

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-116

PROCEDURAL HISTORY

On September 21, 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 South Kitsap School District (District). The Parent 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 September 21, 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 9, 2020, the District requested an extension of time for the submission of its response. OSPI requested the District submit its response no later than October 19, 2020.

On October 19, 2020, OSPI received the District's response to the complaint and forwarded it to the Parent the same day. OSPI invited the Parent to reply.

On October 23, 2020, the complaint investigator conducted an interview with the Parent by phone.

On November 16, 2020, OSPI requested additional information from the District. The District provided OSPI with the requested information on November 18, 2020. OSPI forwarded the additional information to the Parent on November 19, 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) from the commencement of the 2020-2021 school year through September 21, 2020?
2. Did the District follow procedures for any changes made to the Student's IEP for the 2020-2021 school year, including any changes in the Student's placement?

LEGAL STANDARDS

IEP Implementation: 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. 34 CFR §300.323(a); WAC 392-172A-03105(1). A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. 34 CFR §§300.320 through 300.328; WAC 392-172A-03090 through 392-172A-03115. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. The initial IEP must be implemented as soon as possible after it is developed. 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).

IEP Amendments: After the annual IEP team meeting for a school year, the parent of a student eligible for special education and the school district may agree not to convene an IEP team meeting for the purposes of making changes to the IEP, and instead may develop a written document to amend or modify the student's current IEP. If changes are made to the student's IEP the school district must ensure that the student's IEP team is informed of those changes and that other providers responsible for implementing the IEP are informed of any changes that affect their responsibility to the student. Changes to the IEP may be made either by the entire IEP team at an IEP team meeting, or by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated. 34 CFR §300.324; WAC 392-172A-03110.

IEP Must State Amount of Services: An IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the student, or on behalf of the student. An IEP must also include a statement of the program modifications or supports for school personnel that will be provided to enable the student: to advance appropriately toward attaining the annual IEP goals; to be involved and progress in the general curriculum in accordance with present levels of educational performance and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children in the above activities. 34 CFR §300.320(a)(4); WAC 392-172A-03090(1)(d). "The amount of services to be provided must be stated in the IEP, so that the level of [the district's] commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be (1) appropriate to the specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP." Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,475, 12,479 (March 12, 1999) (34 CFR Part 300, Question 35).

Prior Written Notice: Written notice must be provided to the parents of a student eligible for special education, or referred for special education a reasonable time before the school district: (a) Proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student; or (b) Refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student. The notice must include: (a) a description of the action proposed or refused by the agency; (b) an explanation of why the agency proposes or refuses to take the action; (c) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (d) a statement that the parents of a student eligible or referred for special education have protection under the procedural safeguards and, if this notice is not an

initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; (e) sources for parents to contact to obtain assistance in understanding the procedural safeguards and the contents of the notice; (f) a description of other options that the IEP team considered and the reasons why those options were rejected; and (g) a description of other factors that are relevant to the agency's proposal or refusal. 34 CFR 300.503; WAC 392-172A-05010.

Parent Participation in IEP Development: The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child. This is an active role in which the parents (1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; (2) participate in discussions about the child's need for special education and related services and supplementary aids and services; and (3) join with the 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. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,472, 12,473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 5). Regarding parent participation when determining educational placement, the placement team, which includes the Parent decides the type of placement appropriate to meet the student's needs, the placement team may delegate the classroom assignment to the school administration where there is more than one classroom that fits the description of an appropriate educational program for the student. However, that determination must be consistent with the placement team's decision about the appropriate educational setting for the student. *See Letter to Fisher*, 21 IDELR 992 (OSEP 1994); and *Letter to Wessels*, 16 IDELR 735 (OSEP 1990).

FINDINGS OF FACT

2019-2020 School year

1. During the 2019-2020 school year, the Student was enrolled in the District in the first grade and was eligible for special education under the category of autism.
2. On March 6, 2020, the Student's individualized education program (IEP) team met for the Student's annual review and to develop the Student's IEP. The resulting IEP indicated the Student would spend 100% of her time in the *special education setting* and included goals in the areas of math (subtraction), reading (independent reading, "consonant, vowel, consonant"), written expression (sight words), adaptive, (independent task completion, phone number recall), communication (expressive/receptive language, pragmatic language, verbal expressive skills), and social behavior (behavior regulation). The Student's IEP included specially designed instruction and related services in the following areas:
 - Math, 150 minutes weekly by a special education teacher;
 - Reading, 150 minutes weekly by a special education teacher;
 - Written expression, 150 minutes weekly by a special education teacher;
 - Adaptive, 562 minutes weekly, by a special education teacher;
 - Social/behavior, 563 minutes weekly by a special education teacher;

- Communication (as a related service), 30 minutes biweekly, by a speech language therapist;
- Occupational therapy (as a related service), 30 minutes weekly, by an occupational therapy assistant; and,
- Transportation.

