

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-107

PROCEDURAL HISTORY

On September 10, 2020, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the **[REDACTED]** School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On September 11, 2020, 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 October 1, 2020, OSPI received the District's response to the complaint and forwarded it to the Parent on October 2, 2020. OSPI invited the Parent to reply.

On October 9 and 10, OSPI received the Parent's reply and additional information. OSPI forwarded that reply and information to the District on October 13, 2020.

On October 22, 2020, OSPI requested clarifying information from the District and received the requested information on October 26, 2020. OSPI forwarded the information to the Parent on October 27, 2020.

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On October 24, 2020, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on October 26, 2020.

On November 2, 2020, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on November 3, 2020.

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

ISSUES

1. Did the District implement the Student's individualized education program (IEP) during the March 2020 through June 2020 school facility closures, including providing access to the Student's least restrictive environment (LRE)?
2. Did the District follow procedures to address the Parent's request for extended school year (ESY) services for summer 2020?

LEGAL STANDARDS

IEP Implementation during School Facility Closures for COVID-19: At the beginning of each school year, each district must have in effect an individualized education program (IEP) for every student within its jurisdiction served through enrollment who is eligible to receive special education services. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

During the COVID-19 school facility closures, as students received general education instruction and student support services, districts must provide students with disabilities with the special education services—related services and specially designed instruction—supporting a free appropriate public education (FAPE). The U.S. Department of Education Office for Civil Rights (OCR) and Office for Special Education and Rehabilitative Services (OSERS) indicated the "exceptional circumstances" presented during the school facility closures caused by COVID-19 "may affect how all educational and related services and supports are provided" to students with disabilities. There is not an expectation that IEP services would be delivered exactly as the IEP states. *Questions and Answers: Provision of Services to Students with Disabilities During School Facility Closures for COVID-19* (OSPI March 24, 2020); *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (OCR/OSERS March 21, 2020) ("It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities...during this national emergency, schools may not be able to provide all services in the same manner they are typically provided...The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency...FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students.")

While there was not an expectation that districts implemented a student's IEP as written during school closures caused by COVID-19 in spring 2020, districts must have had a plan for how students with disabilities were to receive a FAPE, including the provision of special education. *Questions and Answers* (OSPI, March 24, 2020); *Questions and Answers* (OSPI, May 5, 2020). See also, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (U.S. Department of Education, March 13, 2020) ("SEAs, LEAs, and schools must ensure that to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under the IDEA"). All schools were expected to have begun providing educational services for all

students by March 30, 2020, which OSPI termed "Continuous Learning 2020." OSPI Bulletin 024-20 (March 23, 2020).

The individualized special education services being provided to a student during the school facility closures as part of continuous learning, were to be documented in writing using a student's annual IEP, IEP amendment (particularly if services to be provided during the closure were significantly different from what the IEP indicated), prior written notice, or optional "Continuous Learning Plan" (CLP) or similar document. Districts had flexibility in how they chose to document decisions made in real-time. *Questions and Answers* (OSPI, April 13, 2020). Districts were encouraged to prioritize parent communication, including discussions of how special education services were to be provided during the closures. *Questions and Answers* (OSPI, May 5, 2020).

Specially Designed Instruction: The purpose of the IDEA is to ensure that all students eligible for special education have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 CFR §300.1; WAC 392-172A-01005. Special education includes specially designed instruction, which means adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction: to address the unique needs of the student that result from the student's disability; and to ensure access of the student to the general curriculum, so that the student can meet the educational standards within the jurisdiction of the public agency that apply to all students. 34 CFR §300.39(b)(3); WAC 392-172A-01175(3)(c).

Progress Reporting: The purpose of progress reporting is to ensure that, through whatever method chosen by a school district, the reporting provides sufficient information to enable parents to be informed of their child's progress toward the annual IEP goals and the extent to which that progress is sufficient to enable the child to achieve those goals. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir, 2001) (parents must be able to examine records and information about their child in order to "guarantee [their] ability to make informed decisions" and participate in the IEP process). IEPs must include a statement indicating how the student's progress toward the annual goals will be measured and when the district will provide periodic reports to the parents on the student's progress toward meeting those annual goals, such as through the use of quarterly or other periodic reports concurrent with the issuance of report cards. 34 CFR §300.320(a)(3); WAC 392-172A-03090(1)(c).

