

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 19-03

PROCEDURAL HISTORY

On January 10, 2019, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from an attorney (Complainant) representing the parent (Parent) of a student (Student) attending the Northshore School District (District). The Complainant alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On January 11, 2019, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District Superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On February 1, 2019, OSPI received the District's response to the complaint and forwarded it to the Complainant on February 4, 2019. OSPI invited the Complainant to reply with any information she had that was inconsistent with the District's information.

On February 6, 2019, OSPI determined that additional information would be helpful to the investigation and contacted the District. On February 7, 2019, OSPI received this information from the District and forwarded it to the Complainant on February 12, 2019.

On February 6, 2019, OSPI determined that additional information would be helpful to the investigation and contacted the Complainant. On February 11, 2019, OSPI received this information from the Complainant and forwarded it to the District on February 13, 2019.

On February 20, 2019, OSPI received the Complainant's reply to the District's response. OSPI forwarded that reply to the District on February 21, 2019.

On February 27, 2019, the OSPI investigator conducted a phone interview of the District's Director of Elementary Special Education.

OSPI considered all of the information provided by the Complainant and the District as part of its investigation.

SCOPE OF INVESTIGATION

This decision references events which occurred prior to the investigation time period, which began on January 11, 2018. These references are included to add context to the issues under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation time period.

ISSUES

1. Did the District follow proper procedures for developing the Student's September 6, 2018 individualized education program (IEP) amendment?

2. Did the District follow proper procedures for responding to the Parent's request that the Student's September 6, 2018 IEP amendment be revised to permit the Student to remain in the self-contained special education classroom on the afternoons when his private therapy sessions were canceled?

LEGAL STANDARDS

IEP Team: An individualized education program (IEP) team is composed of: the parent(s) of the student; not less than one regular education teacher of the student (if the student is, or may be, participating in the regular education environment); not less than one special education teacher or, where appropriate, not less than one special education provider of the student; a representative of the school district who is qualified to provide or supervise the provision of specially designed instruction, who is knowledgeable about the general education curriculum, and who is knowledgeable about the availability of district resources; an individual who can interpret the instructional implications of evaluation results (who may be one of the teachers or the district representative listed above); any individuals who have knowledge or special expertise regarding the student, including related services personnel; and when appropriate, the child. 34 CFR §300.321(a); WAC 392-172A-03095(1).

General Education Teacher Attendance at IEP Meetings: Not less than one of the student's general education teachers must participate as a member of the IEP team, if the student is, or may be, participating in the general education environment, to assist in the determination of appropriate annual educational goals, behavioral interventions, supplementary aids and services, program modifications, and/or supports for the student. 34 CFR §§300.321, 300.324; WACs 392-172A-03095(1)(b) and 392-172A-03110. Participation by a general education teacher is an important aspect of the IEP development process because of their knowledge of how a student with a disability might benefit from being placed in a general education classroom. Individuals with Disabilities Education Act (IDEA), 62 Fed. Reg. 55,124 (October 22, 1997) (Appendix C to 34 CFR Part 300). The general education teacher who serves on the IEP team should be one who is, or may be, responsible for implementing a portion of the IEP. However, the general education teacher may not, depending upon the child's needs and the purpose of the specific IEP team meeting, be required to participate in all decisions made as part of the meeting, be present throughout the entire meeting, or attend every meeting. IDEA, 64 Fed. Reg. 12,475, 12,477 (March 12, 1999) (34 CFR Part 300, Questions 24 & 26).

IEP Team Member Excusal: Parents and districts can agree in writing that an IEP team member's participation is not necessary and that the team member may be excused from attending an IEP meeting, in whole or part, if the team member's area of curriculum or related services is not being modified or discussed in the meeting. If the meeting involves a modification to or discussion of the team member's area of the curriculum or related services and the parties both consent in writing to the excusal of the team member, the excused team member must submit written input into the development of the IEP in prior to the meeting. 34 CFR §300.321(e); WAC 392-172A-03095(5). Neither the IDEA nor its implementing regulations require that an IEP team include more than one regular education teacher. Therefore, if an IEP team includes more than one regular education teacher of the child, the excusal provisions of 34 CFR §300.321(e)(2) would not

apply. *Questions and Answers on IEPs, Evaluations, and Reevaluations* (OSERS June 2010) (Question C-3).

IEP Development: In developing each student's IEP, the IEP team must consider: the strengths of the student; the concerns of the parents for enhancing the education of the student; the results of the initial or most recent evaluation of the student; and, the academic, developmental, and functional needs of the student. WAC 392-172A-03110(1)(a)-(d).

Parent Participation in IEP Meetings: Parents of a child with a disability will participate with school personnel, in developing, reviewing, and revising the student's IEP. This is an active role in which the parents: provide critical information regarding the strengths of their child, and express their concerns for enhancing their child's educational program; participate in discussions about their child's need for special education, related services, and supplementary aids and services; and join with other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting. IDEA, 64 Fed. Reg. 12473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 5).

The IDEA specifically provides that parents of children with disabilities have an opportunity to participate in meetings with respect to the identification, evaluation, educational placement, and provision of FAPE to their child. Each school district must ensure that a parent of each student eligible for special education is a member of any group that makes decisions on the educational placement of the parent's child. WAC 392-172A-05001.

IEP Team Unable to Reach Consensus: The IEP team should work toward consensus, but the district has ultimate responsibility to ensure that the IEP includes the services that the student needs in order to receive free appropriate public education (FAPE). It is not appropriate to make IEP decisions based upon a majority "vote" and no one team member has "veto power" over individual IEP provisions or the right to dictate a particular educational program. If the team cannot reach consensus, the district must provide the parents with prior written notice of the district's proposals or refusals, or both, regarding the student's educational program and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12, 472, 12,473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 9). *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). *See also, Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1182-83 (9th Cir. 1984) (Holding that a school district is responsible for providing a student with a disability an education it considers appropriate, even if the educational program is different from a program sought by the parents.)