The Student's IEP included several accommodations, including: regular adult check-ins (daily), additional breaks (as needed), sensory breaks (daily), alternative ways to evaluate (as needed), assistance with organization (daily), breaking of longer assignments into smaller chunks (daily), area to take sensory breaks to calm down and refocus (daily), and individualized/small group instruction (daily).

3. On March 13, 2020, the Washington State 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. 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. On April 6, 2020, the Governor extended the March 13 school facility closure directive through the end of the remainder of the 2019-2020 school year.
4. During the school facility closures, the Student was provided special education services remotely.
5. June 19, 2020 was the last day of the 2019-2020 school year in the District.

Summer 2020

6. On August 25, 2020, the Student's special education teacher and case manager (case manager) for the 2020-2021 school year requested to schedule a video conference "meet and greet" with the Parent and Student on September 3 or 4, 2020. The case manager and Parent agreed to meet on September 3, 2020.
7. On August 27, 2020, the Parent requested the case manager provide her the plan for the Student for the upcoming school year. Specifically, the Parent asked whether the Student would be receiving in-person or remote services at the commencement of the school year, and whether the IEP would be amended to account for notice she received from the Student's former teacher over the summer that the Student would be moved from the functional/adaptive program—which provided students services in a self-contained 100% special education setting—to the social communication program—which provided some instruction in the general education setting.¹ The case manager explained the Student's

¹ The Parent forwarded the Student's current case manager an email from the Student's former special education teacher and case manager, which explained that changes were being made to the remote learning platform and stated: "We felt that your child would benefit from spending time in the general education classroom with para support. Your child will continue to receive all the services and support your child needs." In the email, the former special education teacher explained the Student would be transitioning to a class with a new case manager, and that the former special education teacher would continue to

instruction and services would be provided remotely (as per the District's model during the pandemic), and that an IEP team meeting would be held once school was in session to discuss additional concerns.

8. On September 1, 2020, the case manager provided the Parent with information about how to access the online classroom, which he explained would be used to provide remote instruction during the upcoming school year.
9. On September 2, 2020, the case manager emailed the Parent to inform her of the name of the Student's general education teacher assigned to her for the upcoming school year. The email indicated the Student would be attending "specials," including physical education (PE), music, and library with the general education teacher and paraeducator support.² The Parent responded that she was confused as to why the Student would have a general education classroom, reiterating that the Student's IEP provided that the Student was to spend 0% of her time in the general education setting. In response to her concerns, the special education teacher emailed the Parent and promised the Student would always be with him or one of his paraeducators throughout the year, even when in the general education setting.
10. On September 3, 2020, the case manager and the Parent had their "meet and greet" via Zoom. The case manager's signature indicated his class was also referred to as the social communication/functional adaptive class.
11. On September 4, 2020, the case manager emailed the Parent the Zoom link for the day's student meet and greet and the agenda. The case manager also provided the Parent with the rubric the IEP team would use to assess the Student's need for in-person learning. The rubric included a description of the different operational models and least restrictive environment considerations. The case manager also sent a link to a "first day of school" Zoom meeting. The Parent responded to the case manager's email and requested someone go to the Student's daycare to help the Student login to the Zoom meeting. The Parent wrote, "If not, how do you

support the Parent and Student throughout the transition process. In her reply email to case manager's email about scheduling a "meet and greet," the Parent expressed concern about the transition, noting the Student's IEP indicated the Student would spend 100% of her time in the special education setting. The Parent asked if the Student's IEP was going to be amended at the upcoming Zoom meeting to reflect this change, to which the special education teacher explained no changes would be made to the IEP, but that he was also receiving more information from the special education department and OSPI.