Extended School Year Services: Extended school year (ESY) services means services meeting state standards provided to a student eligible for special education that are beyond the normal school year, in accordance with the student's IEP, and at no cost to the parents of the student. School districts must ensure that ESY services are available when necessary to provide a FAPE to a student eligible for special education services. ESY services must be provided only if the student's IEP team determines, based on the student's needs, that they are necessary in order for the student to receive a FAPE. The purpose of ESY services is the maintenance of the student's learning skills or behavior, not the teaching of new skills or behaviors. School districts must develop criteria for determining the need for ESY services that include regression and recoupment time based on documented evidence, or on the determinations of the IEP team, based on their professional judgment and considering the nature and severity of the student's disability, rate of progress, and

emerging skills, among other things, with evidence to support the need. For purposes of ESY, "regression" means significant loss of skills or behaviors if educational services are interrupted in any area specified in the IEP. "Recoupment" means the recovery of skills or behaviors to a level demonstrated before interruption of services specified in the IEP. 34 CFR §300.106; WAC 392-172A-02020. A student's IEP team must decide whether the student requires ESY services and the amount of those services. In most cases, a multi-factored determination would be appropriate, but for some children, it may be appropriate to make the determination of whether the child is eligible for ESY services based only on one criterion or factor. *Letter to Given*, 39 IDELR 129 (OSEP 2003).

FINDINGS OF FACT

2019-2020 School Year

1. During the 2019-2020 school year, the Student attended a District preschool and was eligible for special education services under the category developmental delay.
2. The District's 2019-2020 school year began on August 27, 2019.
3. The Student's June 14, 2019 individualized education program (IEP) was in effect prior to the COVID-19 school facility closures. The Student's IEP included annual goals in the area of social skills (attending group activities, cooperative play, and playing board games). Progress toward the annual goals was to be reported at the trimester. The Student's IEP provided the Student with the following specially designed instruction:
 - Social: 10 minutes, 3 days per week (provided by a general education teacher in the general education setting)
 - Social: 10 minutes, 1 time per week (provided by the special education teacher in the general education setting)

The Student's IEP noted the Student was attending a regular early childhood program for less than 10 hours per week. The Student's IEP indicated the Student was not eligible for extended school year (ESY) services.

4. On November 18, 2019, the District reported progress on the Student's annual IEP goals. The progress reporting indicated the Student was making sufficient progress on all goals.
5. According to the Parent, sometime in late January or early February, they had a "parent teacher conference/IEP meeting." In her reply to the District's response, the Parent stated she "filled out the paperwork [for summer services] with the school in February and at the IEP meeting in February they have me the paperwork for summer pre-school to fill it out [sic]...When I asked the District about it in April, they said that it was all canceled." The Parent stated:

Before that meeting started, I talked to two ladies in the [early childhood] office...I told them that I had requested summer learning for [the Student] the previous school year, and the IEP team said that nothing was available for him. They said he would qualify for it 2020 summer...I remembered that they had told me to fill out the paperwork...I completed the form...and gave it to them. When we discussed this in the conference/IEP meeting that day,

I told them I had already completed the paperwork for summer learning. I continually asked about it with the district and they said nothing was being offered at all to anyone.

6. According to the District, this was not an IEP meeting. The case manager stated she did not meet with the Parents in February and there were no formal IEP meetings documented in IEP Online during this time period. In additional information from the District, the District's executive director of special education (executive director) stated she was not sure what summer program the Parent was referring to and stated, "the only other program that I know of that has been discussed with the previous team and current team is for the [Student] to participate in Boys and Girls club when...not in school."
7. On March 9, 2020, the District reported the following progress on the Student's goals:
 - Attend Large Group Activity: "insufficient progress...[Student] is requiring multiple prompts to demonstrate listening behavior vs. blurting out during instruction."
 - Play Board Game: "sufficient progress...[Student] loves playing board games and is requiring minimal reminders to take turns."
 - Cooperative Play: "insufficient progress...since Winter Break, Staff has noted regression in [Student's] cooperative play. [Student's] volume has increased and he needs prompts to use toys appropriately: not put them in his mouth or bang them. [Student] is choosing to play less with his peers and is seeking out adult for play time."
8. On March 13, 2020, the Washington Governor issued a proclamation, announcing the closures of all public and private K-12 school facilities in the state through April 24, 2020, due to the COVID-19 pandemic and resulting public health crisis. The District thus closed all schools in the District.
9. On March 23, 2020, OSPI issued guidance, instructing districts that while school facilities are closed and not providing traditional in-person instruction, education must continue. OSPI's guidance outlined the expectation that "continuous learning" would begin for all students by Monday, March 30, 2020.
10. On March 30, 2020, continuous learning began in the District.
11. The District was on spring break April 6-10, 2020.
12. On April 6, 2020, the Governor extended the March 13, 2020 school facility closure directive through the remainder of the 2019-2020 school year.
13. Also, on April 6, 2020, OSPI issued guidance on Continuous Learning 2020, which included recommended guidelines for maximum student commitment each day, as follows: Pre-K: 30 minutes.
14. On April 8, 2020, the Parent emailed the District superintendent, stating the Student had developmental delays and it was "impossible for him to do any kind of distant learning." The Parent asked about plans to include students with "special needs in alternative programs." The

superintendent responded, referring the Parent to the executive director, who in turn had one of the District's special education coordinators set up a phone call with the Parent.