A School District Must Offer a FAPE: School districts must make a formal, written offer of a free appropriate public education (FAPE) through prior written notice. Providing parents a choice of programs in a manner outside of the IEP process does not amount to a formal offer of a FAPE. *Union School District v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994).

Free Appropriate Public Education (FAPE): A FAPE consists of instruction that is specifically designed to meet the needs of the child with a disability, along with whatever support services are necessary to permit him to benefit from that instruction. The instruction and support services must be provided at public expense and under public supervision. They must meet the State's educational standards, approximate the grade levels used in the State's regular education system, and comport with the child's IEP. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 186-188, (1982). Every student eligible for special education between the ages of three and twenty-one has a right to receive a FAPE. 34 CFR §300.101; WAC 392-172A-02000. An eligible student receives a FAPE when he or she receives, at public expense, an educational program that meets state educational standards, is provided in conformance with an IEP designed to meet the student's unique needs and includes whatever support services necessary for the student to benefit from that specially designed instruction. 34 CFR §300.17; WAC 392-172A-01080.

An IEP is required to be "reasonably calculated to enable the child to receive educational benefit." It does not require the absolute best or potential-maximizing education for that child. Rather, the district is obliged to provide a basic floor of opportunity through a program that is individually designed to provide educational benefit to a child with a disability. The basic floor of opportunity provided by the IDEA consists of access to specialized instruction and related services. *Hendrick Hudson v. Rowley* (1982). For a district to meet its substantive obligation under IDEA, a school must "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." An IEP must "aim to enable the child to make progress", the educational program must be "appropriately ambitious in light of [the student's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom," and the student should have the opportunity to meet challenging objectives. *Andrew F. v. Douglas County School District RE-1* 137 S.Ct. 988, 69 IDELR 174 (2017).

Prior Written Notice: Prior written notice ensures that the parent is aware of the decisions a district has made regarding evaluation and other matters affecting placement or implementation of the IEP. It documents that full consideration has been given to input provided regarding the student's educational needs, and it clarifies that a decision has been made. The prior written notice should document any disagreement with the parent, and should clearly describe what the district proposes or refuses to initiate. It also includes a statement that the parent has procedural safeguards so that if they wish to do so, they can follow procedures to resolve the conflict. Prior written notice is not an invitation to a meeting. Prior written notice must be given to the parent within a reasonable time before the district initiates or refuses to initiate a proposed change to the student's identification, evaluation, educational placement or the provision of a free appropriate public education. It must explain why the district proposes or refuses to take action. It must describe any other options the district considered, and it must explain its reasons for rejecting those options. 34 CFR 300.503; WAC 392-172A-05010.

Part-Time Enrollment: WAC 392-134-005(3) reads, in part: "'Part-time public school student' shall mean a student who is enrolled in a public school for less than a 'full-time equivalent student' (FTE) as defined in chapter 392-121 WAC." WAC 392-121-122(2)(b) states: "Beginning with the

2018-19 school year, a student's partial full-time equivalent is the student's weekly enrolled minutes divided by 1,665."

An eligible part-time public-school student shall be entitled to take any course, receive any ancillary service, and take or receive any combination of courses and ancillary services which is made available by a public school to full-time students, including special education services. WAC 392-134-010; see also WAC 392-134-020(1) ("Courses, ancillary services, and any combination of courses and ancillary services shall be provided to part-time public school students at the same level and quality as provided by the public school to full-time students").

FINDINGS OF FACT

2017-2018 School Year

1. During the 2017-2018 school year, the Student attended a developmental preschool program run by the District. The Student was eligible for special education services under the category other health impairment.
2. On January 24, 2018, the District completed a reevaluation of the Student. The January 2018 reevaluation included assessments in the following areas: medical-physical, social/emotional, adaptive, cognitive, communication, motor, vision/orientation and mobility, and Student observation. The Student's reevaluation group determined that the Student continued to be eligible for special education under the category other health impairment. The January 2018 reevaluation report recommended that the Student receive specially designed instruction (cognitive, adaptive, social emotional), related services (vision consultation/services, orientation and mobility consultation with staff), and supplementary aids and services (vision consultation/services, orientation and mobility consultation with staff).
3. On February 19, 2018, the Student's individualized education program (IEP) team created a new annual IEP for the Student. The February 2018 IEP provided the Student with the following specially designed instruction in a *special education setting*:
 - Motor: 40 minutes, 2 times a week (to be provided by a physical therapist (PT) and occupational therapist (OT))
 - Adaptive: 150 minutes a week (to be provided by special education classroom staff)
 - Social/emotional: 120 minutes a week (to be provided by special education classroom staff)
 - Motor: 80 minutes a week (to be provided by special education classroom staff)
 - Cognitive: 110 minutes a week (to be provided by special education classroom staff)
 - Communication: 60 minutes a week (to be provided by speech language pathology (SLP) staff)

The February 2018 IEP provided the Student with the following supplementary aids and services in a *special education setting*:

- Vision consultation with staff—30 minutes, 3 times a year (to be provided by special education staff)

The February 2018 IEP stated that the Student was in school for a total of 600 minutes per week.

