

COMPLAINT INVESTIGATION

WASHOE COUNTY SCHOOL DISTRICT

(#WA072516)

Report Issued on September 21, 2016

INTRODUCTION

On July 25, 2016, the Nevada Superintendent of Public Instruction received a Complaint from an advocate on behalf of a client of the advocacy entity alleging violations in the special education program of a student with a disability attending school in the Washoe County School District (WCSD). The Parent's advocate alleged violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq.; 34 C.F.R. Part 300, and Chapter 388 of the Nevada Revised Statutes and the Nevada Administrative Code (NAC) with regard to the requirements for an independent educational evaluation (IEE). Specifically, the Parent's advocate alleged that the WCSD, without unnecessary delay, failed to ensure the Occupational Therapy and Behavior Analytic IEEs were at public expense or request a hearing; failed to provide the Parent the agency criteria applicable for an IEE; and imposed an impermissible condition of being required to engage in a contractual relationship with the WCSD on the assessor for the Neuropsychological IEE.

The Parent advocate's response to the Complaint raised a new systemic issue regarding the WCSD's policies and procedures for responding to parental requests for an IEE and two new student specific issues. The NDE informed the Parent advocate of the procedures to follow, by a date specific, if the Parent advocate would like to amend the Complaint to include these new issues. In the absence of a response or the filing of an amended or new Complaint by the cited date, this investigation proceeded on the originally filed issue only.

As a preliminary matter, the NDE acknowledges the WCSD's assertion that, by filing this Complaint on behalf of another, the ADVOCATE Complainant was engaging in the unauthorized practice of law. Pursuant to the IDEA, 34 C.F.R. §§300.151(a)(1) and 300.153, an organization or individual may file a signed written complaint under the procedures described in §§300.151 through 300.152. While there are some additional procedures the NDE must take when an individual other than the child's parent files a student specific Complaint to ensure confidentiality, the complaint procedures are otherwise the same.¹ In addition, allegations of the assertion of the unauthorized practice of law are not within the scope of the Complaint process.

¹ See *Memorandum to Chief State School Officers*, 34 IDELR 264 (OSEP, July 17, 2000) This memorandum is publicly available at: www2.ed.gov/policy/speced/guid/idea/letters/2000-3/osep0020.71700safeguards.3q2001.doc "Question 2: When an organization or individual, other than a parent or public agency, files a State complaint regarding FAPE for a specific child, how should an SEA proceed?"

Answer: An SEA is required to resolve any complaint that meets the requirements of SEC. 300.662, including a complaint alleging that a public agency has failed to provide FAPE to a child with a disability. Thus, the SEA would be required to follow the State complaint procedures outlined in SEC. 300.661 as it would any other case where a violation of Part B is alleged. If a complaint is filed by someone other than the parent, the SEA may not provide personally identifiable information to the non-parent complainant as part of the decision without parent consent. Under SEC. 300.571(a)(1), parental consent generally must be obtained before personally identifiable information is

All documents submitted by the Parent's advocate and the WCSD relevant to the issues in the Complaint were reviewed in their entirety in this investigation. The Complaint Investigation Team also received, collected and reviewed additional information as needed during the investigation. The Findings of Fact cite the source of the information determined necessary to resolve the issues in this Complaint. The WCSD submitted legal argument with authority in their responses to the Complaint. All authority cited by the Complainant and the WCSD was also reviewed in the course of this investigation.

COMPLAINT ISSUES

The allegations in the Complaint, further clarified during the investigation, raise the following issue:

Issue: Whether the WCSD complied with the IDEA, 34 C.F.R. §300.502, and the NAC §388.450 with regard to the requirements for an IEE, specifically did the WCSD:

- a) Without unnecessary delay, either ensure the IEEs of an Occupational Therapy Assessment and Behavior Analytic Assessment were provided to the student at public expense or request a hearing if it believed its evaluation of the student was appropriate;**
- b) Upon request, provide to the Parent information about the agency criteria applicable for IEEs, specifically the criteria for the conduct of a Behavior Analytic Assessment; and**
- c) Impose conditions on the Parent on obtaining an IEE at public expense beyond the criteria that the WCSD uses when it initiates an evaluation that were inconsistent with the Parent's right to an IEE, specifically requiring an IEE vendor/provider for the Neuropsychological IEE to engage in a contractual relationship with the district?**

FINDINGS OF FACT (FOF)

GENERAL

1. The student transferred to WCSD on December 15, 2015 from outside the State of Nevada. In the 2015/2016 school year, the student was out of school beginning April 21, 2016. The WCSD determined the student was withdrawn on May 6, 2016 after the student was absent for 10 days and the student's whereabouts were unknown. The 2015/2016 school year ended on June 9, 2016. (Complaint, May 19, 2016 Prior Witten Notice, April 29, 2016 Individualized Education Program (IEP), Student Withdrawal Form, 2015/2016 School Year Calendar)

disclosed to anyone other than officials of participating agencies collecting or using the information under Part B." (Note the cited sections are to the prior IDEA regulations.)