15. Also, on April 8, 2020, the Student's preschool teacher sent several communications through "Class DoJo"¹ to parents, including the Parent, regarding an activity sent on April 3, 2020. The Student's special education teacher and case manager (case manager) also sent the Parent a message through Class DoJo regarding whether the local Boys and Girls Club was serving preschoolers. The case manager stated, "I explained [to the Boys and Girls Club the Student's] need for social interaction and that he is on an IEP" and stated she would be in touch with more information.
16. On April 9, 2020, the Parent and the Student's case manager exchanged messages on Class DoJo regarding the possibility of the Student attending the Boys and Girls Club. The case manager also asked if they had accessed "any of the Scavenger Hunts or other activities on Class Story? Also, I know there are lots of ideas on [general education teacher's] classroom page as well." The Parent replied to several messages related to the Boys and Girls Club.
17. On April 10, 2020, the special education coordinator emailed the Parent, following a phone call with the Parent. The email indicates they discussed the possibility of the Student attending the Boys and Girls Club and the District's assistance setting that up.²
18. On April 13, 2020, the Student's case manager messaged families through Class DoJo regarding what "distance learning...will look like for preschool students." The case manager stated she would send out weekly learning opportunities "for you to share with your child" and let them know that these were "'opportunities' and not assignments." The case manager stated, "If you are able to have your child participate in these opportunities, I'd like to recommend that you give priority to the ones I suggest, as these address skills targeted in their IEP." For the Student, the case manager stated his priority learning opportunities were "#5" (cooperative play friendship skills video and questions sharing) and "#6" (following directions for routines, transitions, small groups, large groups, and a video with a song), although they were welcome to engage in any of the other learning opportunities provided.³

¹ ClassDojo is a school communication platform that teachers, students, and families use every day to build close-knit communities by sharing what's being learned in the classroom home through photos, videos, and messages. <https://www.classdojo.com/about/>.

² Based on the documentation provided in the complaint, the Student was temporarily enrolled at the Boys and Girls Club and that the staff there, despite not having "certifications or education in the Special Education field," would review the Student's IEP so that the staff could be "knowledgeable of [Student's] social emotional goals so that we can implement to the best of our abilities." Based on additional documentation provided by the Parent, the Student only attended for two days.

³ Based on the documentation in the complaint, the Student's priority learning activities remained the same throughout the closure: #5 (cooperative play) and #6 (follow directions); however, the specific activities shared each week changed.

The case manager stated parents could share how the opportunities are going and that she would be checking in with each family each week.

19. The documentation provided in the complaint indicated the case manager sent out asynchronous learning opportunities, priorities, and checked in with the Parent throughout the school facility closures, including on the following dates via ClassDojo:
 - April 13
 - April 21
 - April 29
 - May 10
 - May 18
 - June 5
20. On April 25, 2020, the case manager messaged the Parent through Class DoJo to ask the Parent for input on the IEP, including the Parent's concerns. The case manager asked for Parent input into the IEP and continuous learning plan again on May 10 and 18, 2020.
21. Also, on April 25, 2020, the Parent emailed the special education coordinator and the superintendent, and in part, stated the Student needed "'in person' education" and stated there was "absolutely no other way for him to have continuous learning."
22. On or around May 8, 2020, the Student's father communicated to the Student's general education teacher that the Student was struggling with anxiety. The general education teacher emailed the special education teacher and occupational therapist for suggestions for "deep pressure activities to lessen his anxiety."
23. On May 10, 2020, according to the District's response, the case manager called the Student's father regarding scheduling an IEP meeting. The Student's father said he would call the case manager back and the case manager stated she received no call back.
24. On May 16, 2020, the general education teacher emailed the Parents recommendations and handouts for "heavy work, deep pressure activities" that would "help calm and organize the nervous system." The email also included links to other sensory activities. The teacher noted she sent the same information through Class Dojo as well.
25. On May 17, 2020, according to the case manager, she had an in-person conversation with the Student's father about scheduling an IEP meeting. According to the case manager's notes, "the father said that he would call the Case Manager back but he did not call her."
26. On May 20, 2020 the case manager emailed⁴ the Student's father and on May 21, 2020, the case manager messaged the Parent through Class DoJo regarding the Student's IEP. The case manager stated the IEP was due next month and that she would like the Parents' input on "how [they] would like to proceed." The case manager stated she had discussed potential goals for the Student for the following school year with the general education teacher, but wanted

⁴ The case manager emailed the Student's father's email. Based on the emails provided in the complaint, it is not clear if the father received this email. One email response included in the documentation stated, "delivery to these recipients...is complete, but no delivery notification was sent by the destination server." However, a second email appeared to be a read receipt from the Student's father's email address.

to "include your input as well regarding what you see as [Student's] strengths and what your concerns are in terms of his learning." The case manager stated she could "send you a draft of his IEP for you to review and you can let me know if you have any questions/or are in agreement. We can also discuss the IEP via phone or do a Zoom IEP meeting. Please let me know how you would like to proceed."