4. On May 2, 2018, the Student's IEP team amended the Student's IEP. The Student's present levels and measurable annual goals remained the same. The 30 minute, three times a year vision consultation with staff (as a supplementary aid and service) also remained unchanged. The May 2018 Amended IEP provided the Student with the following amended specially designed instruction in a *special education setting* from May 7, 2018 through June 21, 2018:
 - Adaptive: 170 minutes a week (to be provided by special education classroom staff)
 - Social/emotional: 160 minutes a week (to be provided by special education classroom staff)
 - Cognitive: 130 minutes a week (to be provided by special education classroom staff)

The IEP provided the Student with the following related services in a *special education setting* from May 7, 2018 through June 21, 2018:

- Motor: 40 minutes, 2 times a week (to be provided by an OT and PT)
- Communication: 60 minutes a week (to be provided by an OT and PT)

The IEP stated that the Student was in school for a total of 600 minutes per week from May 7, 2018 through June 21, 2018.

The May 2018 Amended IEP provided the Student with the following specially designed instruction in a *special education setting* from June 22, 2018 through February 18, 2019:

- Adaptive: 355 minutes a week (to be provided by special education classroom staff)
- Social/emotional: 395 minutes a week (to be provided by special education classroom staff)
- Cognitive: 375 minutes a week (to be provided by special education classroom staff)

The IEP provided the Student with the following related services in a *special education setting* from June 22, 2018 through February 18, 2019:

- Motor: 80 minutes a week (to be provided by an OT and PT)
- Communication: 60 minutes a week (to be provided by an OT and PT)

The May 2018 Amended IEP stated that the Student was in school for a total of 1,735 minutes per week from June 22, 2018 through February 18, 2019. The May 2018 Amended IEP also stated: "[Student] will participate with his non-disabled peers for 550 minutes per week for PE, music, recess, field trips, and other activities."

5. On May 2, 2018, the District issued the Parent a prior written notice. In pertinent part, it stated: [Student] will be of kindergarten age for the 2018-19 school year and will be placed in a Functional Skills and Academics classroom...[Student] currently does much outside therapy (speech, OT, PT) on a daily basis. [Parent] will work with the IEP team in the fall to determine [Student's] specific school schedule so he can continue with his outside therapies and attend school as well. He will attend school on a modified schedule based on his outside therapy schedule.
6. According to a "Contact Attempt Report (Amendment)," on August 22, 2018, the District called the Parent to invite her to a meeting scheduled for September 6, 2018 to "review [Student's] current IEP" and "adjust [the IEP] minutes to reflect his current school day." That same day, the Parent stated that she could attend the scheduled meeting.

2018-2019 School Year

7. The District's first day of school was September 5, 2018.
8. During the 2018-2019 school year, the Student was enrolled in kindergarten at a District elementary school. His May 2018 Amended IEP remained in place.
9. On September 6, 2018, the District invited the Parent to a meeting that same day to discuss:
 - a) adjusting the Student's IEP minutes to reflect his 2018-2019 school day; and
 - b) review current IEP.
10. On September 6, 2018, the Student's IEP team amended the Student's IEP. The September 2018 IEP Amendment included measurable annual goals in the following areas: motor, social (initiating play with a peer), communication, adaptive, social emotional, and cognitive, which remained unchanged from the May 2018 Amended IEP (the present levels also remained the same). The IEP noted that the Parent "expressed the following concerns: being able to establish relationships, [Student] being challenged in his educational setting, distractibility, finding the right kindergarten program for [Student], difficulty with initiation."

The September 2018 Amended IEP provided the Student with the following specially designed instruction in a *special education setting* from September 10, 2018 through February 12, 2019:

- Adaptive: 270 minutes a week (to be provided by special education classroom staff)
- Social/emotional: 275 minutes a week (to be provided by special education classroom staff)
- Cognitive: 270 minutes a week (to be provided by special education classroom staff)

The September 2018 Amended IEP provided the Student with the following related services in a *special education setting* from September 10, 2018 through February 12, 2019:

- Motor: 80 minutes a week (to be provided by an OT and PT)
- Communication: 60 minutes a week (to be provided by an OT and PT)

The IEP stated that the Student was in school for a total of 1,330 minutes per week from September 10, 2018 through February 12, 2019, and that 28.2% of that time would be spent in the general education setting.

The September 2018 Amended IEP provided the Student with the following specially designed instruction in a *special education setting* from February 13, 2019 through February 18, 2019:

- Adaptive: 270 minutes a week (to be provided by special education classroom staff)
- Social/emotional: 275 minutes a week (to be provided by special education classroom staff)
- Cognitive: 270 minutes a week (to be provided by special education classroom staff)

The September 2018 Amended IEP provided the Student with the following related services in a *special education setting* from February 13, 2019 through February 18, 2019:

- Motor: 80 minutes a week (to be provided by an OT and PT)
- Communication: 60 minutes a week (to be provided by an OT and PT)

The September 2018 Amended IEP provided the Student with the following supplementary aids and services in a *special education setting* from September 10, 2018 through February 12, 2019, and from February 13, 2019 through February 18, 2019:

- Vision consultation with staff: 30 minutes, 3 times a year (to be provided by special education vision staff)

The September 2018 Amended IEP stated that the Student would be in school for a total of 1,330 minutes per week from February 13, 2019 through February 18, 2019, and that 28.2% of that time would be spent in the general education setting.

11. The following individuals signed the September 2018 Amended IEP, denoting participation: Parent, special education teacher, District representative, SLP, and "occupational/physical therapist." The Parent signed a form excusing the vision specialist from attending the September 6, 2018 IEP meeting because the vision specialist's "services [were] not [to be] adjusted at [the meeting]."

