

**COMPLAINT INVESTIGATION
WASHOE COUNTY SCHOOL DISTRICT
(#WA060413)**

Report Issued on 8/1/13

INTRODUCTION

On 6/04/13, the Nevada Superintendent of Public Instruction received a Complaint dated 6/04/13 from a parent (Parent or Complainant) alleging violations in the special education program of a student with disabilities attending the Washoe County School District (WCSD). The Parent alleged that the WCSD did not implement the student's 12/17/12 individualized educational program (IEP) when it did not provide two of the accommodations in the IEP, specifically: 1) instruction and practice in constructing written products measured against the Nevada Department of Education (NDE) high school proficiency writing exam rubric, biweekly from 12/18/12 – 6/05/13 in the special education setting and 2) a peer buddy to compare assignments, due date notes and classroom information, in each class, from 12/18/12 – 6/05/13 each school day in the general education setting. The Parent also alleged that even though the WCSD knew that the above provisions of a free appropriate public education (FAPE) were not delivered, it did not provide the Parent a prior written notice (PWN) with regard to the decision not to provide the above referenced accommodations and initiate and conduct additional meetings of the IEP Team to revise the IEP when the WCSD failed to provide the agreed upon accommodations.

COMPLAINT ISSUES

The allegations in the Complaint and further clarified during the investigation, raised the following issues under the jurisdiction of the NDE to investigate:

Issue One: Whether WCSD complied with the requirements of the IDEA and the NAC, Chapter 388, with regard to implementing the student's 12/17/12 IEP from 12/18/12–6/4/13 with respect to the provision of certain accommodations, specifically:

- a. Instruction and practice in constructing written products measured against the NDE high school proficiency writing exam rubric biweekly in the special education setting (hereinafter, Practice Testing Accommodation);**
- b. A peer buddy provided to compare assignments, due date notes, and classroom information in each class, each school day in the general education setting (hereinafter, Peer Buddy Accommodation)?**

Issue Two: If any failure to provide the required Practice Testing Accommodation and Peer Buddy Accommodation in Issue One was a result of the WCSD's proposal or refusal to change these provisions in the student's IEP, whether the WCSD complied with the requirements of the IDEA and the NAC, Chapter 388, to:

- a. Conduct an IEP meeting and review and revise the student's IEP as appropriate; and**
- b. Provide the parents with a PWN within a reasonable time before any proposal to change the provision of a FAPE in the 12/17/12 IEP?**

PERSONS PROVIDING INFORMATION

The investigation team reviewed documents and information received from the following individuals:

- Complainant
- Special Education Area Administrator
- Case Manager
- Program Aide
- Principal

DOCUMENTS AND RECORDINGS REVIEWED

The documents and recordings reviewed by the investigation team included the following:

1. Complaint
2. Progress Reports for 2nd 3rd and 4th quarters of the 2012/2013 school year
3. Emails dated 2/26/13, 5/27/13, 6/12/13 and 6/13/13
4. 12/17/12 IEP
5. 6/3/13 IEP
6. WCSD 2012/2013 Academic Calendar (Academic Calendar)
7. Recording of 6/3/13 IEP meeting (Recording)

FINDINGS OF FACT (FOF)

1. The student's 12/17/12 IEP included the two accommodations at issue in this Complaint and these accommodations remained unchanged in the student's IEP until 6/3/13 when a new annual IEP was completed. (12/17/12 and 6/3/13 IEPs)
2. The Practice Testing Accommodation in the 12/17/12 IEP required: "[Student] will be provided with instruction and practice in constructing written products measured against the NDE high school proficiency writing exam rubric...bi-weekly...in Special Education Setting." (12/17/12 IEP)
3. The WCSD did engage in preparatory activities to implement the Practice Testing Accommodation; however, the student was never provided with the Practice Testing Accommodation after its inclusion in the student's 12/17/12 IEP. (Progress Reports, Principal, Case Manager, Review of documentation submitted by the WCSD, Recording)
4. After the date for the initiation of the Practice Testing Accommodation (12/18/12) in the 12/17/12 IEP, there were 19 school weeks starting on January 4, 2013 up to June 3, 2013, the date of the 6/3/13 IEP, offering an opportunity for ten bi-weekly practice tests. (Academic Calendar)
5. At the 6/3/13 IEP meeting, the Practice Testing Accommodation was modified to state: "[Student] will be provided with the opportunity to complete a writing assignment in the [high school proficiency exam] (HSPE) format/testing environment between 6/3/13-9/20/13...1 time...in Special Education Setting." At the date of this Report, the Accommodation had not yet been provided. (6/3/13 IEP, Recording, Case Manager)