27. On May 22, 2020, the Student's general education teacher emailed a survey designed to check in with parents and see what they needed from her.
28. On May 26, 2020, the case manager emailed the Student's father a copy of the Student's draft IEP for review.
29. According to the District's contact attempt report, the District invited the Parents to a meeting scheduled for May 27, 2020 on the following dates: April 21, April 25, May 7, May 10, May 15, May 17, May 18, May 20, and May 26, 2020 via Class Dojo, an in-person conversation, email, and phone. The Parents did not respond.
30. On May 27, 2020, the Student's IEP team—except for the Parents—met and developed the Student's annual IEP. In the team considerations section, the IEP noted the Parents were concerned about the Student regressing because "the structure and socializing provided in the classroom was quite helpful to [Student's] social development."

The IEP included several goals in the area of social skills (adjust behavior to setting, multi-step direction, and peer interaction) and provided that progress would be reported at the trimester. The IEP provided the Student with 15 minutes, twice a week of specially designed instruction in social skills (to be provided by special education in the general education setting). The IEP noted the Student would spend 100% of his time in the general education setting. The IEP also included that the Student was not eligible for ESY.

The IEP also noted the following:

Due to COVID 19, this IEP will be addressed through means designated in the district policies of COVID 19 Distance Learning for the remainder of the 2019-2020 school year. Continual Learning Individualized Plan will follow. Direct service will resume when restrictions have been lifted and instruction in the school building is resumed.

31. The District's response clarified that a continuous learning instruction plan (CLIP) was not developed for the Student because despite the case manager's multiple efforts to schedule a meeting, the family did not respond. The District's response noted that despite the lack of a CLIP, the Student was provided services and that staff regularly communicated with the Parents. A May 27, 2020 prior written notice indicated that the Parent did not respond to contact attempts made via "Class DoJo messages/emails/voicemail." The prior written notice further noted that "weekly learning opportunities" were available for the Student via his "Class DoJo account."
32. Also, on May 27, 2020, the case manager emailed the Student's father with the following attachment: "[Student] CLIP PWN Meeting Contacts.pdf."

33. On May 28, 2020, the Student's father emailed the case manager regarding the IEP and stated, "We wanted to add...extended school year as he was supposed to have that this summer. He has also regressed with not being to attend school as the structure and socializing was helpful with him very much. He tells us he misses his school and [general education teacher]." The Parent stated the rest of the IEP was "fine."

The case manager responded that she "looked at last year's IEP and [ESY] was not indicated on the Summary of Services page" and that she added the comments to the Student's IEP regarding the Parents' concerns. The case manager asked the Student's father to respond with the following: "I, [Student's father], participated and agree with [Student's] IEP."

The Student's father replied: "I, [Student's father], participated and agree with [Student's] IEP."

34. According to the District, the case manager misunderstood the Student's father and thought he was asking about ESY the previous summer, and thus responded regarding the previous IEP.

35. June 16, 2020 was the last day of the 2019-2020 school year for the District.

36. According to the District, the case manager completed progress reporting for the Student at the end of the year. However, the District stated it was "unable to locate a completed end of year progress report in IEP Online."

37. The District, in its response to this complaint, stated according to District policy regarding ESY, "If the need for ESY services is not addressed in the IEP and ESY services may be appropriate for the student, the IEP team will meet by March 31st to address the need for ESY." The District also noted its policy did not take into consideration the current pandemic, and thus, the District "was receptive to requests by parents for ESY after the March 31st deadline during the pandemic."

The District stated it had "no documentation that the family requested ESY services prior to the end of the 2019-2020 school year." The District further stated:

Additionally, the District made multiple attempts to meet with the family to consider services for the [S]tudent, in which progress could have been addressed. Since the family did not request ESY services before the end of the school year and due to the fact that the Parents failed to respond to requests to meet with the IEP team to consider service delivery for the Student, the District did not fail to follow its procedures related to ESY.

38. The Parent, in her reply, provided more information about the "communication problems I had with the district last spring and over the summer." The Parent stated:

The case worker would only send messages through an app called Dojo that I didn't have access to while traveling and in Mexico. In Mexico, I can only receive texts and certain things like email over Wifi...I still don't understand why they didn't send emails or even a phone call to my husband during that time. It wasn't until just a day or two before they wanted the new IEP signed, that they finally called or sent an email to my husband. They even did the meeting without us and we didn't receive anything about it an email or phone call. My

husband was in town the entire time, and they finally called him when they wanted it signed.