In the District's response, the District stated that a general education teacher was not invited to and did not attend the September 6, 2018 IEP meeting. The District's response stated that the general education services and the Student's performance in the general education setting were not going to be reviewed and the meeting.

12. The OSPI investigator asked the District to describe the purpose of the September 2018 IEP meeting. The District stated that the "purpose of the September IEP amendment was simply to correct the minutes in school to show the actual minutes that the Student attended school, no other changes were needed." OSPI's investigator asked the District: "Was there any updated and/or current data considered by the IEP team in [creating the] September 2018 IEP? I note that the present levels and goals are the exact same for the 2/18, 5/18, and 9/18 IEPs." The District responded: "The purpose of the meeting was to update the minutes in school due to the new therapy schedule that the Parent had in place for September, no other changes were made."

13. According to the District, as of September 6, 2018, the Student was part-time enrolled in the District. The District had a full-time equivalency (FTE) calculation for the Student of 0.50.

According to the District, its policy no longer requires a parent to fill out paperwork when their student will be part-time enrolled; the District can unilaterally establish a student as part-time enrolled for school records and attendance purposes.

14. On September 7, 2018, the District issued the Parent a prior written notice. In part, it read: "An IEP amendment meeting was held to adjust the service minutes...[Student's] parents choose to educate [Student] at home for part of his school day at their own expense. This part-time school placement needs to be reflected in the services section of this IEP."

15. The District's response included a "Daily Schedule – Fall 2018," which reflects the schedule for the Student's self-contained special education classroom:

- 8:45-9:05: room prep
- 9:05-9:20: out to buses

- 9:20-9:40: entry routine
- 9:40-9:55: circle time
- 9:55-10:05: bathroom
- 10:05-10:55: work time
- 10:55-11:00: line up for recess
- 11:00-11:30: recess
- 11:30-11:35: transition to class (coats, then wash hands in bathroom or class)
- 11:35-12:15: lunch, then bathroom
- 12:15-12:25: math
- 12:25-12:30: transition to PE/music/library
- 12:30-1:15: PE/music/library
- 1:15-1:20: transition to class
- 1:20-1:45: story/read aloud; phonics lesson
- 1:45-2:10: centers; bathroom
- 2:10-2:25: snack
- 2:25-2:30: transition to recess
- 2:30-2:45: recess
- 2:45-2:55: transition to class (coats, then use restroom)
- 2:55-3:25: play workshop
- 3:25-3:45: closing circle; exit routine
- 3:45-3:50: transition to car/bus
- 3:50 dismissal

According to the District, on Wednesdays, the self-contained special education classroom was dismissed at 2:20 p.m., as opposed to 3:50 p.m.

According to the District, in two regards, the Student's schedule did not exactly match that of the self-contained special education classroom. First, the District provided the Student with motor, communication, and vision therapies at the following times:

- Motor: Monday and Friday, 10:40-11:20
- Communication: Tuesday, 1:15-1:45; Wednesday, 10:00-10:30
- Vision: Consultation 3X a year, so no set schedule.

Second, the Parent removed the Student from school most afternoons to receive private services. According to the Parent, the Student's private service schedule was as follows:

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| <ul style="list-style-type: none"> • Monday <ul style="list-style-type: none"> ○ Speech: 2:15 p.m. – 3:00 p.m. ○ Physical Therapy: 3:15 p.m. – 5:00 p.m. ○ Massage therapy: 5:30 p.m. – 6:30 p.m. • Tuesday <ul style="list-style-type: none"> ○ Speech: 2:00 p.m. – 2:45 p.m. ○ Occupational Therapy¹: 3:00 p.m. – 5:00 p.m. | <ul style="list-style-type: none"> • Wednesday <ul style="list-style-type: none"> ○ Speech: 1:30 p.m. – 2:15 p.m. ○ Physical Therapy: 3:00 p.m. – 5:00 p.m. • Thursday <ul style="list-style-type: none"> ○ Speech: 2:00 p.m. – 2:45 p.m. ○ Occupational Therapy: 3:00 p.m. – 5:00 p.m. ○ Craniosacral²: 5:30 p.m. – 6:30 p.m. |
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¹ According to the Complainant, the Student's private occupational therapy services consisted of one hour of feeding therapy and one hour of sensory integration therapy, which the Parent also referred to with the phrase "integrative listening system." (According to the Taclott Center for Child Development, an "integrative listening system" "is a multi-sensory system that integrates music, movement, and language exercises to help improve brain function. The premise...is that stimulation of movement, balance, vision, and auditory pathways are vital to the ability to pay attention, process information, coordinate movement, learn and response." <https://www.thetalcottcenter.com/blog/itemlist/category/2-clinical.html>)

² According to the website Medical News Today, craniosacral therapy "is an alternative treatment typically used by osteopaths, chiropractors, and massage therapists. It claims to use a gentle touch to manipulate

- Friday
 - Speech: 2:00 p.m. – 2:45 p.m.
 - Occupational Therapy: 3:00 p.m. – 5:00 p.m.³

16. In its investigation of this complaint, OSPI’s investigator asked the Complainant how she would characterize the decision-making process in the September 6, 2018 meeting. Specifically, the OSPI investigator asked the Complainant: “Was it [more] a matter of ‘the District didn’t believe the [Student’s private] services were necessary for a free appropriate public education (FAPE)? Or was it more a matter of ‘the District was prepared to offer services in these areas but Parent preferred they be administered by a private provider’?” In response, the Complainant stated, in part:

Due to the District’s limited availability for therapy time v. classroom lessons, as well as Student’s limitations in fine motor, gross motor, and oral mobilities, the District does not have the resources, time, or ability to work on Student’s limitations outside of the school setting...The District does not have a feeding therapy program, integrative listening system, shoulder stability rehabilitative program, and other programs that [Student] needs on a daily basis relative to Student’s hemispherectomy surgery...The District has never offered the therapies the Parent is accessing outside of school nor explained whether the Student required those therapies in order to receive a FAPE...The District has never offered or even considered the therapies the medical team believes are necessary for the Student...The District has not been able to identify and/or diagnose the Student with a stage 3 posterior tongue tie, which has prevented his speech and feeding therapy from improving...For physical therapy, the District does not provide direct muscle strengthening programs guided to prevent serious injury to the Student’s body due to dislocation, nor the knowledge for...stability for external hip rotation and correct gait training.