2. The WCSD conducted assessments of the student in January 2016 that were reported to include “all of the components of a comprehensive evaluation required by the state.” At the time of the assessments, the student’s teacher and parents did not have a concern about the student’s gross/fine motor skills and the Multidisciplinary Team determined a formal assessment was not required in that area. No Occupational Therapy Assessment was conducted. A health assessment of the student was conducted as part of the student’s evaluation that addressed health concerns, social history, physical appearance and behavioral observations and oral, vision and hearing exams. (January 14, 2016 Multidisciplinary Psycho-Educational Team Report, January 12, 2016 School Nurse Special Education Health Assessment)
3. On February 24, 2016, a “supplemental addendum report” was completed for the January 14, 2016 Multidisciplinary Report. It was not intended as a comprehensive evaluation, but rather to report on the student’s current functioning and to suggest any program changes. The review of prior evaluations included the review of the assessment by the out-of-state Occupational Therapist. The WCSD conducted an Adaptive Behavior Assessment on February 16, 2016 and the student’s teacher reported that the student had not had significant behavioral difficulties in the classroom (comparatively) “until recently”. An observation of the student’s adaptive behavior was conducted on March 1, 2016 and behavior data was collected on March 16, 2016. (February 24, 2016 Supplemental Addendum, April 29, 2016 IEP)
4. Upon enrollment in the WCSD for the 2015/2016 school year, the student had an out-of-state IEP dated September 10, 2015 that was in effect until September 12, 2016. The out-of-state IEP included the provision of Occupational Therapy as consult for 15 minutes every nine weeks in school and Occupational Therapy for 30 minutes every two weeks in the school setting. While only a draft IEP was provided during this investigation, it appears that the student had an interim IEP dated January 11, 2016. The student’s initial IEP in the WCSD was dated March 18, 2016 IEP and, based on a draft IEP, may have been amended on April 29, 2016. The March 18, 2016 IEP included 120 minutes of direct Occupational Therapy per month (later clarified as intending to be an assessment/referral). (September 10, 2015 IEP, January 11, 2016 draft interim IEP, March 18, 2016 IEP, and April 29, 2016 draft IEP, January 21, 2016 Prior Written Notice)
5. The Parent disagreed with the WCSD evaluation and on May 26, 2016 sought an IEE as follows: A Speech and Language Assessment by a specific entity; and an Occupational Therapy Assessment by a specific entity. In addition, rather than identifying the area of assessment or the particular type of assessment, the Parent sought the use of agencies as follows:
 - a. Theory and Practice: By a specific evaluator;
 - b. Child Behavior Solution: By specific evaluators;
 - c. SIT (Later clarified as Fit Learning) (May 26, 2016 and May 31, 2016 Parent Emails)
6. On June 1, 2016, the WCSD issued a Prior Written Notice to the Parent on its consideration of the multiple requests for IEEs and the need to review the work completed by the WCSD. (June 1, 2016 Prior Written Notice)
7. The WCSD treats parental requests for the conduct of IEEs and parental requests for payments for IEEs already conducted in the same manner with regard to whether they

authorize the IEE at public expense or file a Due Process Complaint to request a hearing. In this case, the Parent requested the IEE for the several assessments at public expense in advance of the conduct of the assessments. (WCSD Response, Complaint)

8. The WCSD approved the conduct of two of the requested assessments as an IEE, the Speech and Language Assessment and the Psycho-educational Assessment (psychological and academic evaluation) and denied the provision of the Occupational Therapy and Fit Learning Assessments. (June 7, 2016 and June 29, 2016 WCSD Letters to Parent)

CRITERIA AND CONDITION

9. In response to a request for additional information in this investigation process, the WCSD indicated that the WCSD criteria for the provision of IEEs “closely matches” the criteria for evaluations within the WCSD and provided an example for a psycho-educational evaluation. (WCSD Response to Complaint)
10. In an internal email provided in the WCSD Response, the WCSD acknowledges that the WCSD does not have its own policy so the WCSD follows the NAC and that it has no procedures as to the IEE process and, citing NAC §388.450: “So, we can just state that we follow this.” (August 15 – 16, 2016 WCSD Emails)
11. The Parent’s advocate requested the criteria the WCSD uses for IEEs as described in the IDEA at various times. The WCSD responses to these requests assert the right of the WCSD to set criteria for IEE so long as those criteria are the same as those used by the district, to the extent those criteria are consistent with the parent’s right to such an evaluation. The WCSD did not provide the Parent advocate a document of the set criteria, but did inform the advocate that a licensed psychologist or school psychologist is required to conduct a psycho-educational evaluation and for speech evaluations the provider must be a licensed speech pathologist. The WCSD did not inform the advocate of the opportunity to demonstrate that unique circumstances justify the selection of an evaluator who does not meet agency criteria. (July 1 and 11, 2016 WCSD Emails, Review of Documents)
12. The Parent’s advocate attempted to clarify the request for the IEE criteria on at least one occasion: “You have made mention of various criteria, but it appears to be a moving target known only to you. We are looking for the formal written document that outlines ALL criteria used by the district.” (July 11, 2016 Advocate Email)
13. On July 13, 2016, the WCSD responded that it had answered the same questions multiple times and had approved all IEE requests that corresponded to the district evaluation that the Parent disagreed with and that had providers with the requisite qualifications to perform the corresponding IEEs. (July 13, 2016 WCSD Email)
14. With regard to the conditions/policy for the WCSD regarding IEEs, the WCSD responded as follows to the request for additional information on the contractual conditions in the course of this investigation:
 - a. The WCSD complete an Independent Contractor Agreement with the appropriately licensed professional – depending on the scope of the IEE. (WCSD Response to the Complaint)