² In its response, the District stated this email was provided in error, that the Student was never offered time in the general education setting, and that the Student's teachers are special education teachers. On November 16, 2020, the complaint investigator emailed the District's counsel and requested documentation, showing the percentage of students with IEPs in the Student's current classes. On November 18, 2020, the District provided the requested documentation, showing that more than 50% of the students in each of the Student's current classes have IEPs, confirming the Student's program provides her with instruction and services entirely in the special education setting.

expect [Student] to login to a computer and connect herself?" The case manager replied, "Still working on logistics. When I know more, I will share it with you."

12. Also, on September 4, 2020, the Parent emailed the District's director of special services (director), requesting a meeting prior to the first day of school to address concerns about what she believed to be an increase general education time on the Student's schedule for the upcoming school year, to request the Student receive in-person support in order to access the services on her IEP, and to discuss a resolution to address "lost learning time" that occurred during the spring. In her email, the Parent wrote that the Student had "always been in a life skills and special needs program" and "had never attended a general education program." She also relayed concerns about the Student's inability to learn remotely, noting that during the school facility closures caused by the pandemic in the spring, the Student had missed "nearly 60 days of special needs services, and even more in missed [educational instruction]." The Parent added that, "Because of [Student's] disability and childcare needs, [Student] was only able to attend four out of 11 Zoom meetings, which provided only some activities for her to complete at home."³
13. On September 6, 2020, the case manager sent out links for weekly virtual office hours from 2:30-3:30 pm from September 9 until November 1, 2020. He also provided the Parent a link to a video conference for the Student to receive individual academic instruction every weekday for 30 minutes from 10:30-11:00 am from September 9 through November 1, 2020.
14. On September 6, 2020, the Student's IEP team met virtually to complete the service delivery rubric to determine the Student's need for in-person services, which would be discussed at the meeting on September 9, 2020. The rubric documented the IEP team's discussion of the following factors, which were taken into consideration when determining whether the Student required in-person services:
 - Student Progress
 - Present levels prior to COVID – "Prior to COVID student was showing negative behaviors based off[f] observation of peers. Plan was being put into place to get her minimal general education peer modeling to help with behaviors." "Limited measurable growth on [Student's] academic goals as they had just recently been created before closure. [Student] has many academic skills but limited communication has made it difficult to access."
 - Present levels during COVID – "[Student] was limited on her accessibility to remote learning. She was able to watch [speech language pathologist (SLP)] and [occupational therapist (OT)] related activities but needed adult support to operate computer and hand over hand modeling to complete at home. Student's speech has improved due to time with typically developing peers at day care but is unable to access remote learning while

³ In email exchanges with the director and case manager whereby the Parent requested in-person services, the Parent further explained, "I am unable to complete the virtual learning set up and instruction for [Student] during the day. [Student's] disability and special needs require in-person assistance. Due to her autism, as noted in her IEP, she was unable to complete the tasks, did not understand the communication methods being virtual, and completely missed nearly 60 days of special needs services and even more in missed education. In total, she missed 1/3 of the educational services required."

parents work. Academic levels have not increased according to parent report. Parent concerned that continual remote learning will delay her daughter's growth even more."

- Engagement
 - Remote learning during COVID: *constant support (0)* – Needs continual prompting, fails to engage, unable to engage due to environmental factors.
 - "Student can only access virtual learning when parents are home and working with her. Parents both work throughout day M-F and have limited time in evening to work with all children in home. She is receiving social instruction while at daycare as she interacts with/observes peers.⁴ Non prefer task will follow instruction up to 5 min. Preferred interactive games will participate for 30 min. (sic)"
 - Technology at home: *significant support (1)* – Needs frequent prompts to briefly engage, participate in and complete activities/assignments.
 - Technology at school: *significant support (1)* – Needs frequent prompts to briefly engage, participate in and complete activities/assignments.
 - Synchronous learning: *constant support (0)* – Needs continual prompting, fails to engage, unable to engage due to environmental factors.
 - Asynchronous learning: *significant support (1)* – Needs frequent prompts to briefly engage, participate in and complete activities/assignments.

2020-2021 School Year

15. The District's first day of school was September 9, 2020.
16. At the start of the 2019-2020 school year, the Student continued to qualify for special education under the category of autism, was in the second grade, and was enrolled in a District elementary school. The Student's March 2020 IEP was in effect.
17. Also, on September 9, 2020, the Student's IEP team met to discuss the Parent's request for in-person services. The Parent, principal, case manager, speech language pathologist (SLP), and occupational therapist (OT) attended. In response to the rubric the team completed to assist it in determining the Student's need for in-person services, the IEP team determined "a remote only plan will not meet the Student's educational needs" and proceeded to develop a "modified learning plan" to determine what services the Student would receive when the District was using a fully remote or hybrid learning model due to local health restrictions. Following the meeting, the District provided the Parent with prior written notice (PWN), which documented the services the IEP team determined the Student would receive according to the modified learning plan.