In its investigation of this complaint, OSPI’s investigator also asked the District how it would characterize the decision-making process in the September 6, 2018 meeting. In response, the District stated that the District has the services the Student is accessing privately, and “does not think additional services are necessary for FAPE...Parent has chosen to do this due to her insurance coverage—Parent reported to the special education teacher that she has insurance to cover unlimited outside therapies and will do that until he turns 7.”

However, in a phone interview with the OSPI investigator, the District’s director of elementary special education (director) stated that no discussion took place during the September 6, 2018 meeting as to whether the services the Student was accessing privately were necessary for FAPE, and if they were, whether the District could provide equivalent services. The director stated that the purpose of the September 6, 2018 meeting was “was simply to correct the minutes in school to show the actual minutes that the child attended school, no other changes were needed.”

the joints in the cranium or skull, parts of the pelvis, and the spine to treat disease...[by] enhancing the body’s own healing capabilities.” <https://www.medicalnewstoday.com/articles/318490.php>

³ According to the District, the Parent picked the Student up from school at the following times on the following days: Monday (1:50 p.m.), Tuesday (1:40 p.m.), Wednesday (1:10 p.m.), Thursday (1:40 p.m.), Friday (1:10 p.m.).

17. In its investigation of this complaint, OSPI's investigator asked the District: "Has the District been marking the Student's afternoons as excused absences?" In response, the District stated: "Since these were scheduled absences, we have excused them, and with the partial FTE we don't record each one."

18. On October 17, 2018, the Parent and the special education teacher exchanged several emails. The Parent stated that the Student's private speech therapist had the flu and so she would like the Student to be in school all day. The special education teacher responded, in part: "As much as I would love for [Student] to swim with us, he is not able to stay all day. We modified his IEP to reflect a shortened school day so he cannot attend school for extra time even when his outside therapies are cancelled. This goes for all days that he has outside scheduled therapies. The district policy requires that we stick to the minutes that we agreed to at the IEP meeting."

In response, the Parent asked: "Is there anyway to change the wording on his IEP going forward so that if his outside therapies are cancelled, [Student] can attend school and not miss out for no reason?" The special education teacher responded, in part: "I appreciate your willingness to problem-solve. Let's look at this together and see what we can come up with. The minutes are based on each week so we can look and see if there is something more creative we can do." The Parent responded, in part: "Perfect! Let me know when you want to meet or how we can get this done ASAP. With winter approaching, there could be a lot of cancellations with therapies and I can't justify [Student] missing your lessons if he's not benefiting from therapy."

19. On October 25, 2018, according to an email from the special education teacher to the Parent, the Parent, the special education teacher, and the one of the school's assistant principals (assistant principal 1) met to "talk about [Student's] current IEP minutes and see if there [was] any leeway to change his schedule from time to time."

Attached to the special education teacher's email was a copy of "District Policy 3122, Process for Parents Requesting Excusal from School Day for Students with an IEP." In part, it read:

- If the approved absence is regularly scheduled (meaning specific days and times each week) and the student has an IEP, the IEP team would amend the IEP to reflect the reduction in minutes of services in the school day due to the student's regularly scheduled absences. The calculation of LRE would be based on the total number of minutes the student is projected to be in attendance at school, excluding the time for student's regularly scheduled absences.
- It would be reflected in the [prior written notice] PWN, in the other relevant factors section, that service minutes/LRE calculation has been changed to reflect the parents' request for excused absences under Policy 3122. If the schedule of the student's absence changes again (to increase or decrease attendance due to regularly scheduled absences), the IEP would be amended to reflect the student's adjusted attendance. The PWN should also reflect that the team has offered the student all necessary educational services through a full-day educational program.
- If the IEP team members believe that a request for regularly scheduled absences adversely impacts a student's receipt of FAPE through his or her IEP, the team should request support from the special services' office.

- In order for school staff to adequately plan educational services for students with IEPs who have approved regularly scheduled absences, it is the expectation that students will not be attending school on those scheduled days and times in the event of unforeseen reasons.

20. On October 29, 2018, assistant principal 1 emailed the Parent, stating, in part: "I had an opportunity to speak to the District office regarding the attendance policy. They want us, at the building level, to be consistent in the enforcement of the policy. Unfortunately, that means that [Student] will not be able to attend when his outside appointments are cancelled."

Later that same day, the Parent responded to assistant principal 1, including the special education teacher in her response. The Parent's response stated, in part:

I was just informed that I have apparently agreed to part time homeschooling [Student]. None of which was ever talked about. I want this off of [Student's] IEP immediately. I have contacted the state [department] of education regarding the policies and have contacted [Student's] lawyers as well at this point since the District will not negotiate. Please let me know a date in the near future to amend the IEP and take off homeschool. I have not agreed to that, which is why [Student] is attending [a District elementary school] and I made that clear in the transition meeting at [the early childhood center].