The Parent, in additional information provided to OSPI, stated she left for Mexico on May 11, 2020 and was gone about five weeks. The Parent also stated they "had been camping out of town for a few days each week the preceding 2 weeks." The Parent stated that she did not check the Class DoJo "much in April," and stated she "just assumed the school would email or call when important communication was needed."

Summer 2020

39. On August 21, 2020, the Student's general education kindergarten teacher emailed families in her class, welcoming them to kindergarten and providing information about signing up for "Parent Connect Meetings." The Parent responded, stating that the Student had an IEP and asking what the plan was for him, because the Student was "unable to zoom or phone."

40. On August 26, 2020, the Parent, special education teacher, general education teacher, administrator, and school psychologist intern met for an IEP meeting to discuss the plan for the 2020-2021 school year. According to the meeting notes, the team discussed the start of the school year and the Parent shared her concern that the Student "cannot do any form of zoom." According to the notes, the Parent shared that the Student "needs peers to follow. He has regressed a lot since school has ended" (e.g., cannot play with neighbors, multiple "meltdowns," does not understand personal space, etc.).

The notes further stated the special education teacher "will push into the zoom. She will work on building a relationship. To engage him with zoom" and that the general education teacher "can meet [Student] in a small group, give him a box of games for home, and will be able to mute him so he will not have to worry about his voice volume. He will be given all the paper support for academics." The group also discussed in-person learning.

The prior written notice from the meeting, dated August 31, 2020, stated the District would be starting the 2020-2021 school year online: "[Continuous Learning (CL)] 2.0 will be virtual via zoom and teacher videos." The notice also stated the team:

agreed to use the seesaw app via moms phone and project on the tv so [Student] would watch his zoom meeting and teacher videos...Sped teacher will join zoom meetings with the [general education] teacher to assist [Student]. Teacher will provide samples of projects with the school supplies sent home so [Student] has a model to follow at home. Teacher and parent will meet for parent connect next week. [Multidisciplinary team] second week of school to touch base on CL2.0.

41. Later, on August 26, 2020, the general education teacher emailed the Parent. The teacher provided information about the "Seesaw Class App" she would be using that year to do "video and read alouds [sic] for [the Student] to watch or listen to." There was also a parent app that would allow the teacher to send "messages that go out to the whole class and another way to reach me during the school day."

2020-2021 School Year

42. On September 3, 2020, the Parent had a "parent connect meeting" with the general education kindergarten teacher.
43. On September 10, 2020, OSPI received the Parent's complaint and opened this investigation. In the complaint, the Parent stated that due to the Student's disability, distance learning was "inappropriate and in an extremely restrictive environment which caused him not to receive any minutes of general education" during the school facility closures. The Parent also stated the Student did not "receive summer school either" and that they requested ESY and "summer pre-k through ECEAP was promised." The Parent stated the Student had regressed and that the District "has not met any of his social and emotional goals in his IEP."
44. On September 24, 2020, the Student's IEP team met. The team determined the Student would return to in-person instruction two days per week for 5.5 hours per day. The team also determined the Student would be provided "synchronous and asynchronous learning opportunities when not on site at school." The Student's IEP team decided it would reevaluate the Student to determine the Student's "current needs to support ongoing placement and programming decisions."
45. The District, in its response, also stated it was proposing "6 hours of recovery services [that] will be addressed through the extension of service time made at the September 24, 2020 IEP meeting" and that this was "an extension of time beyond what the current IEP states to address the Student's IEP goals and provide support for potential regression due to the Covid-19 pandemic." The District clarified that this was six additional hours of specially designed instruction (in addition to the 30 minutes weekly on the Student's current IEP), which would be provided during the increased service time (e.g., Student attends in-person instruction two days per week for 5.5 hours per day). And, the District noted, that these six hours have already been provided.

CONCLUSIONS

Issue One: IEP Implementation – The Parent alleged the District failed to provide the Student special education services during the school facility closures and that due to the Student's disability, distance learning was "inappropriate and in an extremely restrictive environment."

Special Education Services

Given the exceptional circumstances of the COVID-19 global pandemic, the federal Department of Education and OSPI recognized that IEPs could not be implemented as written as school facilities closed and districts transitioned to distance learning. Here, the Student's June 2019 IEP was in place prior to the school facility closures. The IEP included goals in the area of social skills and required the Student receive 40 minutes a week of specially designed instruction in social (30 minutes provided by a general education teacher and 10 minutes provided by a special education

teacher, in the general education setting). The Student attended a "regular early childhood program" in the District.