- b. The WCSD also requires Releases of Information from the parent to write the contracts with the IEE providers. (June 30, 2016 Email)
 - c. With regard to the request for the list of criteria the WCSD uses when it initiates an evaluation, the WCSD did not provide a policy in existence, but responded: “The Washoe County School District utilizes its own employees when initiating an evaluation for special education. Depending on the scope of the evaluation, the evaluators will include:
 - i. A school psychologist who has a Nevada DOE license as a School Psychologist
 - ii. A speech pathologist who has a NV DOE license as an Endorsement in Speech and Language Impairments
 - iii. An educator who has an endorsement for a Generalist Resource Room from the state of Nevada
 - iv. A school nurse credentialed by the state of NV
 - v. Initial fingerprinting/background check with the WCSD prior to employment.” (WCSD Response to this Complaint)
15. With respect to IEE providers, the WCSD did not provide a policy in existence, but responded: “The requirements for a private provider to conduct IEEs also varies (sic) with the scope of evaluations. For example, if the IEE is for speech and language than we require the private provider to be an individual licensed by the state of NV as a Speech Pathologist. If the IEE is disputing our psycho-educational evaluation we require the provider to be a licensed school or clinical psychologist in the state of NV who resides in Washoe County.” (WCSD Response to this Complaint)
16. The WCSD’s Independent Contractor Agreement form² applies to the procurement of services *prior* to the performance of a service. This form is not designed solely for the process of procurement of special education IEEs, but rather a general procurement process. Without an approved Independent Contractor Agreement, there is no authorization for services to be performed by the provider. In addition to the services to be performed and the schedule of services and payment, there are various certifications, including possession of general liability and automobile insurance and the absence of criminal charges and/or arrests, and debarment, suspension and other responsibilities federally required. Fingerprinting is mandatory if the individual provider will be working directly with children and unsupervised by WCSD staff or will have access to student information. (February 6, 2016 Independent Contractor Agreement Form)
17. The WCSD responded to the request for information in the course of this investigation that the WCSD does allow exceptions to the Independent Contractor requirements. Reportedly, there is a process in place if something about the Agreement is proving burdensome, the contractor can ask for an exception to a requirement and the WCSD would consider that request and decide whether the request should be granted or denied. When asked, the WCSD did not submit documentation that IEE providers were provided with this policy or the requested alternative methods by which the WCSD paid vendors when invoices are submitted after the conduct of the IEE or in situations such as an order for reimbursement for a service ordered in a hearing decision. The form available on the WCSD website does not include any statement of exceptions or an

² Although requested, this form was not provided to the Complaint Investigation Team; however, it is available on the WCSD website: http://www.washoecountyschools.net/csi/pdf_files/AP-F006%20ICA%20revK3.pdf

opportunity for a potential contractor to request an exception. (WCSD Supplemental Response, February 6, 2016 Independent Contractor Agreement Form)

18. In response to the provider of the Neuropsychological IEE who had a prior contractual relationship with the WCSD, including being fingerprinted, and was required to be re-fingerprinted, the WCSD IEE contact indicated that she talked to fingerprinting personnel and was unsuccessful in getting the requirement waived since it is a new contract and a new contract year. The internal email between the Office of Student Services and Psychological Services inquires: "Does she have to be re-finger print (sic)? That seems silly. . . ." "I have passed on to my supervisors a request that we work with Business on these requirements." (July 19, 2016 WCSD Email, July 22, 2016 WCSD Email, WCSD Web Directory)
19. The first psychologist selected by the Parent terminated interest in the conduct of the IEE due to the insurance required by the business department of the WCSD. (March 15, 2016 WCSD Email)
20. While not specifically an issue in this Complaint, the requested provider for the Speech and Language and the Occupational Therapy IEEs responded to an inquiry from the Parent's advocate regarding the contractual conditions: "You're right, at this time we are not doing outside assessments for the district. It has become a struggle and big process on the front end with the paper work contract etc. Recently we set up the appointment, saw the family for Speech, OT and PT, and didn't get the paper work to even start the payment process until after the date" (September 8, 2016 Email from Provider)
21. On July 20, 2016, after the Parent's return of the Release of Information authorization to the WCSD, the WCSD confirmed that that the contract paperwork had been sent to the provider selected to conduct the Neuropsychological IEE. (July 20, 2016 WCSD Email)
22. The student's Neuropsychological IEE was completed on July 26, 2016 with an August 4, 2016 Report. The IEE provider submitted an invoice to WCSD on August 6, 2016 and was paid on August 26, 2016. (August 4, 2016 Report of the Neuropsychological IEE)

OCCUPATIONAL THERAPY

23. On March 18, 2016, the student's IEP Team proposed an assessment for Occupational Therapy. The Parent participated in the March 18, 2016 IEP meeting and provided consent for the conduct of an Occupational Therapy Assessment on April 20, 2016. The consent for this assessment was not subsequently revoked by the Parent. (April 20, 2016 Parent Consent for Occupational Therapy Assessment, Review of Documents)
24. On June 7, the WCSD denied the request for an IEE in Occupational Therapy since the district had a signed permission to evaluate for Occupational Therapy; they were unable to evaluate the student due to the student's absence; and "[A]s such, districts have the right to evaluate before granting an Independent Evaluation." (June 7, 2016 WCSD Letter to Parent)
25. The Parent's advocate informed the WCSD that the Occupational Therapy IEE was due to WCSD's abandonment of Occupational Therapy services the student had been receiving upon the student's placement in WCSD. Further, upon enrollment, the WCSD

was provided blanket consent for evaluation and failed to conduct an assessment in this area at that time. (June 30, 2016 Email, January 11, 2016 Parent Consent)