On October 30, 2018, the special education teacher responded, stating, in part:

I responded in [Student's] book a little about this today. The term 'homeschool' in this case means that the Student is receiving services outside of school during the school day. This is an easy thing to change in an IEP amendment. I apologize for the confusion that this has caused. I can replace homeschool with 'private therapy' or 'outside therapy.' Which terminology would you prefer? Would you like to meet with me in person to discuss and make this change? Would you rather I make the change and send you a draft of the wording to review and approve? Just let me know what would be easiest for you?

Later that same day, the Parent responded, stating, in part:

I just got done reading [Student's] communication book. If we can change the wording so that it states something like [Student] being pulled out of school for medical services, that would be a better representation of the whole picture. After talking with [assistant director of elementary special education] yesterday, she was very hung up on the policy 3122 and the fact that I have agreed to homeschool [Student]. Despite me telling her we are not homeschooling [Student], she insisted that the IEP states [that] and the policy 3122 needs to be upheld because of it. So we need to get that whole statement out of there. I feel like the District will approach policy 3122 a little differently if they understand that [the District elementary school] is [Student's] sole form of education. If anything, it eliminates that to come up as an excuse.

I feel like as it stands now, it would be me saying, 'Oh, I don't really want to homeschool [Student] part time today. I'd rather have [the special education teacher] teach him instead.' When really, the minutes he's not in school need to reflect that he truly is not receiving any outside education services on any level. It's strictly medical, and we are seeking more educational time when medical appointments are cancelled or not in place...I don't see the need to have a meeting over a simple change...the only thing I feel we need to have an IEP meeting on is in regards to the policy 3122 and the minutes for adjustment...if you just

want to send over the draft of the revision for me to look over quickly, I can approve over an email and sign it quickly when I drop [Student] off or pick him up.

Later that same day, the special education teacher responded to the Parent, stating, in part: "That all makes sense to me. Thank you for [the] specific wording of 'medical services.' That is helpful. I will type up a draft this week, hopefully tomorrow, and send it to you."

21. On November 7, 2018, the assistant superintendent for secondary education emailed the Parent, stating, in part:

I have been working with [assistant principal 2] for the past week regarding your request to have [Student] remain at school when his therapy sessions are cancelled...we are willing to honor the requests for [Student] to remain at school as needed with one weeks advance notice to the teacher and [assistant principal 2]. This will allow time for the teacher to make sure that plans are in place to provide [Student] with the support he may need.

22. On November 15, 2018, the Student's IEP team amended the Student's IEP. The vision consultation remained unchanged, and the specially designed instruction and related services changed as follows. The November 2018 Amended IEP provided the Student with the following specially designed instruction in a *special education setting* from November 26, 2018 through February 12, 2019, and from February 13, 2019 through February 18, 2019:

- Adaptive: 270 minutes a week (to be provided by special education classroom staff)
- Social/emotional: 275 minutes a week (to be provided by special education classroom staff)
- Cognitive: 270 minutes a week (to be provided by special education classroom staff)

The IEP provided the Student with the following related services in a *special education setting* from November 26, 2018 through February 12, 2019 and from February 13, 2019 through February 18, 2019:

- Motor: 80 minutes a week (to be provided by an OT and PT)
- Communication: 60 minutes a week (to be provided by an OT and PT)

The November 2018 Amended IEP stated that the Student was in school for a total of 1,330 minutes per week from November 26, 2018 through February 12, 2019, and a total of 1,330 minutes per week from February 13, 2019 through February 18, 2019.

23. The District's response included an email communication between the Parent and the Parent's attorney, dated November 15, 2018. In pertinent part, an email from the attorney read:

I do not think [Student's] IEP should be amended at all. What I think is the IEP with a full day of services should be his IEP. Then the prior written notice can says Parents decided to have him miss some school due to doctor's appointments but if an appointment is cancelled, Parents will give at least one school days' notice and then [Student] will stay for the full day. That is what I told [assistant superintendent of special services] on Tuesday.

24. On November 16, 2018, the District issued the Parent a prior written notice. In part, it read: An IEP meeting was held with Parent, [special education teacher], and district representative...[we are proposing adjusting] language in [the] prior written notice to reflect medical services received outside of school. Parent would like the term 'homeschool' removed and replaced with medical services: the school district has offered a full day

program which consists of 1735 minutes a week in school. [Student's] family has chosen to reject a full day program for a modified, partial day to pursue medical services.⁴

25. On December 7, 2018, the Parent's attorney, assistant superintendent of special services, assistant principal 1, and special education teacher exchanged emails with one another regarding how much notice the District required for the Student to attend a full day of school if the Student's private therapy sessions were canceled.

According to the District's response, the school team ultimately requested "Forty-eight hours' notice from Parent if Student was going to be attending during an otherwise regularly scheduled absence." The District stated that "forty-eight hour notice allows the special education teacher to receive the message, often times at the end of the day or the next morning due to the teacher schedule, lesson plan accordingly, and assign staff schedules."

According to the Parent's complaint, this was unacceptable to her because "there are times when [Parent] does not get forty-eight hours' notice herself."

26. The District was on break from December 19, 2018 through January 1, 2019.

27. According to the Parent, on January 30, 2019, the Student's IEP team created a new draft IEP for the Student. According to the Parent, at the meeting, the District again stated:

It would reduce the minutes on the Student's IEP [for] the amount of time he would be out if he attended all of his medical therapy appointments...[I] objected as...this will result in the District refusing to allow Student to stay on days his medical therapy appointments are cancelled...The District stated it was required to write the IEP with the reduced minutes even though there will be days the Student will be present for the entire day. I do not believe this to be true and I believe it would result in a denial of FAPE [for] Student. The District should offer a full-day program and note in the prior written notice that on days the Parent removes the Student early from school for medical appointments, he will miss class time that will not be made up.