⁴ The Parent relayed to the OSPI complaint investigator that although the Student had access to peers while at daycare, the Student's behaviors towards peers while there was becoming increasingly negative because she was frustrated from being unable to access online learning like her peers. Thus, although the Student was receiving some social interaction instruction at daycare, the Parent also reported the Student was regressing on her social/behavior goals, which encouraged prosocial interaction with peers.

The PWN indicated that when the District was “providing 100% remote learning for all students,” the Student would receive the following services:⁵

- “Daily ‘calendar time’ meetings with entire class focusing on social skills and math;”⁶
- 30 minutes daily of individual instruction with “teacher/paraeducator focusing on academic skills;”
- 30 minutes 5 times a week of specialist classes (PE, music and library);
- 30 minutes weekly of speech therapy using zoom or teleconferencing;
- 30 minutes weekly of occupational therapy using zoom or teleconferencing; and,
- Access to online curriculum using google classroom.

The PWN further stated that when the District began offering some in-person services, the Student would begin receiving in-person services five days a week, during which the Student would receive the following services in-person:

- Specially designed instruction in social/behavior, 30 minutes, 4 times weekly;
- Specially designed instruction in math, 30 minutes, 3 times weekly;
- Specially designed instruction in reading and writing (combined), 30 minutes, 2 times weekly;
- Access to specialist, 30 minutes, 4 days weekly;
- Occupational therapy with paraeducator support, 30 minutes, 1 day a week; and,
- Speech language pathology (SLP) instruction, with paraeducator support, 30 minutes 1 day a week.

During periods of hybrid learning, the Student would continue to receive the following services remotely, in addition to the services provided in-person:

- 30 minutes daily of individual instruction using zoom⁷
- Access to online curriculum via Google classroom

The PWN indicated that the IEP team agreed that motor and communication services would be provided by teletherapy any time in-person services could not be provided in order for the Student to make progress on her IEP goals. It further stated that the OT and SLP would “factor in [Student’s] endurance and stamina for virtual learning, [Student’s] total time in virtual learning for the day, and [Student’s] individual needs when establishing schedules/times for [specially designed instruction] and related service delivery.” It noted that during occupational therapy sessions, the Student would focus on working on sustained and visual attention. During speech therapy sessions, the PWN stated that “total service minutes may be reduced or redistributed and will not exceed the recommended [District] Remote Learning guidance for instructional time. At this time, [Student] will receive 30 minutes of teletherapy services weekly...”⁸

⁵ The PWN did not specify the setting for the services.

⁶ The PWN did not specify the amount of time for calendar time. However, the Student’s schedule indicated calendar time is provided daily for 20 minutes.

⁷ The PWN did not specify the service provider or service area.

⁸ According to meeting notes documented in an email between the OT and social communication specialist, sent on October 7, 2020, at the meeting, the IEP team agreed the Student’s OT goal would be “When given

According to the PWN, during the meeting, the IEP team considered providing an online only learning model, but rejected the option due to "Parent Report that student was unable to access virtual schooling during COVID closure as student's daycare is unable to support online format. Both parent(s) work full time jobs and are unable to take work off to support student at home. [Student] needs hand over hand assistance with technology and adult supervision to access and full engage with online content (sic)."⁹ The PWN further noted that the team considered an increase in minutes of class time, but stated it would consider altering the Student's class time as "government guidelines change."¹⁰

18. On September 10, 2020, the Parent requested the director provide her the written protocols for making decisions regarding in-person services. The director provided the Parent with the Washington State Department of Health's "Decision Tree for the Provision of In Person Learning among Public and Private K-12 Students during COVID-19," a chart of recommendations for phasing in in-person learning, a form requesting consideration of in-person services during remote learning, and the District's early/increased in-person services procedure.
19. On September 11, 2020, the case manager emailed the Parent Zoom links for the Student's upcoming physical education class.
20. On September 12, 2020, the case manager emailed the Parent, saying he had heard she did not receive his communications the previous day and that he was resending them. He also informed her that they were working diligently on the Student's schedule and hoped to have more information the following week.

the opportunity to practice [Student] will increase sustained visual attention improving attention to fine motor task and following directions from approx. 20 minutes of sustained visual attention to task at hand in a quiet room with 2 additional adults to 25 minutes of sustained visual attention in a classroom environment with less than 3 verbal/visual cues, 3/3 consecutive trials as measured by classroom performance, work samples, teacher/therapist observations, and data collection."