6. The IEP Team anticipated the 6/3/13 Practice Testing Accommodation would provide baseline information about the student's test taking skills with relation to the HSPE and enable the Team to determine needed steps to prepare the student for the Proficiency Exam in Writing. A related academic goal was also included in the 6/3/13 IEP: "Given a writing assignment [student] will construct sentences, paragraphs and essays administration consistent with the HSPE protocol and scored by an individual trained in HSPE writing scoring, with scores that meet or exceed the passing standards according to the NDE high school writing proficiency rubric quarterly by 6/3/2014." (6/3/13 IEP, Case Manager, Recording)
7. The student will be in the 10th grade starting with the 2013/2014 school year. (6/3/13 IEP, Recording)
8. The HSPE in writing is administered to students in the 11th grade. (Case Manager, Recording)
9. The Peer Buddy Accommodation in the 12/17/12 IEP required: "A peer buddy will be provided to compare assignments, due dates notes and classroom information...in each class, each school day...in General Education Setting." (12/17/12 IEP)
10. The student has difficulties with social skills and the Peer Buddy Accommodation was designed as a measure to help the student interact and communicate with classmates. (Complaint, Recording)
11. Peer buddies were not provided by the WCSD for the student. (Case Manager, Recording)
12. During the time period of this Complaint, the student had an assigned aide who observed the student in each class in the General Education Setting. (12/7/12 IEP, Case Manager)
13. The student independently requested help from peers and interacted with them in the Case Manager's class and in other classes observed by the Case Manager and the Program Aide. In addition, at the end of the 3rd quarter the student reported having friends at school, eating lunch with them and talking with them between classes. The student also indicated talking to other students in Math Class. The student was observed interacting with other students between classes and after school outside of the classroom. As of the end of the 4th quarter, based on observations in multiple classroom setting (both structured and unstructured) the student was observed to more easily join, maintain and exit a conversation or discussion and seemed more aware and demonstrate more frequent changes in vocal inflection. (Case Manager, Program Aide, (3rd Quarter Progress Report, 4th Quarter Progress Report, Student, Recording)
14. At the 6/3/13 IEP meeting, the Peer Buddy Accommodation was modified to state: "[Student] will have a peer buddy in each class to compare assignments, due dates notes, & classroom information." This wording was to reflect the IEP Team's decision to have the student choose the peer buddy in each class, rather than having a peer buddy provided for the student. (Recording)
15. The Parents were not provided a PWN with respect to the WCSD's failure to implement the Practice Writing Accommodation or the Peer Buddy Accommodation. (Review of WCSD documentation, Special Education Area Administrator)
16. There were multiple IEP meetings between the 12/17/12 IEP meeting and the 6/3/13 IEP meeting. The WCSD neither proposed a revision of these accommodations at any of these meetings nor convened an IEP meeting to review these accommodations prior to the 6/3/13 IEP meeting. (Review of WCSD documentation, Special Education Area Administrator)

CONCLUSIONS OF LAW AND REASONS

Issue One: Whether WCSD complied with the requirements of the IDEA and the NAC, Chapter 388, with regard to implementing the student's 12/17/12 IEP from 12/18/12–6/04/13 with respect to the provision of certain accommodations, specifically the Practice Testing Accommodation and the Peer Buddy Accommodation?

