30 days of completion.