⁹ The District did not document in the PWN that the Parent requested, and the District denied the Parent's request for in-person services. OSPI notes that while it was the District's preference to offer only remote services to all students at the commencement of the school year, there was not a statewide prohibition on the provision of in-person services, nor was the District prohibited from considering the alternatives proposed by the Parent. A district is required to make an individualized determination for each student regarding how to implement the services in their IEP to the greatest extent possible and parents retains their right to access available IDEA dispute resolution options if they disagree with a district's decision regarding how to implement those services. Thus, while the District preferred to provide only remote services, it was still required to follow procedures for responding to the Parent's request and proposals, including providing PWN if it declined to implement them.

¹⁰ It was unclear from the District's response why the District was unable to increase minutes of class time until "government guidelines change."

21. On September 13, 2020, the case manager emailed the Parent a video for week two of virtual learning, along with information for the week ahead.
22. On September 14, 2020, the SLP coordinated speech services with the case manager in anticipation of the Student's return to in-person services.
23. On September 15, 2020, the Parent emailed the director to request an estimate on the timeline for the District to approve in-person services for students. The director explained that it was trying to follow the Center for Disease Control (CDC's) guidelines and provided the Parent with a copy of the CDC's "Considerations for K-12 Schools: Readiness and Planning Tool." The Parent responded that this was not what she believed she had been previously told and that she was not notified the timeline had changed. The director responded that the school was working on preparing the cohorts' schedules for in-person learning, scheduling the necessary cleanings, and preparing the school site for in-person services. In response to the director's email, the Parent asked how she could appeal the District's decision to not provide in-person services, stated she would be filing a complaint, and again asked for the legal documents the District was using to base its decision. The District cited the documents it had already provided the Parent and added, "We informed you that we had to follow these guidelines. I'm sorry that there was a misunderstanding."
24. Also, on September 15, 2020, the case manager emailed the Parent a reminder of when calendar time would be available on the virtual classroom.
25. On September 16, 2020, the OT left a voicemail with the Parent regarding scheduling a time slot with the Student for teletherapy.
26. On September 17, 2020, the OT provided the Parent with information regarding occupational therapy and teletherapy services. The OT informed the Parent that the Student's occupational therapy services were scheduled for Mondays at 1:30 pm. The OT informed the Parent that a paraeducator would help the Student log on if the Student was receiving in-person services at school and noted that if the Student was at home, a "parent/guardian/caregiver" would need to help the Student log on. The OT provided the Parent instructions for setting up equipment and preparing for online therapy, a parent checklist, parent tips and tricks for online therapy, a materials checklist, and a teletherapy home environment survey. The OT requested the Parent confirm if the Student would be present for the therapy session. The Parent did not confirm.
27. On September 17, 2020, the case manager sent the Parent a Zoom link to access the Student's individual instruction time at 10:30 am.
28. On September 18, 2020, the school principal provided the Parent with an update on planning in-person services. The Principal explained that they were working on creating a partial day schedule with students attending either in the morning or afternoon to ensure the number of students was kept to no more than five in a room, which it stated was consistent with health and safety guidelines and to allow for deep cleaning between groups of students. The Parent

responded and stated that having the Student only attend for half a day made things difficult and asked if there was a way to increase the number of students by either holding the gathering outside or using a different building with more capacity.