Pursuant to the NAC and the IDEA, the WCSD was required to provide the services and instruction deemed necessary for the student by the IEP Team. (NAC §388.281(6)(g), 34 C.F.R. §300.17(d)) The student's 12/17/12 IEP included the Practice Testing Accommodation and the Peer Buddy Accommodation at issue in this Complaint and these accommodations remained unchanged in the student's IEP until 6/3/13 when a new annual IEP was completed. (FOF #1)

Practice Testing Accommodation

The Practice Testing Accommodation in the student's 12/17/12 IEP required: "[Student] will be provided with instruction and practice in constructing written products measured against the NDE high school proficiency writing exam rubric...bi-weekly...in Special Education Setting." (FOF #2) The student was never provided with the Practice Testing Accommodation after its inclusion in the student's 12/17/12 IEP. (FOF #3) The WCSD did engage in preparatory activities to implement the Practice Testing Accommodation (FOF #3); however, that is not enough to meet its responsibility to provide special education and related services to a student with a disability in accordance with the student's IEP. (NAC §388.281(6)(g); 34 C.F.R. §300.17(d); Vol. 71, Fed. Reg. pg. 46664 (August 14, 2006))

The student's IEP Team maintained a modified Practice Testing Accommodation in the 6/3/13 IEP to be completed by 9/20/13. (FOF #5) One of the purposes of the 6/3/13 Practice Testing Accommodation was to provide baseline information about the student's test taking skills with relation to the HSPE and enable the Team to determine needed steps to prepare the student for the Proficiency Exam in Writing. (FOF #6) Had the WCSD implemented the 12/17/12 Practice Testing Accommodation, the student would have received instruction and practice in constructing written products and the IEP Team would have had the necessary baseline information for the 2013/2014 school year. Therefore, the WCSD's failure to implement the Practice Testing Accommodation in the student's 12/17/12 IEP was violative of the requirements of the IDEA and the NAC and caused a deprivation of educational benefits to the student. (Amanda J. v. Clark County School District, 260 F.3d 1106; 35 IDELR 65 (9th Cir. 2001))

Peer Buddy Accommodation

The Peer Buddy Accommodation in the 12/17/12 IEP required: "A peer buddy will be provided to compare assignments, due dates notes and classroom information...in each class, each school day...in General Education Setting." (FOF #9) The student has difficulties with social skills and the Peer Buddy Accommodation was designed as a measure to help the student interact and communicate with the student's classmates. (FOF#10)

The WCSD did not provide any peer buddies for the student as required by the Peer Buddy Accommodation in the student's 12/17/12 IEP. (FOF #11) The WCSD's failure to implement the Peer Buddy Accommodation was violative of the requirements of the IDEA and the NAC to provide services in accordance with a student's IEP. (NAC §388.281(6)(g); 34 C.F.R. §300.17(d); Vol. 71, Fed. Reg. pg. 46664 (August 14, 2006))

Notwithstanding this violation, on the student's own accord, the student did interact and communicate with classmates consistent with the IEP Team's intended result for the Peer Buddy Accommodation. (FOF #s 10, 12 – 14) The student is to be commended for that. Consistent with this achievement of the student, the Peer Buddy Accommodation in the student's 6/3/13 IEP was revised to reflect the IEP Team's decision to have the student choose the peer buddy in each class, rather than WCSD provide a peer buddy for the student. (FOF #14) The student's achievement of interaction and communication with classmates (FOF #10) on the student's own accord does not negate the WCSD's violation, but rather is a consideration in determining the appropriate remedy for the WCSD's failure to provide this Accommodation.

Therefore, the WCSD did not comply with the requirements of the IDEA and the NAC, Chapter 388, with regard to implementing the student's 12/17/12 IEP from 12/18/12–6/4/13 with respect to the provision of the Practice Testing Accommodation and the Peer Buddy Accommodation.