BEHAVIOR ANALYTIC ASSESSMENT

26. The Parent's advocate characterized the assessment as a Behavior Analytic Assessment in the Complaint and on July 11, 2016, by descriptive terms. On June 30, 2016, the advocate described the requested IEE by Fit Learning as an academic assessment to the WCSD, and on July 11, 2016 described it as the conduct of an assessment by behavior analysts to determine if the student has mastered necessary standards-based skills, by grade level and what behavioral factors may need to be addressed for effective learning. (Complaint, June 30, 2016 and July 11, 2016 Advocate Emails)
27. On June 7, 2016, the WCSD agreed to fund an IEE for a psychological and academic evaluation by a licensed psychologist selected by the Parent as one of the preferred evaluators. The request for assessment through Fit Learning was denied on the basis that the individuals at FIT Learning were not licensed psychologists and were not, therefore, qualified examiners of academic function pursuant to the WCSD criteria. Further, since the WCSD had granted the request for IEE in academic functioning through the psychologist, the WCSD believed that the Fit Learning assessment would constitute an impermissible second assessment in the area of academic functioning. (June 7, 2016 WCSD Letter to the Parent, July 1, 2016 WCSD Email)
28. The Parent's advocate informed the WCSD if the WCSD's criteria for evaluation prohibited an academic assessment by a state licensed and Board Certified Behavior Analysts, to provide the WCSD criteria. (June 30, 2016 Advocate's Email)
29. Using the example of a special education teacher conducting an academic assessment, the Parent's advocate explained the distinction between the assessment conducted by a licensed psychologist and the academic and functional performance by a licensed and Board Certified Behavior Analysts through the Fit Learning assessment. (July 1, 2016 Advocate Email.)
30. On July 11, 2016, the WCSD indicated it was willing to consider contracting with a special educator for the academic portion of the evaluation and notified the Parent's advocate that: "The personnel at FIT are neither licensed psychologists nor licensed special educators. . . . WCSD will not be authoring an evaluation with FIT learning at our expense." (July 11, 2016 WCSD Email)
31. In response to the July 11, 2016 WCSD email, the Parent's advocate indicated that "[I]f the district has information about another vendor using behavior analysts to conduct assessments that determine if the student has mastered necessary standards-based skills, by grade level, and what behavioral factors may need to be addressed for effective learning, we would be pleased to seek assessment with that vendor." "If the district can bring a behavior analyst to the table to meet with the student and identify the barriers to general education placement and the missing standards-based skills, that would also be acceptable." (July 11, 2016 Advocate Email)
32. The WCSD did not respond to the Parent advocate's clarification of the requested IEE being one by a behavior analyst; the request for information on alternative vendors who

use behavior analysts to conduct assessments; or the offer to obtain the assessment through a WCSD behavior analyst. (Review of Documents)

33. WCSD has the positions of an Implementation Specialist for behavior, Board Certified Behavior Analyst, and classified behavior technician. (WCSD Student Support Services, All Children Matter, 2015/2016)³
34. Subsequent to the filing of the Complaint, the Parent signed consent for a WCSD Board Certified Behavior Analyst determined assessment for behavior planning to be conducted as soon as possible at home and school. (August 2, 2016 Parent Consent)

CONCLUSION OF LAW

Issue: Whether the WCSD complied with the IDEA, 34 C.F.R. §300.502 and the NAC §388.450 with regard to the requirements for an IEE, specifically did the WCSD:

- a) **Without unnecessary delay, either ensure the IEEs of an Occupational Therapy Assessment and Behavior Analytic Assessment were provided to the student at public expense or request a hearing if it believed its evaluation of the student was appropriate;**
- b) **Upon request, provide to the Parent information about the agency criteria applicable for IEEs, specifically the criteria for the conduct of a Behavior Analytic Assessment; and**
- c) **Impose conditions on the Parent on obtaining an IEE at public expense beyond the criteria that the WCSD uses when it initiates an evaluation that were inconsistent with the Parent's right to an IEE, specifically requiring an IEE vendor/provider for the Neuropsychological IEE to engage in a contractual relationship with the district?**

WITHOUT UNNECESSARY DELAY

In this case, the student's Parent requested an IEE for assessments at public expense in advance of their conduct. (FOFs #5, #7) In accordance with the IDEA, 34 C.F.R. §300.502(b)(2), and NAC §388.450(1), if a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either file a Due Process Complaint to request a hearing to show that its evaluation is appropriate; or ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria. Citing judicial decisions and hearing decisions from other states denying reimbursement for IEEs where the district or parent went to hearing on requested IEEs, it is the legal position of the WCSD that a school district is permitted to deny an IEE request and not go to hearing if the request does not meet the basic requirement of the IDEA law and regulations. As discussed below, there is one condition that the United States Department of Education, Office of Special Education (OSEP), has responded that it is

³ This publication is publically available at:
http://www.washoeschools.net/cms/lib08/NV01912265/Centricity/Domain/76/All%20Children%20Matter%20SSS%20Nov%202015_MG%2010_26.pdf

permissible for a school district to deny a request and not request a hearing consistent with the district's position.

However, as the cited cases in the WCSD's response demonstrate, if the parties disagree whether an IEE request meets the requirements of IDEA laws and regulations that is typically a determination to be made in an evidentiary hearing that turns on the facts of the case. "The purpose of requiring the public agency to either initiate a due process hearing if it wishes to challenge a parent's request for an IEE, or otherwise provide an IEE at public expense, is to require public agencies to respond to IEE requests and to ensure parents are able to obtain an IEE as set forth in section 615(b)(1) of the Act. There is no corresponding need to specify that a parent also has the right to initiate a due process hearing since if a public agency does not do so it must provide the IEE at public expense." (Discussion of the IDEA regulations: Federal Register /Vol. 64, No. 48 / Friday, March 12, 1999 /Rules and Regulations)

"Ultimately, though, if the parent believes that the school district is no longer proceeding in good faith, such that the right to an IEE at public expense is being compromised, but the school district has not filed a due process complaint, he or she has several options. One would be to proceed with the IEE that he or she believes to be appropriate and then to seek compensation from the school district for the IEE the parent had obtained. If the school district refused to pay and did not file for due process (either to show that the school district's evaluation was appropriate, or that the evaluation obtained by the parents did not meet agency criteria), the parent could seek to compel the school district to provide the IEE at public expense (i.e., pay for the IEE the parent had obtained) through any of the dispute resolution mechanisms allowed by the IDEA, including mediation (34 C.F.R. § 300.506), the filing of a State complaint (34 C.F.R. §§ 300.151-300.153) or by filing a due process complaint (34 C.F.R. § 300.507). Alternatively, the parent could, without proceeding to have the IEE conducted, challenge the school district's failure to provide an IEE at public expense through any of these mechanisms." *Letter to Anonymous*, 56 IDELR 175 (OSEP August 13, 2010)⁴

In this case, rather than filing a Due Process Complaint, the Parent, through his advocate, opted to file this State Complaint.

