

**COMPLAINT INVESTIGATION  
WASHOE COUNTY SCHOOL DISTRICT  
(#WA120312)**

**Report Issued on 2/7/13**

**INTRODUCTION**

On 12/3/12, the Nevada Superintendent of Public Instruction received a complaint dated 12/3/12 from a parent (Complainant or parent) alleging violations of the Individuals with Disabilities Education Act (IDEA) and violations of the Nevada Administrative Code (NAC) by the Washoe County School District (WCSD) with respect to allowing the Complainant to inspect and review the education records of the Complainant's child (student). On 12/6/12, the Complainant submitted additional related allegations with respect to the WCSD providing a list of the types and locations of the student's education records. On 12/10/12, the Complainant again submitted related allegations with respect to the WCSD's handling of the Complainant's request for a hearing to challenge the information in the student's education records.

The Nevada Department of Education (NDE) exercised its discretion to accept the additional allegations included in the 12/6/12 and the 12/10/12 letters as part of its investigation of the original 12/3/12 complaint. (Discussion of the IDEA regulations: Federal Register /Vol. 71, No. 156 /Monday, August 14, 2006 /Rules and Regulations, Pg. 46603). In addition, the NDE determined that, due to the exceptional circumstances of the sequential submission of related complaints by the same complainant, an extension of the 60-day time line was warranted to ensure that the WCSD had an adequate amount of time to respond to the new allegations. (34 C.F.R. §300.152(b)). Hereinafter, references to the Amended Complaint include the 12/3/12, 12/6/12 and the 12/10/12 complaints.

The allegations set forth in the Amended Complaint accepted by the NDE for investigation were:

1. The WCSD failed to provide the student's education records possessed or used by five WCSD employees prior to the 10/15/12 IEP meeting, the 10/22/12 IEP meeting, and the 11/5/12 IEP meeting or within a 45-day time limit.
2. The WCSD failed to provide a list of the types and locations of education records it collected, maintained, or used relating to the student.
3. The WCSD improperly delayed and, ultimately, thwarted the Complainant's request on 10/11/12 for a hearing to challenge information in education records to ensure that it was not inaccurate, misleading or otherwise in violation of privacy or other rights of the student.
4. The WCSD improperly asserted that it had the right to delay and/or deny an opportunity for a hearing to challenge information in education records.

5. The WCSD failed to ensure that the decision about the merit of the Complainant's concerns was based solely on evidence presented at the hearing.

### **AMENDED COMPLAINT ISSUES**

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

Issue One: Whether the WCSD complied with federal and state requirements to permit the Complainant to inspect and review the student's education records collected, maintained, or used by the WCSD following the Complainant's request on 10/11/12, specifically were the education records made available for inspection and review without unnecessary delay and before the IEP meetings on 10/15/12, 10/22/12, and 11/5/12 and not later than 45 days after the request was made.

Issue Two: Whether the WCSD complied with federal and state requirements to provide the Complainant with a list of the types and locations of education records it collected, maintained, or used relating to students.

Issue Three: Whether the WCSD complied with federal and state requirements to provide an opportunity for a hearing when the Complainant requested a hearing on 10/11/12 to challenge information in the student's education records to ensure that they were not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student.

### **PERSONS PROVIDING INFORMATION**

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

- Complainant
- WCSD Senior Director, Student Accounting (Senior Director)
- WCSD Area Administrator, Student Support Services (Area Administrator)
- WCSD Outside Counsel

### **DOCUMENTS REVIEWED**

The documents reviewed by the investigation team included the following:

1. Amended Complaint
2. Complainant letter to the chair of the complaint investigation team, including attachments, dated 1/8/13 submitted as additional input to the Amended Complaint (Complainant Letter)

3. Written correspondence (including emails) related to the Complainant's 10/11/12 request to inspect and review records (Issue One emails)
4. Written correspondence (including emails) related to the Complainant's request for a list of the types and locations of the student's education records (Issue Two emails)
5. Written correspondence (including emails) related to the Complainant's request for a hearing (Issue Three emails)
6. Draft of 12/3/12 IEP (Draft IEP)
7. WCSD Policy: Granting Access to Educational Records of Students (Records Access Policy)
8. WCSD document: Special Education Rights of Parents and Children (WCSD Website)
9. WCSD List of Types and Locations of Information: Educational Records Availability and Location Document (Records List)
10. WCSD Policy: Procedures for Challenging an Educational Record
11. #WA040209 Complaint Investigation Report and follow-up correspondence dated 7/6/09 and 7/28/09 (2009 Complaint related documents)