Issue Two: If any failure to provide the required Practice Testing Accommodation and Peer Buddy Accommodation in Issue One was a result of the WCSD's proposal or refusal to change these provisions in the student's IEP, whether the WCSD complied with the requirements of the IDEA and the NAC, Chapter 388, to:

- a. Conduct an IEP meeting and review and revise the student's IEP as appropriate; and**
- b. Provide the parents with a PWN within a reasonable time before any proposal to change the provision of a FAPE in the 12/17/12 IEP?**

As discussed under Issue One, this case is an unfortunate case of the failure of the WCSD to implement the student's IEP. The failure to provide the Practice Testing Accommodation and the Peer Buddy Accommodation for the student was neither the result of the WCSD's proposal to revise the accommodations in the student's IEP or refusal to do so at the Parents' request. In fact, while these accommodations in the student's IEP were revised at the 6/3/13 IEP meeting, they were retained. (FOF #s 5 and 14) Since the failure to implement the student's IEP was neither the result of the WCSD's proposal or refusal to change these provisions in the student's IEP, it is unnecessary to address the legal questions of the IEP meeting and the PWN. However, due to the persistence of the controversy between the Complainant and the WCSD on the issue of when PWNs are required, as demonstrated by prior Complaints, the following further rationale is provided regarding the requirements for an IEP meeting and a PWN under the IDEA and the NAC to further clarify the applicable law.

a. IEP Meeting

The review and revision, if appropriate, of a student's IEP must be done in accordance with the provisions of the IDEA, 34 C.F.R. §300.324, and the NAC §388.281. There were multiple IEP meetings for the student between the 12/17/12 IEP meeting and the 6/3/13 IEP meeting. However, the WCSD neither proposed a revision of these accommodations at any of these meetings nor convened an IEP meeting to review these accommodations prior to the 6/3/13 IEP meeting. (FOF #16) The Complainant's allegation of noncompliance in this Complaint is based on the belief that the WCSD was required to initiate and conduct a meeting of the IEP Team to revise the student's IEP when the district failed to provide the accommodations 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 student's unique needs that are the basis for an IEP Team's decisions regarding the provision of services that are appropriate for the individual student. (33 IDELR 249 (OSEP 2000); 37 IDELR 126 (OSEP 2002))

In this case, it would have been impermissible for the WCSD to have amended the student's IEP due to the availability of special education and related services or administrative convenience (50 IDELR 48 (OSEP 2007)) or other reason other than the student's unique educational needs. Rather, as discussed above, the WCSD was required under the IDEA and the NAC to provide the services in the student's IEP, and did not. Therefore, there was no requirement to initiate and conduct additional meetings of the IEP Team to revise the IEP due to this impermissible failure to implement the student's IEP.

b. PWN

Similarly, in accordance with the NAC §388.300(8)(c) the WCSD was required to notify the Parents within a reasonable time before any proposed or refused action regarding the provision of a FAPE to the student. (See also IDEA: 34 C.F.R. §300.503) The WCSD did not provide a PWN to the Parents upon its failure to implement the student's IEP (FOF #15) and the Complainant believes that it was required to do so. As discussed previously in the #WA022513 Complaint filed by this Complainant, while failure to implement a student's IEP is violative of the IDEA and the NAC, the noncompliance does not trigger a PWN. It is instructive to examine the purpose of the requirement to provide a parent a PWN: "The purpose of such advance notice is to provide the parent sufficient time to consider the proposal or refusal and respond prior to implementation of the proposed action, or in response to a refusal to take a requested action. In order for the parent to make his or her decision, she or he must be clear on the action being proposed or refused..." (56 IDELR 141 (OSEP 2010))

In this case, while the WCSD failed to provide the two accommodations to the student, the WCSD did not propose to change the student's IEP, nor was there a refusal to change those provisions in the IEP upon parental request. Without such proposal or refusal from the WCSD with regard to the provision of FAPE to the student, there was no requirement to issue a PWN.

Therefore, given the failure to provide the required Practice Testing Accommodation and Peer Buddy Accommodation was not a result of the WCSD's proposal or refusal to change the provision of a FAPE to the student, the WCSD was not required to conduct an IEP meeting and review and revise the student's IEP or provide the Parents with a PWN.

ORDER FOR CORRECTIVE ACTION

The WCSD is required to take corrective action to address the violations found in this complaint investigation, specifically with regard to the failure to provide the Practice Testing Accommodation and the Peer Buddy Accommodation in accordance with the student's IEP. The corrective action must address the needs of the student with regard to identified educational deprivation and ensure the appropriate future provision of services for all students. (34 C.F.R. §300.151(b))

Compensatory Education for Failure to Provide the Practice Testing Accommodation

The complaint investigation team determined that the student did have educational deprivation caused by the WCSD's failure to provide the Practice Testing Accommodation and must be provided compensatory education. Fortunately, since the HSPE in writing is not administered to students until the 11th grade

(FOF #8) and the student will be in the 10th grade this coming school year (FOF #7), there is time to provide compensatory services to address the educational deprivation.