OCCUPATIONAL THERAPY

The Parent requested an Occupational Therapy IEE on May 26, 2016. (FOF #5) While there was an assessment conducted by an Occupational Therapist in the out-of-state evaluation, the WCSD did not conduct an Occupational Therapy Assessment or review the out-of-state Assessment in the January 2016 assessment and the Multidisciplinary Team determined that no formal assessment of the student's gross/fine motor skills was warranted. (FOF #2) Without explanation for the belated review, the WCSD did review the out-of-state Occupational Therapy Assessment as part of the supplemental report in February 2016. (FOF #3)

The student's IEP Team proposed an assessment for Occupational Therapy on March 18, 2016. The Parent participated in the IEP meeting and provided consent on April 20, 2016. (FOF #23) The student was out of school beginning April 21, 2016 and the assessment was not conducted in the 2015/2016 school year. (FOFs #1, #24)

⁴ Publically available at: www2.ed.gov/policy/speced/guid/idea/letters/2010-3/redacted081310iee3q2010.pdf

On June 7, 2016, the WCSD denied the request for an IEE in Occupational Therapy since the WCSD had a signed permission to evaluate for Occupational Therapy; they were unable to evaluate the student due to the student's absence; and "[A]s such, districts have the right to evaluate before granting an Independent Evaluation." (FOF #24) It is the position of the Parent's advocate that the Occupational Therapy IEE was due to WCSD's abandonment of Occupational Therapy services the student had been receiving prior to the student's enrollment in WCSD and the WCSD's failure to conduct an assessment in this area upon the receipt of the Parent's blanket consent for evaluation. (FOFs #2, #4, #25)

In accordance with the IDEA, 34 C.F.R. §300.502(b)((1), a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency. In a policy letter from the United States Department of Education, OSEP responded to a question regarding the filing of a Due Process Complaint in circumstances consistent with the WCSD's characterization:

"With respect to your parenthetical indicating that "the district filed for a due process hearing," we note that when a parent requests reimbursement for an IEE prior to the completion of the district's evaluation, the school district may deny the request for reimbursement **without filing for a due process hearing**. See 34 CFR § 300.502(b)(1). If, after the completion of the school district's evaluation, the parent requests an IEE at public expense, and the school district objects, the school district could file a due process complaint to show that its evaluation is appropriate or to demonstrate that the IEE obtained by the parent did not meet agency criteria. 34 CFR § 300.502(b)(2)(i)." (Underlined for emphasis. *Letter to Zirkel*, 52 IDELR 77 (OSEP December 2008))⁵

This does not mean, however, that an agency must have an existing assessment in the particular area. Further, a disagreement between a parent and agency whether there was an evaluation obtained by the public agency may need to be resolved in a hearing:

"When an evaluation is conducted in accordance with 34 CFR §§300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs. Under 34 CFR § 300.502(b)(2), if a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either: (i) initiate a hearing under 34 CFR § 300.507 to show that its evaluation is appropriate; or (ii) ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing under 34 CFR § 300.507 that the evaluation obtained by the parent did not meet agency criteria." (*Letter to Baus*, 65 IDELR 81 (OSEP February 23, 2015))⁶

In this case, the Complaint Investigation Team determined that the WCSD may have been within their right pursuant to the IDEA, 34 C.F.R. §300.502(b)(1), and the above cited interpretation of the OSEP to deny the Occupational Therapy Assessment and refrain from filing a Due Process Complaint given the seeming absence of an existing Occupational Therapy Assessment, particularly given the lack of any concerns in the area of gross/fine motor at the time of the comprehensive evaluation and the Parent's consent to a WCSD Occupational Therapy Assessment prior to the request for an IEE. (FOFs #2, #23, #24) However, it is troubling that the belated impetus for the WCSD's supplemental review and consideration of

⁵ This letter is publically available at: <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/all2008.html>

⁶ This letter is publically available at: <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html#2015>

the existing assessment by the out-of-state Occupational Therapist in February 2016 (FOF #3) was unexplained in the course of this investigation.

As discussed previously, the Parent's advocate asserted that the initial comprehensive evaluation four months earlier should have included an Occupational Therapy assessment since the student was receiving Occupational Therapy at that time of enrollment in the WCSD and it was abandoned by the WCSD. (FOF #25) However, it is also troubling to the Complaint Investigation Team that the Parent consented to the conduct of a WCSD Occupational Therapy Assessment prior to requesting an IEE and did not subsequently revoke that consent as permitted pursuant to the IDEA, 34 C.F.R. §300.9(c)(1), after the request for the IEE or otherwise explain the sequence of events. (FOF #25)

After independently reviewing and weighing the evidence and arguments, the Complaint Investigation Team determined there is insufficient evidence to come to a determination as to the probable truth of the matter. It is important to note that, unlike evidentiary hearings, there is no burden of proof assigned in the Complaint process:

"Unlike due process hearings, State complaints are investigative in nature, rather than adversarial, and do not include the same procedural rights accorded to parties in an impartial due process hearing. Therefore, the Department believes that it is not consistent with the IDEA regulation for an SEA to treat a State complaint like a due process complaint and assign the burden of proof to either party. Under 34 CFR §300.152, once a State complaint is properly filed, it is solely the SEA's duty to investigate the complaint, gather evidence, and make a determination as to whether a public agency violated the IDEA. It is not the burden of the complainant – or any other party – to produce sufficient evidence to persuade the SEA to make a determination one way or another. Rather, the SEA must independently review and weigh the evidence, generally by reviewing student and school records, data and other relevant information, and come to a determination supported by relevant facts..." (*Letter to Reilly*, 64 IDELR 219 (OSEP November 3, 2014))⁷

Therefore, there is insufficient evidence to make a determination whether the WCSD complied with the IDEA and the NAC, Chapter 388, with respect to requesting a hearing to prove its evaluation of the student was appropriate given its denial of the requested Occupational IEE. Importantly, this conclusion does not preclude the Parent from filing a Due Process Complaint to resolve this dispute in an evidentiary hearing.