After the District closed school facilities on March 13, 2020, the Student's IEP was not implemented as written, which during this time alone does not represent a violation of the IDEA. However, that does not end the analysis as the District still had an obligation to provide students with special education services during the school facility closures. On March 23, 2020, OSPI communicated the expectation that districts would begin providing educational services to all students by March 30, 2020 ("continuous learning"); and, as instruction was being provided to all students, districts must have a plan for how students eligible for special education services would receive a free appropriate public education (FAPE), which consists generally of specially designed instruction and related services. For students in preschool, OSPI guidance recommended that maximum student commitment each day be 30 minutes. OSPI described the nature of instruction that students were to receive during the COVID-19 closure as follows: "[School districts] should avoid assuming that continuity of education outside of a typical school building can only occur through online means. Districts will provide instruction using printed online learning materials, phone contact, email, technology-based virtual instruction, or a combination to meet student needs."

Based on the District's documentation, the Student's general education preschool teacher primarily communicated through "Class DoJo," a school communication platform application, and posted activities for students to engage in throughout the school facility closure. While the Student did not have direct in-person access to peers given the Governor ordered closures, the Student's general education teacher checked in and provided learning activities, and the District assisted in getting the Student a spot at the local Boys and Girls Club (although the Student only attended two days).

On April 13, 2020, the Student's case manager provided more information about continuous learning for preschool students, which was to consist of weekly learning opportunities. The weekly opportunities included priority activities for each student, which were activities that addressed skills targeted in a student's IEP. For the Student, the case manager noted his priority learning activities related to cooperative play, friendship skills, and following directions for routines, transitions, and groups. The documentation provided indicated the case manager contacted the Student and Parent with learning opportunities on, at minimum, the following dates: April 13, April 21, April 29, May 10, May 18, and June 5. Additionally, the District responded to some requests from the family, for example on May 16, 2020, the general education teacher provided the Parents with recommendations and handouts for "heavy work, deep pressure activities" that would "help calm and organize the nervous system" and links to other sensory activities. Based on the documentation provided, it is not clear whether the Student accessed any of the learning opportunities provided. However, the District offered the Student asynchronous learning opportunities that targeted his specific IEP goal areas throughout the closure. Thus, while services looked different than what was provided in the Student's IEP during regular, pre-COVID in-person learning, given that the District provided access to individualized learning that targeted the Student's goal areas, OSPI finds no violation.

IEP Meeting & Continuous Learning Plan

During the school facility closures, the Parent expressed concern that the Student was not able to participate in remote learning (e.g., on April 8, the Parent emailed the District superintendent, stating the Student had developmental delays and it was “impossible for him to do any kind of distant [sic] learning”⁵; and on April 25, the Parent emailed the special education coordinator and the superintendent and stated the Student needed “in person’ education” and stated there was “absolutely no other way for him to have continuous learning.”) It is unclear what specifically about continuous learning was not working for the Student, given that the Student’s teachers were providing asynchronous learning opportunities (later, the Parent stated the Student was unable to engage with Zoom; however, it does not appear instruction was provided through Zoom for this Student in the spring). Regardless, the Parent’s concerns should have been discussed by the Student’s IEP team and the IEP team could have considered whether the Student’s needs were such that he required in-person instruction in the spring.

The District attempted to schedule an IEP meeting with the Parents because the Student’s annual IEP was due in June, and because the District needed to create a continuous learning instruction plan (CLIP) for the Student. The District attempted to contact the Parent on at least nine occasions to schedule a meeting and get the Parents’ input into the IEP and CLIP (April 21, April 25, May 7, May 10, May 15, May 17, May 18, May 20, and May 26, 2020) and used a variety of contact methods, including Class DoJo, email, phone, and an in-person conversation. The IEP team met without the Parent and developed the Student’s annual IEP on May 27, 2020.

The Parent expressed concern that the communications from the District were all sent via Class Dojo, which she could not access when camping in late April/early May and traveling out of the country after May 11, 2020. The Parent stated she did not understand why the District did not email or call the Parent or the Student’s father. While the Parent stated that the “communication problems” the District had impeded the Student’s ability to access instruction and the Parents ability to be involved in the Student’s educational program, the District’s documentation indicated the District made diligent efforts to ascertain the Parents concerns, get input in the Student’s education program, and schedule a meeting to develop the IEP and CLIP.

Several of the messages were sent prior to the Parent’s out-of-country travel (e.g., messages sent on April 21 and 25, and May 7, and May 10) and the Parent previously communicated with the District through Class DoJo (e.g., communications regarding the Boys and Girls Club), despite her statements that she did not check the Class DoJo “much in April” and stated she “just assumed the school would email or call when important communication was needed.” It is not clear the District knew the Parent would not be able to access this method of communication later in the spring. Further, contrary to the Parent’s assertion that no emails were sent or phone calls made,

⁵ Based on the emails this led to a conversation about and the District assisting the Parent with getting the Student a spot at the local Boys and Girls Club that was serving preschool aged students. Based on the documentation, it seems likely that the District was assisting the Parent in connecting with childcare as both the Parent and the Student’s father were working during this period in essential industries. Ultimately, it appears the Student only attended the Boys and Girls Club for two days.

the District attempted to contact the Parents via email, phone, and in-person. In one instance, the case manager spoke with the Student's father on the phone, who stated he would call the case manager back about scheduling a meeting but did not. The case manager also spoke with the Student's father in-person and according to the case manager's notes, "the father said that he would call the Case Manager back but he did not call her."