After the date for the initiation of the Practice Testing Accommodation (12/18/12) in the 12/17/12 IEP, there were 19 school weeks starting on January 4, 2013 up to June 3, 2013, the date of the IEP. Had the Practice Testing Accommodation been provided bi-weekly as required, it would have been provided ten times, beginning with the week of January 14, 2013 and ending on the week of May 27, 2013. (FOF #4) Therefore, following the opportunity for the student to complete a writing assignment in the HSPE format/testing environment (Practice Test) on or before 9/20/13, the WCSD must provide 10 sessions of instruction and practice in constructing written products measured against the HSPE writing rubric unless the WCSD and the Parents agreed otherwise, in writing. The 10 sessions must be completed by the end of the 2013/2014 school year. Because the implementation of this compensatory education is predicated on the completion of the Practice Test required in the 6/3/13 IEP, the WCSD must provide evidence to the NDE that it was administered as required by the 6/3/13 IEP within 10 days of its administration and no later than 9/20/13. Documentation of the completion of the 10 sessions ordered herein (or to any alternative agreed to by the WCSD and the Parents) must be provided to the NDE within ten days of their completion.

Compensatory Education for Failure to Provide the Peer Buddy Accommodation

The matter of the failure to provide a Peer Buddy Accommodation is a more complicated analysis. Compensatory education is designed to provide the educational benefits that likely would have accrued to the student from special education services the school district should have 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, 43 IDELR 32 (D.C. Cir. 2005)) As noted previously by the complaint investigation team, the student admirably took matters into hand and interacted with classmates on the student's own accord. Further, the student interacted with other students between classes and after school outside of the classroom and by the end of the school year was observed to more easily join, maintain and exit a conversation or discussion and seemed more aware and demonstrate more frequent changes in vocal inflection. (FOF #13)

Notwithstanding this educational benefit, this was a material failure to implement the student's IEP. (Van Duyn v. Baker School District, 107 LRP 51958 (9th Cir. 2007)) While the student did attain some benefit, is it the educational benefit that likely would have accrued to the student from the Peer Buddy Accommodation if the WCSD supplied the Peer Buddy in the first place? There is no way to know that. The complaint investigation team will not substitute its judgment for the IEP Team. The IEP Team determined the student required this accommodation to receive a FAPE and the student did not receive it; therefore, compensatory education is warranted.

Upon consideration of the student's current IEP, unless agreed to otherwise in writing by the WCSD and the Parents, the student must receive thirty minutes a month of speech/language services addressing socialization skills in addition to any speech/language services already required by the 6/03/13 IEP. The thirty minutes a month of these speech/language services will be provided for a period of five months, the number of full months the 12/17/12 IEP was in effect. Documentation of the completion of the additional speech/language time (or to any alternative agreed to by the WCSD and the Parents) must be provided to the NDE within ten days of its completion.

Corrective Action Plan (CAP)

Upon consideration of the findings in this Complaint regarding failure to provide services in accordance with an IEP and the finding of this same violation in two prior Complaint Reports in the past year, the

WCSD is directed to, within 30 days of the receipt of this Report, to develop and submit to the NDE a proposed comprehensive CAP to correct this noncompliance. The CAP must include a method to document and monitor the implementation of designated services in this student's and other students' IEPs in the WCSD. The CAP must include an explanation of the distinction between this CAP and the prior CAPs addressing this same issue and why this CAP will effectively correct this repeated noncompliance.

Following approval of the CAP by the NDE, it must be implemented within 30 days, and in any case, by September 30, 2013. The method of documentation and monitoring of the CAP must include its commencement within 30 days of its approval and a report submitted to the NDE to document its ongoing implementation periodically but no less than twice during the 2013/2014 school year.