28. According to the Parent, at a January 30, 2019 IEP meeting:

For the short time the general education teacher was present for the IEP meeting, the Parent was able to get limited information on that class and how much the Student attended, which was almost none, and how he was doing. At this meeting, [I] was told [that] the Student had a typical peer group he played with during recess and that these typical peers waited for him and made sure he participated in their play, often making accommodations so this could happen. This...led to a discussion about how much general education time the Student should have...there was a discussion on increasing the Student's time in the general education class for this year and next year, but that discussion

⁴ The District's response contained a statement that is similar to that found in the November 16, 2018 prior written notice: "Parent removes the Student every day in the afternoon resulting in actual attendance of 1,330 minutes a week. The Parent is choosing to remove the Student for outside medical services, services that were not based upon a recommendation of the IEP team. The District proposed FAPE as 1,735 minutes which is a full week of services. But due to Student's unilateral removal by Parent, the full-day program was not being provided and the IEP needs to accurately reflect service minutes."

could not be finished as [I am] still waiting for the IEP meeting to be continued with the general education teacher.

CONCLUSIONS

Issue 1: IEP Development – The Parent alleged that the District did not follow proper procedures for developing the Student’s September 6, 2018 Amended IEP.

Properly Constituted IEP Team – An IEP team is composed of: the parents of the student; not less than one regular education teacher of the student (if the student is, or may be, participating in the regular education environment); not less than one special education teacher or, where appropriate, not less than one special education provider of the student; a representative of the school district; an individual who can interpret the instructional implications of evaluation results (who may be one of the teachers or the district representative listed above); any individuals who have knowledge or special expertise regarding the student, including related services personnel; and when appropriate, the child.

Parents and districts can agree in writing that an IEP team member’s participation is not necessary and that the team member may be excused from attending an IEP meeting, in whole or part, if the team member’s area of curriculum or related services is not being modified or discussed. If the meeting involves a modification to or discussion of the team member’s area of the curriculum and the parties both consent in writing to excuse the team member, the excused team member must submit written input into the development of the IEP prior to the meeting.

Here, both the May 2018 and September 2018 Amended IEPs stated that the Student would participate in the general education environment. The District conceded, however, that a general education teacher was not invited to and did not attend the September 6, 2018 IEP meeting. The Parent did sign a document to excuse the vision specialist from attending the September 6, 2018 meeting because the vision specialist’s “services [were] not [to be] adjusted at [the meeting].” The Student’s general education environment was going to be discussed at the September 6, 2018 meeting and therefore, a general education teacher should have attended. The Parent and District did not agree to and sign a form excusing the general education, nor did they have the general education teacher submit written input into the development of the IEP prior to the meeting. The other required members of the IEP team were present at the September 6, 2018 meeting; for example, the Parent, special education teacher, District representative, SLP, and “occupational/physical therapist” all attended the meeting. Here OSPI finds a violation because the District failed to follow excusal procedures for the general education teacher. The District will develop written guidance on this topic.

Developing an IEP to Provide FAPE – In developing each student’s IEP, the IEP team, including the parent, must consider: the strengths of the student; the concerns of the parents for enhancing the education of the student; the results of the initial or most recent evaluation of the student; and, the academic, developmental, and functional needs of the student. Further, through an IEP, a district must make a formal, written offer of a free appropriate public education (FAPE). A FAPE consists of instruction that is specifically designed to meet the needs of the child with a disability,

along with whatever support services are necessary to permit him to benefit from that instruction. The instruction and support services must be provided at public expense and under public supervision. They must meet the State's educational standards, approximate the grade levels used in the State's regular education system, and comport with the child's IEP.

Here, in creating the September 2018 Amended IEP, the District considered the Parent's concern for enhancing the education of the Student. The IEP reads, in part, that the Parent: "expressed the following concerns: being able to establish relationships, [Student] being challenged in his educational setting, distractibility, finding the right kindergarten program for [Student], difficulty with initiation." And, importantly, the District agreed to adjust the Student's service minutes principally because of the Parent's desire to provide the Student with certain private therapies. In creating the September 2018 Amended IEP, the District properly considered the Parent's concerns for enhancing the education of the Student.

It is not clear, however, that the Student's IEP team properly considered what a FAPE consisted of for the Student, based on a consideration of the Student's individualized, disability-related needs. For example, the present levels and measurable annual goals remain the same in the Student's September, February, and May 2018 Amended IEPs. When asked if the team considered updated or current data when amending the IEP in September 2018, the District stated that the purpose of the September 6, 2018 meeting was solely to amend the Student's service minutes to accommodate the Student's private therapy schedule. Importantly, both the District and the Parent stated that the Student's IEP team did not discuss whether the services and therapies the Student was receiving from private providers were necessary for the Student to receive a FAPE; how these private therapies might intersect with what a FAPE looked like for this particular Student; and therefore, whether the District had an obligation to offer these services. The IEP team amended the Student's IEP to reflect the minutes of school he was attending in the morning; however, the team did not discuss whether a FAPE could be provided to the Student in a half day or whether a FAPE consisted of a full day program for the Student. The IEP team instead amended the IEP to reflect the District services the Student was currently accessing.

The IEP team should have considered the totality of the Student's needs and then the District should have made an offer of a FAPE. From that point, the Parent could choose to access only certain services through part-time enrollment. Given that the IEP team failed to discuss whether the IEP as amended offered the Student a FAPE, the District is in violation and will be required to hold an IEP meeting.