The following legal authorities are relied upon in this report and cited as appropriate:

- NAC Chapter 388
- IDEA law and regulations: 20 U.S.C. §1400 et seq; and 34 C.F.R. Part 300
- Federal Register /Vol. 71, No. 156 /Monday, August 14, 2006 /Rules and Regulations, Pg. 46603
- Family Educational Rights and Privacy Act regulations (FERPA: 34 C.F.R. Part 99)
- Various United States Department of Education (USED) policy letters from the Office of Special Education Program (OSEP) and the office responsible for implementing FERPA, the Family Policy Compliance Office (FPCO)

## **FINDINGS OF FACT (FOF)**

### **General FOF**

1. This investigation involved a ninth grade student with autism who attended a high school within the WCSD during the 2012/2013 school year. (Draft IEP)

### **Specific FOF**

#### **Issue One—Inspection and Review of Education Records**

2. The Complainant, on 10/11/12, requested the student's education records that were in the possession of five specific employees. (Issue One emails)

3. IEP meetings held subsequent to the 10/11/12 record request were held on 10/15/12, 10/22/12, 10/31/12, 11/5/12, 11/26/12, and 12/3/12. (Draft IEP)
4. The WCSD's document entitled Special Education Rights of Parents and Children (available on their website) states that the school district must comply with parents' request to inspect and review any education records on their child without unnecessary delay and before any meeting regarding an IEP, or any impartial due process hearing (including a resolution meeting or a hearing regarding discipline), and in no case more than 45 calendar days after the request. (WCSD Website)
5. The WCSD opted to provide both the Complainant and the spouse (jointly parents) copies of the requested education records. Some of the education records requested were sent to the parents on 11/6/12. Additional education records, but not all of the records requested, were sent to the parents on 11/29/12, 49 calendar days following the 10/11/12 record request. (Issue One emails)
6. Subsequent to the jurisdiction of the complaint investigation with respect to Issue One, all outstanding education records that were requested on 10/11/12 and had not previously been provided (as described above in FOF #5) were provided to the parents. (Senior Director, Area Administrator, Issue One emails)

### **Issue Two—List of Types and Locations of Education Records**

7. On 12/1/12, the Complainant requested a list of the types and locations of the student's education records collected, maintained, or used by the WCSD. (Issue Two emails)
8. On 12/6/12, the WCSD provided both parents with a copy of the Records List. (Issue Two emails)
9. The Records List had two sections. The first section was entitled "List of Educational Records Available at a Student's School". The education records listed were the following:
  - Academic records (transcript/grades/report cards)
  - Attendance
  - Discipline
  - Schedule
  - Achievement tests
  - Transportation
  - Health folder
  - Enrollment records
  - Cumulative folder
  - Program records (ELL, IEP, 504, FR/L, GT, CIT)
  - Athletic records.(Records List)

10. The second section of the Records List was entitled “The Following Programs, Departments, and/or Individuals May have Education Records for Students.” Listed were:

- Special Education Records
  - Speech Pathologists
  - School Psychologists
  - Counseling
  - 504/MTSS
  - Home Hospital
  - Supplemental Credit
  - School Police
  - Gifted and Talented
  - Children in Transition
  - Athletics/Activities
  - Assessment
  - Student Health Services
  - Family School Partnerships
  - Transportation
  - Title I
  - ELL
  - Migrant
  - Student Accounting
- (Records List)

11. There are some types of education records in locations other than the school that are not included on the WCSD’s list of types of education records; for example, correspondence between WCSD administrators and parents. In addition, the Area Administrator does maintain some education records and the location of those records are not included in the list of locations. (Area Administrator, Senior Director)

12. A state complaint investigation in 2009 determined that the WCSD did not provide the parents a list of the requested locations of the student’s education records, as required by the NAC §388.287(6). As a corrective action the WCSD was directed to provide the parents “a list of the locations of the student’s educational records collected, maintained, or used in the 2008/2009 school year up to the date of the complaint”. In a follow up to the parents’ 7/6/09 allegation that the list provided by the WCSD as required by the corrective action, was not sufficient, the NDE stated in letters to the parents and the WCSD, on 7/28/09, “It is possible that the complainants desired the list to be more comprehensive, yet it is clear that the list that was provided met the minimum criteria articulated in the final report”. (2009 Complaint related documents)

The list of types and locations provided to the parents for the student listed the following:

- Cum File-CSMS main office
- IEP file-Case Managers locked file drawer
- Speech file-CSMS speech room in locked file cabinet
- OT file-CSMS in locked file cabinet
- Autism Consultant Records-Student Support Services
- School Psychologist Records-Student Support Services (2009 Complaint related documents)