An IEP meeting would have been the appropriate venue to discuss the Parents' concerns about distance/continuous learning. Ultimately, OSPI finds the District made sufficient efforts to schedule a meeting and get the Parents' input into the Student's IEP. OSPI does not fault the District for meeting without the Parents in this situation, as the Parents were not responsive to scheduling request and request for input. Thus, OSPI finds no violation.

Student's Progress

Progress reporting is an element of IEP implementation and a method for a district to demonstrate that special education services were provided. IEPs must include a statement, indicating how the student's progress toward the annual goals will be measured and when the district will provide periodic reports to the parents on the student's progress toward meeting those annual goals. OSPI understands that progress reporting may look different for spring 2020, given the school facility closures, and in recognition of the fact that IEPs may not have been implemented as written.

Here, the District reported progress on the Student's goals on March 9, 2020 and indicated the Student was making insufficient progress on two goals and sufficient progress on the other goal. The District stated the case manager completed progress reporting for the Student at the end of the year; however, the District stated it was "unable to locate a completed end of year progress report in IEP Online." There is no documentation that a copy of the progress report was provided to the Parent.

The District also held the Student's annual IEP meeting at the end of May 2020. Considering a student's progress is a necessary element of developing an annual IEP, as the progress indicates a student's present levels and helps inform the services provided. Despite the lack of progress reporting, at the annual IEP meeting, the IEP team reduced the number of minutes of specially designed instruction the Student would receive from 40 minutes weekly to 30 minutes weekly; however, it does not appear the IEP considered the Student's progress or regression and impact of the school facility closures when making this decision.

Thus, OSPI finds the District in violation regarding the progress reporting element of IEP implementation. The District will be required to conduct progress monitoring and update the Student's progress reporting, specifically addressing the impact of the school facility closures and current progress.

Issue Two: Extended School Year (ESY) Services – The Parent alleged the District failed to provide the Student ESY services. In the complaint, the Parent stated she requested ESY and

"summer pre-k through ECEAP was promised." The Parent stated the Student had regressed and that the District "has not met any of his social and emotional goals in his IEP."

ESY services are services meeting state standards provided to a student eligible for special education that are beyond the normal school year, in accordance with the student's IEP, and at no cost to the parents of the student. School districts must ensure that ESY services are available when necessary to provide a FAPE to a student eligible for special education services. ESY services must be provided only if the student's IEP team determines, based on the student's needs, that they are necessary for the student to receive a FAPE. School districts must develop criteria for determining the need for ESY services that include regression and recoupment time based on documented evidence, or on the determinations of the IEP team, based on their professional judgment and considering the nature and severity of the student's disability, rate of progress, and emerging skills, among other things, with evidence to support the need.

Here, neither the Student's June 2019 IEP (in place at the start of the COVID-19 school facility closures), nor his May 27, 2020 IEP noted the Student was eligible for ESY.

According to the District, generally, "if the need for ESY services is not addressed in the IEP and ESY services may be appropriate for the student, the IEP team will meet by March 31st to address the need for ESY." Given the current pandemic, the District "was receptive to requests by parents for ESY after the March 31st deadline during the pandemic." However, the District stated it had "no documentation that the family requested ESY services prior to the end of the 2019-2020 school year," despite multiple attempts to schedule an IEP meeting with the Parents.

In her reply to the District's response, the Parent stated she had a parent teacher conference/IEP meeting in late January or early February and filled out paperwork for the Student to receive summer learning. The Parent stated, "when I asked the District about it in April, they said that it was all canceled." There was no documentation provided in the complaint that confirmed an IEP meeting occurred in February 2020, and it is unclear what paperwork the Parent filled out. The District stated the Student's case manager did not meet with the Parent in February and that there was no documentation of an IEP meeting. Further, the District stated it was not sure what summer program the Parent was referring to and stated the only other program discussed by the Student's team was the Boys and Girls club.

Regardless of what occurred in February and contrary to the District's assertion that the Parents did not request ESY, there was an email from the Student's father from May 28, 2020 that stated: "We wanted to add...extended school year as he was supposed to have that this summer. He has also regressed with not being to attend school as the structure and socializing was helpful with him very much..." Instead of treating this as a request for ESY and letting the Parents know that an IEP team discussion was necessary to make a determination, the Student's case manager responded that she looked at the Student's 2019 IEP and that ESY was not "indicated on the Summary of Services page." The District noted the Student's case manager misunderstood the email and thought the Student's father was asking about ESY the previous summer (2019) and thus why she responded with information about the Student's 2019 IEP.