29. On September 19, 2020, the SLP emailed "Presence Learning" to the case manager so he could have access to the communication services to be provided to the Student upon her return to in-person services at school.
30. On September 21, 2020, the Student was absent for her scheduled Zoom meeting for occupational therapy services. According to notes maintained by the OT, the OT noted the Student was likely to not have been at the session because the Student was in daycare during the day and the Parent had previously told the OT that the daycare did not have the ability to help students with teletherapy access.
31. Also, on September 21, 2020, the case manager sent the Parent a waiver to sign for sending students to school to receive in-person services. The case manager also requested information regarding the Student's daycare so he could provide it to transportation in preparation for the commencement of in-person services.
32. On September 23, 2020, the case manager informed the Parent that they were preliminarily planning for the Student to begin receiving in-person services on September 28, 2020, for two hours per day, four days per week. The Parent was also informed that the Student would receive occupational therapy and communication services while in school.
33. On September 24, 2020, the SLP met with the case manager and paraeducators for a presence learning practice session, which would be used by the case manager and providers to help the Student access remote learning when receiving in-person services.
34. On September 25, 2020, the case manager informed the Parent that the District needed to postpone the in-person services while it awaited updated guidance from local health officials. The principal explained that while they planned the next steps for in-person learning, individual instruction, core grade level meetings, and teletherapy would be provided virtually. He further explained that calendar time would be recorded daily so it could be watched at their convenience, and that he would send home additional virtual reading and work instructions. In response, the Parent stated that if the District was unable to provide in-person services, she would like the District to send the Student to a district that was able to provide in-person services. The Parent further expressed concern that the Student had not yet been able to participate in any learning for the 2020-2021 school year.
35. Also, on September 25, 2020, the Parent emailed the director and principal that the Student was having a difficult time at daycare and was having an increase in behaviors because she was seeing other kids with laptops accessing online learning while she was unable to. The Parent wrote:

[Student] asked me every day about doing school work and wants to do the Zoom meetings. Because of the adult/child ratio in daycare there is no way that someone can

devote the time to [Student] that she needs in order to participate in school the way they have it set up. I was able to at least make her somewhat happy by telling her that she was going to start next week and that she would get picked up by a bus again. But now I have to try and explain to her that this will not happen.

The Parent suggested having the District send a paraeducator to the Student's daycare to provide additional support, adding that it would be possible at the daycare to get a room with only the Student and the paraeducator. The Parent also asked if the YMCAs were still providing daycare services at the schools and asked if the Student would be able to get paraeducator support if she transferred the Student to a different daycare. The Parent further asked if it would be possible to get paraeducator support if she could find another solution where she would be able to find a room where they would be able to socially distance.

36. Also, on September 25, 2020, the principal responded that he would look into the Parent's suggestion of using the YMCA. He relayed that he had heard from another person that there are "some daycares that are working with kids to support their connection to their online learning." He added that "this is not the same as having a para[educator] sitting side by side with the student," but agreed to gather that information and would stay in touch with the Parent.
37. In response to the Parent's statements that the Student was unable to access any instruction during the school day because of the Parent's work schedule, the case manager offered to schedule weekly virtual meetings for 30 minutes with the Parent and Student at 5:00 pm. The Parent responded that she understood the case manager was trying to help given his limitations, but asked "how 30 mins a week is going to provide the education and support [Student] needs. This is not within her IEP and if the district cannot support her then they need to send her out of district to get to support that she so desperately needs."
38. On September 28, 2020, the SLP emailed the Parents and indicated that she had scheduled the Student's therapy sessions with the teacher at 2:30 pm, but knew both Parents worked and that the scheduled time probably would not work with their schedules. She asked if they would prefer she email them materials they could use to work with the Student at home instead. According to the SLP's notes and documentation provided by the District, the Parent did not respond to the emails.
39. On September 28, 2020, the OT spoke to the Parent on the phone regarding the best way to support the Student during remote learning. According to notes maintained by the OT, the Parent reported to her that the Student was frustrated because the Student was unable to participate in scheduled OT teletherapy during the day because she was attending daycare and did not have computer access or help from educational staff to "log in and participate in sessions." The OT reported that the Parent suggested a paraeducator from the District come to the daycare to help the Student login to the therapy sessions and to assist during therapy. The OT relayed that when she offered to send materials/activities home for the Parent to use with the Student, the Parent "mentioned feeling like that is unrealistic as she has other children who need help with school, and having all the focus on [Student's] activities is not something

she can accomplish during the evening time.” Following her phone call with the Parent, the OT emailed the principal, social communication specialist, and the director to relay the Parent’s concerns and recommendations to see if there was a way to assist the Student under the current circumstances.