BEHAVIOR ANALYTIC ASSESSMENT

As a preliminary matter, the IEE request for the Behavior Analytic Assessment lacked clarity in the May 26, 2016 IEE request since it was described by the Parent as an assessment by Fit Learning, without further specification, and later clarified by the Parent's advocate as an academic assessment by this provider. (FOF #5) With a variance in a July 1, 2016 Email that clarified the intended request in part, the Parent's advocate characterized this IEE request as an academic assessment up to July 11, 2016 when it was clearly stated as the conduct of an assessment by behavior analysts to determine if the student had mastered necessary standards-based skills, by grade level and what behavioral factors may need to be addressed for effective learning. (FOFs #26, #29, #31)

⁷ This letter is publically available at: <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html#2014>

Commencing June 7, 2016, the WCSD timely responded to the Parent advocate's request for an academic IEE and the WCSD and the Parent's advocate engaged in discussions/negotiations on the requested IEE. (FOFs #27 - #31) In response to the WCSD's offer on July 11, 2016 to provide this IEE with an alternative provider, the Parent's advocate did put the WCSD on notice that the sought after IEE was an assessment by a behavior analyst to determine if the student has mastered necessary standards-based skills, by grade level, and what behavioral factors may need to be addressed for effective learning. In that same email, the Parent's advocate indicated that "[I]f the district has information about another vendor, we would be pleased to seek assessment with that vendor." "If the district can bring a behavior analyst to the table to meet with the student and identify the barriers to general education placement and the missing standards-based skills, that would also be acceptable." (FOF #31)

The WCSD did not respond to the Parent advocate's clarification of the requested IEE being one by a behavior analyst of the student's skills and behavioral factors, the request for information on alternative vendors who use behavior analysts to conduct assessments, or the offer to obtain the assessment through a WCSD behavior analyst. (FOF #32) Given the requirement in the IDEA, 34 C.F.R. §300.502(e) regarding agency criteria being the same as the criteria that the public agency uses when it initiates an evaluation discussed in detail below, it is important to note that the WCSD has the positions of an Implementation Specialist for behavior, Board Certified Behavior Analyst, and classified behavior technician. (FOF #33)

The standard under the IDEA, 34 C.F.R. §300.502(b)(2), and the NAC §388.450(1) is that if a parent requests an IEE at public expense, the public agency must, **without unnecessary delay**, either file a Due Process Complaint to request a hearing to show that its evaluation is appropriate; or ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria. With regard to the conduct of the Behavior Analytic IEE, the WCSD did neither up to the filing of this Complaint.

What does "unnecessary delay" mean? "The term "unnecessary delay" used in 34 C.F.R. §300.502(b)(2) is not defined in the regulations. It permits however, a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE." (*Letter to Anonymous*, 56 IDELR 175 (OSEP August 13, 2010))

In *Pajaro Valley Unified School District v. J.S.*, 47 IDELR 12, C 06-0380 PVT (U.S.D.C., Northern District, California 2006), the Ninth Circuit Court of Appeals opined that whether or not unwarranted delay has occurred must be determined given the facts of each particular case. In *Pajaro Valley*, the district waited three months to request a hearing. The Court determined that the district's failure to "...either honor the parent's request or seek administrative review "without unnecessary delay" amounted to a procedural violation of the IDEA."

Based on the facts in *J.P. v. Ripon Unified School District*, 52 IDELR 125, 2:07-cv-02084-MCE-DAD (U.S.D.C., Eastern District, California 2009),⁸ the Court declined to find that a two month delay was "unnecessary delay":

"In Pajaro, however, unlike this case, the delay was completely unexplained. Here, on the other hand, even after Plaintiffs' IEE request was tendered, the parties continued to discuss provision of an IEE through a series of letters. See AR 171-175. The evidence

⁸ Cited by the Ninth Circuit Court of Appeals in *C.W. v. Capistrano Unified School District*, 784 F.3d 1237, 65 IDELR 31 (9th Cir. 2015).

shows that the parties did not come to a final impasse in that regard until February 7, 2007, less than three weeks before the District's due process report was filed. Id. at 174-75. . . . Additionally, as also noted by Defendant, the District's Winter Break also began immediately after the Plaintiffs' IEE request on December 21, 2006, a factor that must also be considered in determining the timeliness of the District's due process request.

Whether or not unwarranted delay has occurred must be determined given the facts of each particular case. Pajaro Valley, 2006 WL 3734289. Given the circumstances present here, the Court cannot say that "unnecessary delay" was present so as to invalidate the underlying due process request made by the District in this matter. . . . ”

A request to a district to conduct an IEE, rather than reimburse a parent for an IEE, may also be a factor in the determination of what constitutes an “unnecessary delay”, because the former delay may impact the student’s educational programming rather than a possible financial hardship a reimbursement delay would cause. (**Seth B. v. Orleans Parish School Board**, 810 F.3d 961, 52 IDELR 125 (5th Cir. 2016)) In this case, the student effectively withdrew from school prior to the IEE request (FOF #1), so this factor is not a contributing factor in the school year at issue.