### **Issue Three –Hearing to Challenge Information in the Education Records**

13. On 10/11/12 at 12:38 P.M., the Complainant requested a “FERPA” hearing to challenge information in the student’s education records and included the authority in the IDEA. (Hereinafter, IDEA/FERPA Hearing) No specific records being challenged were identified in the request. (Issue Three emails)
14. Various emails ensued between WCSD and the Complainant on 10/11/12 regarding the records that were the basis of the request and required procedures for the hearing. The WCSD did not deny the Complainant’s request for a hearing in these communications. (Issue Three emails)
15. On 10/11/12 at 10:18 P.M., the Complainant sent an email withdrawing the request for an IDEA/FERPA Hearing, also stating that he reserved the right to request one later. The subject line of the email was “Re: Request for FERPA Hearing Addressed to [Chief, Student Support Services]. (Issue Three emails)
16. Outside Counsel was not informed of the withdrawal of the IDEA/FERPA Hearing request and numerous emails continued to be exchanged between the Complainant and the WCSD with respect to the Complainant’s request for an IDEA/FERPA Hearing. The emails included a 10/24/12 email from the WCSD denying the Complainant’s request for a FERPA Hearing on the basis of information received from the USED, FPCO. (Outside Counsel, Issue Three emails)

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

Issue One: Whether the WCSD complied with federal and state requirements to permit the Complainant to inspect and review the child’s education records collected, maintained, or used by the WCSD following the Complainant’s request on 10/11/12, specifically were the education records made available for inspection and review without unnecessary delay and before the IEP meetings on 10/15/12, 10/22/12, and 11/5/12 and not later than 45 days after the request was made.

State regulations at NAC §388.287(1) require that: “The parents of a pupil must be

allowed to inspect and review any educational records relating to their child which are collected, maintained, or used by a public agency. The public agency shall comply with such request without unnecessary delay and in any event: (a) Before any meeting regarding an individualized educational program or any hearing relating to the identification, evaluation or placement of the pupil or the provision of a free appropriate public education; and (b) Not later than 45 days after the request has been made". (See also 34 C.F.R. §300.613)

State regulations at NAC §388.034 state that day "means a calendar day". (See also 34 C.F.R. §300.11(a))

In this case, the Complainant requested specific education records for the child on 10/11/12. (FOF #2). IEP meetings for the student subsequent to the record request were held on 10/15/12, 10/22/12, 10/31/12, 11/5/12, 11/26/12, and 12/3/12. (FOF # 3). The WCSD provided some of the records requested on 11/6/12 and provided some, but not all, of the remaining records on 11/29/12. (FOF # 5). Therefore, the WCSD did not provide the requested education records prior to the IEP meetings cited in the complaint (10/15/12, 10/22/12, and 11/5/12) as required under the IDEA and the NAC. (34 C.F.R. §300.613 and NAC §388.287(1)) While the IEP meeting dates are the determinative point in time for the Amended Complaint, the WCSD also did not provide the requested records within the 45 days after the request was made in accordance with the IDEA and NAC. (34 C.F.R. §300.613 and NAC §388.287). Subsequent to the jurisdiction of the complaint investigation, all outstanding education records that were requested on 10/11/12 and had not previously been provided, were provided to the Complainant. (FOF #6)

It is important to note that neither the IDEA nor the NAC require an educational agency to provide parents copies of requested education records. Rather, the parents have the right to inspect and review any education records relating to their child which are collected, maintained, or used by a public agency. (NAC §388.287 and 34 C.F.R. §300.613). This right to inspect and review only includes the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records or, without the copies, any meaningful review of the records is impractical. (NAC §388.287(2)(c) and 34 C.F.R. §300.613(b)(2)). The WCSD opted to provide the parents rights in excess of the IDEA and the NAC, and that is certainly permissible. However, this action did not relieve the WCSD of meeting the above cited timeliness provisions in the IDEA and the NAC.

*Therefore, the WCSD did not comply with federal and state requirements to permit the Complainant to inspect and review the requested education records collected, maintained, or used by the WCSD following the Complainant's request on 10/11/12 before the IEP meetings on 10/15/12, 10/22/12, and 11/5/12 and in any event not later than 45 days after the request was made.*

Issue Two: Whether the WCSD complied with federal and state requirements to provide the Complainant with a list of the types and locations of education records it collected, maintained, or used relating to students.