Given that the Student's March 2020 progress report (pre-closure progress) indicated the Student was making insufficient progress in some areas (notably, the Student was making sufficient progress on all goals in November 2019, indicating potential regression since November) and the potential impact of the school facility closures, the District should have treated the May 28, 2020 email as a request for ESY. At minimum, the case manager should have let the Parents know the IEP team would need to meet and discuss ESY. Thus, OSPI finds a violation.

The District will be required to hold an IEP meeting and discuss whether the Student's need for future ESY and recovery services to make up for missed ESY in summer 2020. OSPI notes that the Student has already been provided six hours of recovery services; however, it is not clear the District specifically considered the impact of missed ESY in determining the need for these six hours.

CORRECTIVE ACTIONS

By or before **November 30, 2020** and **December 11, 2020**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Progress Monitoring & Reporting

By **November 30, 2020**, the District will conduct progress monitoring on the Student's current IEP goals and provide the Parents an updated progress report recording progress at the end of the 2019-2020 school year and the first trimester of the 2020-2021 school year. The progress reporting will indicate the Student's current progress and comment on the impact of the school facility closures on progress. The progress report should be based on any information the Student's IEP team has about the Student's progress during the closure, considering information and observations provided by the Parent.

By **November 30, 2020**, the District will provide OSPI with a copy of the progress reporting and documentation that it was provided to the Parent.

IEP Meeting

By **December 4, 2020**, the Student's IEP team will meet and discuss the Student's progress reporting, the impact of the school facility closures, if the Student would have been eligible for ESY in the summer of 2020, and the impact of not receiving ESY services during the summer of 2020. Based on the progress reporting and the Student's current present levels, the IEP team will discuss and determine the following:

- Whether the Student needs any additional recovery services, in addition to the six hours already provided, due to the failure to consider ESY.
- Does the Student need ESY for the 2020-2021 school year? OSPI reminds the District that ESY services are not restricted to summer, but could be provided during other school breaks, such as winter break, if there is evidence of regression or inability to maintain skills. If the team determines

it is too early in the school year to make an ESY determination, the IEP team will agree on a plan to address ESY at a future ESY.

- Whether the Student's IEP should be amended to provide the Student with additional or different supports and services to mitigate the impact of the school facility closures and lack of ESY. For example, was it appropriate for the Student's IEP team to reduce the number of minutes of specially designed instruction in May 2020 without considering the impact of the closures?

Note: The District stated the IEP team determined a reevaluation was necessary. If the IEP team feels the reevaluation should be completed prior to discussing the above topics, please let OSPI know right away and we can consider an extension to the corrective action deadline.

By **December 11, 2020**, the District will provide OSPI with the following documentation: 1) Meeting invitation or scheduling communication; 2) Meeting agenda and/or notes; 3) IEP or amended IEP; 4) Prior written notice (including documentation of the decision made regarding additional recovery services if necessary and ESY); and, 5) Any other relevant documentation.

By December 18, 2020, OSPI will review the Student's IEP, as well as any plan proposing additional services (including amount, when services will be provided, and timeline for delivering services), and will either amend or approve the proposal. At that point, OSPI will provide additional deadlines for review if necessary.

DISTRICT SPECIFIC:

None.

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.

RECOMMENDATION

OSPI notes that districts must ensure extended school year (ESY) services are available when necessary to provide a free appropriate public education (FAPE) to a student eligible for special education services. ESY services must be provided if the student's IEP team determines, based on the student's needs, that they are necessary for the student to receive a FAPE. Districts must develop criteria for determining the need for ESY services that include regression and recoupment time based on documented evidence, or on the determinations of the IEP team, based on their professional judgment and considering the nature and severity of the student's disability, rate of progress, and emerging skills, among other things, with evidence to support the need.

Here, the District stated that if the need for ESY services is not addressed in the IEP and ESY services may be appropriate for the student, the IEP team will meet by March 31st to address the need for ESY. Required ESY determinations to be made by March 31st improperly removes the decision from the IEP team and relevant data for those students where a need for ESY may be determined after March 31. The determination of whether ESY is necessary for a student is an individualized decision, based on the student's needs, such as data of regression and recoupment time, among other things, made by the Student's IEP team. Thus, a situation could arise where the

IEP team reasonably needs to make a determination about ESY services for a student after March 31 in a particular school year. A decision to deny a student ESY solely based on a request being made after March 31 would be a violation of the IDEA and state implementing regulations. OSPI recommends the District amend its ESY policy to make clear that requests for ESY are considered after March 31 when necessary for the student to receive a FAPE.

Dated this ___ day of November, 2020

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.)