The facts of this case reveal that the WCSD conducted an Adaptive Behavior Assessment of the student on February 16, 2016, and the student’s teacher reported that the student had not had significant behavioral difficulties in the classroom (comparatively) “until recently”. (FOF #3) The WCSD conducted further assessments of the student’s adaptive behavior on March 1, 2016; and behavior data was collected on March 16, 2016. (FOF #3)

The Parent requested an IEE by Fit Learning on May 26, 2016, nine school days before the end of the 2015/2016 school year (FOF #1); the WCSD issued a Prior Written Notice of its consideration of the requested IEE within three school days of the request (FOF #6); the WCSD and the Parent engaged in discussions/negotiations of the assessments within seven days after the request with the requested assessment being characterized as an academic assessment up until July 11, 2016 (FOFs #26, #27); and on June 7, 2016 the WCSD approved the Parent’s request for a Neuropsychological IEE that was to include an academic assessment, but denied the additional academic assessment by Fit Learning. (FOF #27) The IEE requested was not clarified as a Behavior Analytic IEE until July 11, 2016 (FOF #26); and this Complaint was filed on July 25, 2016 alleging the WCSD’s failure to provide the Behavior Analytic IEE.

Given the specific facts of this case, the Complaint Investigation Team determined that the WCSD was required to file a Due Process Complaint after the conclusion of discussions/negotiations with the Parent’s advocate on July 11, 2016 and the effective denial of the Behavior Analytic IEE. However, at the time of the filing of the Complaint, an “unnecessary delay” had not occurred. Therefore, the WCSD did not violate the IDEA, 34 C.F.R. §300.502(b)(2), and NAC §388.450(1), with regard to the time period for filing a Due Process Complaint.

To be clear, upon the receipt of this decision, the WCSD will be put on notice that there is a limited period of time to meet the requirement of “unnecessary delay” in which to either provide the Behavior Analytic IEE, come to an alternative agreement with the Parent regarding a WCSD assessment as previously offered (FOF #31), or file a Due Process Complaint. Based on the Parent Consent signed after the filing of this Complaint, it appears that the Parent and

the WCSD have come to an agreement with regard to the conduct of a Behavior Analytic Assessment to be done by WCSD. (FOF #34)

Therefore, the Complaint Investigation Team determined that up to the filing of the Complaint, the WCSD complied with the IDEA, 34 C.F.R. §300.502(b)(2), and NAC §388.450(1), with regard to the request for a Behavior Analytic IEE and there was insufficient evidence to make a determination with regard to the request for the Occupational Therapy IEE.

CRITERIA

In accordance with the IDEA, 34 C.F.R. §300.502(a)(2), and NAC §388.450(3), each public agency must provide to parents, upon request for an IEE, information about where an IEE may be obtained, and the agency criteria applicable for IEEs as set forth in the IDEA, 34 C.F.R. §300.502(e), and NAC §388.450(8). The IDEA, 34 C.F.R. §300.502(e), and NAC §388.450(8) provide that if an IEE is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE. Except for these criteria, a public agency may not impose conditions or timelines related to obtaining an IEE at public expense.

Citing the IDEA, 34 C.F.R. §300.502, the United States Department of Education responded in a policy letter “. . . a public agency, including a local educational agency (LEA), or school district, must set criteria under which an IEE can be obtained at public expense, including the location of the evaluation and the qualifications of the examiner, which must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE. 34 C.F.R. § 300.502(e)(1).” (*Letter to Anonymous*, 56 IDELR 175 (OSEP August 13, 2010))

In this case, in response to the request for additional information on the WCSD's written conditions/policy for IEEs in this investigation process, the WCSD acknowledged that the WCSD does not have its own policy or procedures for the IEE process.⁹ Citing NAC §388.450, the WCSD's response was: “So, we can just state that we follow this.” (FOF #10)

Similarly, when asked for a list of the criteria the WCSD uses when it initiates an evaluation, the WCSD indicated that the WCSD criteria for the provision of IEEs “closely matches” the criteria for evaluations within the WCSD and provided an example for a psycho-educational evaluation. (FOFs #9, #14, #15) In response to the requests of the Parent advocate for the criteria the WCSD uses, the WCSD asserted the right to set criteria for IEE so long as those criteria are the same as those used by the district and did not provide the Parent advocate those set criteria or inform the advocate of the opportunity to demonstrate that unique circumstances justify the selection of an evaluator who does not meet agency criteria. (FOFs #11, #12, #13) Therefore, the Complaint Investigation Team determined that the WCSD does not have a written policy/procedure that could have been provided to this Parent or other parents, upon a request for an IEE that includes information about the agency criteria applicable for IEEs pursuant to the IDEA, 34 C.F.R. §300.502(a)(2).

The only IEE request at issue in this Complaint with regard to the provision of the criteria to the

⁹ The WCSD Special Education Procedure Manual dated October 22, 2016 does provide the WCSD's general policy that provides the basic policy for IEEs, but does not include the criteria for IEEs.
<http://www.washoeschools.net/cms/lib08/NV01912265/Centricity/Domain/76/SSS%20Procedure%20Handbook%2010-19-15.pdf>

Parent is for the Behavior Analytic Assessment. As discussed previously, the Parent's request for an IEE by Fit Learning without a statement of the area to be assessed and the communications of the Parent's advocate that followed were confusing with regard to the actual area of assessment. However, had the WCSD provided the Parent's advocate the required set criteria of the WCSD upon the May 26, 2016 request for an IEE as required, the matter may have been clarified earlier than July 11, 2016. (FOF #31) The Complaint Investigation Team also noted that the WCSD's failed to provide even case specific criteria to the Parent advocate for the conduct of the Behavior Analytic Assessment upon the clarification of the nature of the IEE on July 11, 2016. (FOF #11)

Therefore the WCSD failed to comply with the IDEA, 34 C.F.R. §300.502, and the NAC §388.450 with regard to the requirements for an IEE to, upon request for an IEE, provide to the Parent information about the agency criteria applicable for IEEs, specifically the criteria for the conduct of a Behavior Analytic Assessment.