The WCSD was obligated to “maintain and provide to parents on request a list of the types and locations of educational records it collects, maintains, or uses relating to pupils.” (NAC §388.287(6); See also 34 C.F.R. §300.616). On 12/1/12, the parents requested a list of the types and locations of the student’s education records collected, maintained, or used by the WCSD. (FOF #7)

Neither the NAC nor the IDEA provides additional guidance with regard to the content of this mandatory list. In this case, there appears to be a fundamental disagreement between the Complainant and the WCSD whether the list required is for an individual student or for all students and the level of detail required in the list. Both the NAC and the IDEA distinguish between the confidentiality of information requirements regarding individual students and procedures generally. The provisions of the IDEA and the NAC establishing individual student’s rights with regard to the confidentiality of information use terms such as “relating to their children” or “the child” (See for example: 34 C.F.R. §§300.613 and 300.618; NAC §388.287(1)). The IDEA and the NAC also provide general confidentiality of information requirements and those requirements use more general terms such as parents. (34 C.F.R. §§300.614 and 300.617; NAC §388.287(4) and (7))

The provisions in the NAC and the IDEA at issue in this Amended Complaint use the general terms of “parents” and “pupils”, not individual terms that would require the WCSD to provide the parents a list of the types and locations of education records it collected, maintained, or used relating to their child. It is important to note that a prior complaint report regarding this provision of law and the same Complainant and the WCSD was issued by the NDE with a finding of noncompliance. (FOF #12). Notwithstanding the analysis in that case with regard to the list provided to the parents and the individual child remedy, the report cited the general provision in NAC §388.287(6) and was not intended to reflect that the requirement prospectively necessitated the WCSD provide individual parents a list of the types and locations of their child’s records. The clarification provided to the parents subsequent to the report further elaborated on the level of detail required in a list of types and locations. (FOF #12)

Notwithstanding the general nature of the list required pursuant to the IDEA and the NAC as described above, the list of the types and locations of education records collected, maintained, or used by the agency must be complete. Therefore, the critical question is whether the list of types and locations of education records the WCSD provided to the parents on 12/6/12 met these standards and was complete. (FOF #8-10). The WCSD had a list of types of education records available in the location of the

school, but did not have a list of the types of records available throughout the agency, such as correspondence between WCSD administrators and parents. (FOF #11). Therefore, the list of the types of education records was not complete. In addition, the Area Administrator did maintain some education records. The list of the locations of education records did not include the location of these records. (FOF #11) Based on the absence of this location alone, the list of locations was also not complete.

*Therefore, the WCSD did not comply with federal and state requirements to provide the Complainant with a list of the types and locations of education records it collected, maintained, or used relating to students.*

Issue Three: Whether the WCSD provided a hearing in compliance with federal and state regulations when the Complainant requested a hearing on 10/11/12 to challenge information in the student's education records to ensure that it was not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student.

In accordance with the IDEA and the NAC, Chapter 388, if a parent of a student with disabilities believes that information in the student's education records collected, maintained, or used is inaccurate or misleading or violates the privacy or other rights of the child, the parent has the right to request the agency amend the information. (34 C.F.R. §300.618; NAC, Chapter 388, §388.288). If the agency refuses to amend the information in accordance with the request, the agency must, on request, provide an opportunity for a hearing to challenge the information in their child's education records. (34 C.F.R. §300.619; NAC, Chapter 388, §388.288)

The hearing held under the IDEA, 34 C.F.R. §300.619, must be conducted according to the procedures in the FERPA, 34 C.F.R. §99.22. (34 C.F.R. §300.621; NAC §388.288). Title 34 C.F.R. §99.22(a) requires the agency to hold the hearing within a reasonable time after it has received the request for the hearing from the parent.

The USED, OSEP has provided little guidance regarding the opportunity for a hearing under the IDEA, but has acknowledged the IDEA confidentiality of information regulations contain many of the same privacy protections that exist in FERPA and noted some provisions, not including the hearing procedures, that do not exist in FERPA or that go beyond FERPA requirements. (34 IDELR 264 (OSEP, 2000)). Therefore, it is instructive to look to the guidance issued by the USED, FPCO, on the opportunity for a hearing conducted pursuant to 34 C.F.R. §99.22:

“FERPA affords parents the opportunity to seek amendment of their children's education records which they believe contain information that is inaccurate or misleading. While a school is not required to amend a record in accordance with a parent's request, it is required to consider the request for amendment of an

education record, to inform the parent of its decision, and if the request is denied, to advise the parent of the right to a hearing on the matter. If, as a result of a hearing, a school decides not to amend the record, then the parent has the right to insert a statement in the record setting forth his or her views. That statement must remain with the record for as long as the record is maintained.