Issue 2: Response to Parent's Request Concerning Scheduling – Here, the Parent and the District have different understandings of the Student's current enrollment status and the implications of his enrollment status. The Parent stated that the Student is not being homeschooled on a part-time basis nor did she intend to homeschool the Student. The Parent wants an IEP that: a) reflects a full-time enrollment; and b) includes a statement that the Student is regularly pulled out of school on afternoons to receive "medical services," and that, when those "medical services" are canceled, the Student is allowed to stay in school. The District stated that the Student's IEP must reflect the services he is actually scheduled to receive on a regular basis.

Here, the District amended the Student's IEP to reflect the services he was accessing (regardless of whether this represented a FAPE for the Student, see above). When the Parent requested that the Student be able to attend school on afternoons when his private therapy appointments were canceled, the District initially responded that the school had to follow the District attendance policy—meaning the Student would not be able to attend when his outside appointments were canceled. After discussion between the Parent and the District, the District stated that the Student could attend on afternoons his private appointments were canceled, but that the school would need forty-eight hours' notice. The Parent disagreed because there are times when she does not get forty-eight hours' notice herself. The Parent's attorney stated that the attorney thought the Student's IEP should include a full day of services, that the prior written notice should state the Parent can decide to have him miss school for appointments, and if the appointment is canceled, the Student can attend with one school days' notice.

The District maintains, and documents in prior written notices, that the Parent has chosen to reject a full day program for the Student for a "modified, partial day to pursue medical services." The District also categorizes the Student as a part-time enrolled student based on the number of minutes he attends school weekly: 1, 330.⁵

The fact remains that there is a disagreement about the Student's enrollment status (Parent and Parent's attorney would like this Student to be full-time enrolled) and the District maintains that based on the number of minutes he attends school in the morning, the Student is part-time enrolled. The question of enrollment status is inherently tied to the above discussion regarding what a FAPE for the Student consists of. Because the District failed to address this at the IEP meeting, the District failed to properly respond to the Parent's requests regarding scheduling. The District will discuss this at the Student's IEP meeting.

OSPI asks that the IEP team review OSPI's February 2016 tip on part-time enrollment in its special education monthly update, and recommends that the IEP team consider holding a facilitated IEP meeting through Sound Options.

CORRECTIVE ACTIONS

By or before **April 12, 2019** and **May 17, 2019**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

By or before **April 5, 2019**, the Student's IEP team will meet to address the topics raised in this complaint. The IEP team will discuss what a free appropriate public education (FAPE) looks like

⁵ The Student meets the regulatory definition of a part-time enrolled student. A part-time public school student is defined as a student is enrolled for less than a "full-time equivalent" (FTE) student as defined in chapter 392-121 WAC. Beginning in the 2018-2019 school year, a student's partial FTE is the student's weekly enrolled minutes divided by 1,665. During the relevant period, the Student's weekly enrolled minutes were: 1,330. Therefore, the Student is a part-time enrolled Student—1,330 divided by 1,665 is 0.798, which is less than 1 FTE.

and consists of for this Student, based on his unique disability related needs. The team will discuss how the Student's private therapies intersect with a FAPE. The IEP team should consider the totality of the Student's needs and then the District should make an offer of a FAPE. From that point, the Parent can choose to access only certain services through part-time enrollment.

Before the meeting, the District members of the Student's IEP team will be required to review the part-time enrollment tip in OSPI's February 2016 Monthly Update. OSPI's February 2016 Monthly Update is attached hereto as **Exhibit 1**. The Parent is also encouraged to review this tip before the meeting.

By **April 12, 2019**, the District will submit to OSPI: 1) a copy of the meeting invitation; 2) a copy of any prior written notices; 3) a copy of the agenda or topics discussed at the meeting; 4) a copy of the IEP if amended; and, 5) any other related documents.

DISTRICT SPECIFIC:

By or before **April 5, 2019**, the District will develop written guidance on required IEP team membership and proper excusal procedures. The guidance will be provided to all certificated staff, including special education teachers, general education teachers, and educational staff associates (ESA) at the elementary school identified in this complaint. ESAs include school psychologists, physical therapists, speech language pathologists, school counselors, and other service providers. The guidance will also be provided to principal and assistant principals.

By **April 12, 2019**, the District will submit a draft of the written guidance to OSPI. OSPI will approve the guidance or provide comments by April 19, 2019 and provide additional dates for review, if needed.

By or before **May 10, 2019**, the District will provide the written guidance to the above listed individuals and ensure that the staff have an opportunity to review the guidance and ask questions. By **May 17, 2019**, the District will provide OSPI with documentation that the staff has reviewed the written guidance. The documentation will include an official human resources roster of the required staff, so OSPI can cross-reference the list with the actual recipients.

The District will submit a completed copy of the Corrective Action Plan (CAP) Matrix documenting the specific actions it has taken to address the violations and will attach any other supporting documents or required information.

Dated this ____ day of March, 2019

Glenna Gallo, M.S., M.B.A.
Assistant Superintendent
Special Education
PO BOX 47200
Olympia, WA 98504-7200

THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

IDEA provides mechanisms for resolution of disputes affecting the rights of special education students. This decision may not be appealed. However, parents (or adult students) and school districts may raise any matter addressed in this decision that pertains to the identification, evaluation, placement, or provision of FAPE to a student in a due process hearing. Decisions issued in due process hearings may be appealed. Statutes of limitations apply to due process hearings. Parties should consult legal counsel for more information about filing a due process hearing. Parents (or adult students) and districts may also use the mediation process to resolve disputes. The state regulations addressing mediation and due process hearings are found at WAC 392-172A-05060 through 05075 (mediation) and WAC 392-172A-05080 through 05125 (due process hearings.)