CONDITIONS

In accordance with the IDEA, 34 C.F.R. §300.502(e), and NAC §388.450(8), if an IEE is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE.

“In order to ensure the public agency's criteria are consistent with a parent's right to an IEE, the district must allow parents the opportunity to demonstrate that unique circumstances justify the selection of an evaluator who does not meet agency criteria. In some instances, the only person qualified to conduct the type of evaluation needed by the child may be an evaluator who does not meet agency criteria. . . . In such situations, the public agency must ensure that the parent still has the right to the IEE at public expense and is informed about where the evaluation(s) may be obtained.” (*Letter to Parker*, 41 IDELR 155 (OSEP, February 20, 2004)).¹⁰

In this case, the issue is whether the Independent Contractor Agreement process (FOFs #14, #16) was an impermissible condition with respect to requiring an IEE vendor/provider for the Neuropsychological IEE to engage in a contractual relationship with the district. (FOF #18) The WCSD asserts that it utilizes its own employees when initiating an evaluation for special education and does not contract with independent contractors for that purpose. (FOF #14)

The WCSD's Independent Contractor Agreement requirement does not apply just to special education IEEs, but rather is a general procurement requirement for independent contractors. (FOF #16) Therefore, the issue is not the imposition of a criteria/condition that is different than when the WCSD conducts its own evaluation or a condition imposed only on IEE providers/vendors. The issue is whether this procurement process imposes a condition that was inconsistent with the Parent's right to the Neuropsychological IEE.

The WCSD's Independent Contractor procurement process is detailed and somewhat

¹⁰ See also *Letter to Petska*, 35 IDELR 191 (OSEP, September 10, 2001) where the Office of Special Education Programs determined that certain written policies of four Wisconsin districts regarding criteria for IEE-examiner qualifications were inconsistent with parents' rights to an IEE at public expense, including the absence in its policy that parents have the opportunity to demonstrate that unique circumstances justify selection of an IEE examiner who does not meet the agency's qualification criteria. This letter is publically available at: <http://www2.ed.gov/policy/speced/guid/idea/memosdcitrs/all2001.html>

cumbersome; however, the Complaint investigation Team determined it is not solely applicable to the conduct of IEEs; is comparable to other public agency procurement processes generally; and the vetting process for assurances that services will be performed as procured and requirements such as providers possessing insurance and not being a criminal risk is consistent with public policy. While, in this case, two providers declined to conduct the evaluations due to, at least in part, the WCSD's Independent Contractor requirements/process (FOFs #19, #20), one of the Parent's selected IEE providers for the conduct of the Neuropsychological Assessment did engage in the contractual process to conduct the Neuropsychological IEE of the student. (FOF #18, #22)

Notwithstanding the assertion of the WCSD that it does allow exceptions to the Independent Contractor requirements (FOF #17), the WCSD did not submit requested documentation of this policy and that IEE providers were provided with this policy. The form available on the WCSD website does not include any statement of exceptions or an opportunity for a potential contractor to request an exception and, in this case, the WCSD did not inform the vendor of possible exceptions to the process for the re-fingerprinting requirement in the new fiscal year. (FOF #18)

Since this procurement process is in advance of a parent obtaining a requested IEE, the Complaint Investigation Team requested information from the WCSD on the alternative methods by which the WCSD paid vendors when invoices are submitted after the conduct of the IEE or in situations such as an order for reimbursement for a service ordered in a hearing decision. The WCSD did not provide this requested information. (FOF #17)

Since the Parent obtained the requested IEE despite the Independent Contractor Agreement process and the IEE provider has been paid for the IEE, there is compliance with regard to this student. (FOF #22) However, the apparent absence of a written policy to provide vendors the process to request exceptions and a policy with regard to the processing of IEE invoices after the conduct of an IEE (when the WCSD decides to pay for the IEE rather than request a hearing) will be addressed in the Corrective Action required for the absence of criteria cited previously.

Therefore, the WCSD complied with the IDEA, 34 C.F.R. §300.502, and the NAC §388.450, with regard to the requirements for an IEE, specifically requiring an IEE vendor/provider for the Neuropsychological IEE to engage in a contractual relationship with the district did not impose conditions on the Parent on obtaining an IEE at public expense beyond the criteria that the WCSD uses when it initiates an evaluation that were inconsistent with the Parent's right to an IEE

ORDER FOR CORRECTIVE ACTION

The WCSD is required to take corrective action to address the violation found in this Complaint investigation, specifically the WCSD's failure to provide the Parent, upon request for an IEE, the criteria of the WCSD.

CORRECTIVE ACTION PLAN—ESTABLISH CRITERIA AND PROCEDURE

Within 21 days of the receipt of this Report, the WCSD must develop and submit to the NDE a proposed Corrective Action Plan (CAP) to develop a document(s) with written criteria to be provided to parents, upon request for an IEE, that includes information about where an IEE may be obtained, the agency criteria applicable for IEEs and the opportunity to demonstrate that unique circumstances justify the selection of an evaluator who does not meet agency criteria. With regard to the request for an IEE prior to the performance of a service, the criteria must provide information to parents on the Independent Contractor Agreement process and the process by which a provider/vendor can request an exception (or an alternative process to the Independent Contractor process, at the WCSD's discretion). The CAP must include the policy/procedures with regard to the processing of IEE invoices after the conduct of an IEE (when the WCSD decides to pay for the IEE rather than request a hearing) and the procedure the WCSD will establish to ensure the WCSD timely provides this document(s) to parents upon the request for an IEE.

Following approval of the CAP by the NDE, it must be implemented within 45 days and the set criteria and written procedure must be submitted to the NDE to document its implementation.