This right is not unlimited, however, and a school is not required by FERPA to afford a parent the right to seek to change substantive decisions made by school officials, such as grades or other evaluations of a student. This fact is indicated in the legislative history of FERPA. The primary source of legislative history regarding FERPA is contained in the "Joint Statement in Explanation of Buckley/Pell Amendment," Volume 120 of the Congressional Record, pages 39862-39866. The Joint Statement states that FERPA was "*not intended to overturn established standards and procedures for the challenge of substantive decisions made by an educational institution.*" (Emphasis added). FERPA was intended to require only that educational agencies and institutions conform to fair recordkeeping practices and not to override the accepted standards and procedures for making academic assessments, disciplinary rulings, or placement determinations. Thus, while FERPA affords parents the right to seek to amend education records that contain inaccurate information, this right cannot be used to challenge a grade or an individual's opinion, unless the grade or the opinion has been inaccurately recorded." 14 FAB 23 (FPCO, 2011)

The FPCO further indicated in other policy documents that "...schools are not required to create records in response to a parent's request." (15 FAB 34 (FPCO, 2012)). "Additionally, if FERPA's amendment procedures are not applicable to a parent's request for amendment of education records, the school is not required under FERPA to hold a hearing on the matter." (FERPA General Guidance for Parents: <http://www2.ed.gov/policy/gen/guid/fpc/ferpa/parents.html>; See also: **11 FAB 6 (FPCO 2007)**)

In this case, the Complainant requested an IDEA/FERPA Hearing and then withdrew the request on the same day. (FOF #13 and 15). The WCSD did not deny the request for a hearing while there was an outstanding request during this portion of a business day. (FOF #14). Furthermore, the WCSD was not required to provide an opportunity for a hearing under the IDEA, 34 C.F.R. §300.619, and the NAC §388.288 during the brief period that there was an outstanding request.

An anomaly in this case is that on October 24, 2012, after the Complainant withdrew the request for a hearing, the WCSD did deny the Complainant's request for a hearing on the basis of information received from the United States Department of Education, FPCO. (FOF #16). Since there was no pending request for hearing at the time of the denial, it is unnecessary for the investigation team to determine whether this denial was consistent with the NAC §388.288, the IDEA, 34 C.F.R. §§300.618 and 300.619, the

incorporated provision of the FERPA, 34 C.F.R. §99.22, and the above cited policy interpretations of the FPCO.

*Therefore, the complaint investigation team concluded that the WCSD was not required to provide a hearing in compliance with federal and state regulations when the Complainant requested a hearing on 10/11/12 to challenge information in the student's education records and then withdrew the request.*

## **ORDER FOR CORRECTIVE ACTION**

WCSD is required to take corrective action to address the violations found in this complaint investigation, specifically: 1) the WCSD did not provide the Complainant the right to inspect and review the requested education records prior to the student's cited IEP meetings and not later than 45 days after the request was made; and 2) the WCSD did not provide a complete list of the types and locations of the education records it collected, maintained, and used.

### **Directed Action**

Within 30 days of the receipt of this report, the WCSD must develop and submit to the NDE a revision of its Records List. The revised Records List must be inclusive of all the types of educational records as well as the physical locations of the education records for students, consistent with the requirements of NAC §388.287(6). Within five days following receipt of approval by the NDE of the revised Records List, the WCSD must make a copy of the Records List available to the parents.

In addition, within 30 days of the receipt of this report, the WCSD must submit a list informing the NDE of the steps the WCSD proposes to take to ensure that the revised Records List will be substituted for the current Records List in all locations where it might currently reside. Within 30 days of receiving approval by the NDE of the proposed steps, the WCSD must provide documentation to the NDE that those steps were implemented.

### **Professional Development/Training**

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

1. Include a proposal to review and revise, **as necessary**, the WCSD's policies and procedures with regard to providing parents, upon their request, with an opportunity to review and inspect education records before an IEP meeting regarding an individualized educational program or any hearing relating to the identification, evaluation or placement of the pupil or the provision of a free

appropriate public education not later than 45 calendar days of the receipt of the request.

2. Provide professional training to appropriate personnel (as determined by WCSD administrators), who are involved in responding to requests providing parents a timely opportunity to inspect and review education records consistent with the requirements of the NAC §388.287 and 34 C.F.R. §300.613.

The CAP must be approved by the NDE prior to implementation. Following approval of the CAP by the NDE, it must be implemented within 30 days and a report must be submitted to the NDE to document its implementation.