40. On September 29, 2020, the SLP was prepared and in the therapy room for presence learning speech therapy session. The Student was not present for the scheduled therapy time.
41. On October 2, 2020, the case manager contacted the Parent to check in. He asked if the Parent was able to watch or participate in the activities with the Student upon arriving home from daycare. The Parent responded that she had not been able to watch the videos. When the complaint investigator interviewed the Parent, the Parent explained that it was difficult for the Student to attend to videos and instructions at that time of day and that the Parent also has other children who need supervision and support with schoolwork at that. The Parent further explained that because she does not live with the Student’s father and is a single parent at home in the evenings, caring for the Student and her siblings while also assisting with the Student’s education is challenging.
42. On October 5, 2020, the Student was not present for her scheduled occupational teletherapy session.
43. On October 6, 2020, the Student was not present for her scheduled speech therapy session.
44. On October 7, 2020, the communication specialist emailed the case manager, SLP, and OT that she was looking into other schooling options in the area for the Student and requested updated information on the services they had provided and what was sent home. The OT and SLP promptly provided the requested information. The case manager also provided information, noting that on September 13, 2020, he and his team sent home work packets and extra writing materials for the Student to use, but that the Parent had reported she had not been able to use them with the Student. The case manager further reported the Parent and Student had never attended a scheduled daily one-on-one meeting with either him or one of his paraeducators. He added that he offered to stay late one day a week on Wednesdays, but that the Parent also declined that offer and again requested the District send a paraeducator to the Student’s daycare instead. He further confirmed that the Student had not accessed any of the daily scheduled therapy sessions. The case manager also explained that each day at 9:00 am, he records calendar time and places the file in Google classroom and on class tag for viewing, and that the Student has access to read-alouds, writing workshops, and weekly virtual math via the online classroom and class tag, which the Student was not accessing.
45. On October 13, 2020, the principal informed the Parent that the staff were getting fitted for N95 masks and the District was hopeful it could begin providing in-person services on October 19, 2020.
46. On October 23, 2020, the Parent reported to the complaint investigator that the District had still not begun providing in-person services.

47. On November 2, 2020, the District began providing the Student with a hybrid of in-person and remote services. The District began implementing the hybrid services model outlined in the Student's modified learning plan.

CONCLUSIONS

Issue 1: IEP Implementation – The Parent alleged the District failed to implement the Student's individualized education program (IEP) from the commencement of the 2020-2021 school year through September 21, 2020, when the complaint was filed. In particular, the Parent alleged that although the District offered special education services to the Student, the District did not implement the IEP because the District did not provide in-person services, which the Parent alleged the Student required to access her special education services.

At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services that is compliant with the procedural requirements of the IDEA and state regulations. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. "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 student'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).

OSPI has indicated that at the commencement of the 2020-2021 school year, districts must implement students' IEPs to the *greatest extent possible*, regardless of the model the district chooses to open the school year with (e.g., remote, hybrid, in-person). While districts should not continue to use the distance or continuous learning plans implemented in spring 2020, districts may develop a contingency plan for anticipated future temporary emergency situations—e.g., another Governor ordered shut down—or, if agreed to by a parent, temporarily amend an IEP to describe how a student will receive services remotely if certain provisions of the IEP necessary for the provision of a free appropriate public education (FAPE) are temporarily unable to be provided due to health and safety circumstances outside the district's control. Districts may not, however, unilaterally or arbitrarily make changes to a student's IEP, including arbitrarily decreasing the number of minutes of instruction or services provided to a student during remote learning. Districts must also continue to implement appropriate accommodations and related services to ensure students are able to equally access their learning and are receiving the intended educational benefits of their IEP to the greatest extent possible. Districts may not use an emergency contingency plan or a temporary amendment to waive its obligation to provide FAPE despite the ongoing impact of COVID-19.

At the commencement of the 2020-2021 school year, based on local health guidelines, the District expressed a preference for full remote learning for all students, while also developing a plan to transition some students to in-person services, once permitted to do so according to local health and safety guidelines. The District created a rubric for use by parents and IEP teams to help determine which students should receive in-person services first. On September 6, 2020, prior to

the commencement of the school year, the Student's IEP team met virtually to complete a rubric for the Student to determine her need for in-person services. The rubric indicated the Student required in-person services to access specially designed instruction and therapies in order to make progress on her March 2020 IEP goals. In particular, the rubric documented the Student needed adult support and supervision to assist with the appropriate use of remote technology, including logging on to the computer, and to support the Student during tasks required to participate in remote synchronous and asynchronous learning (including that the Student required hand-over-hand modeling). The Student also required in-person support to assist the Student in accessing teletherapy for related services. It also documented the reasons why the Parents were unable to provide the adult support during the school day or in the evening, and that while the daycare provided supervision of the Student, it was unable to provide the type of adult support the Student required to appropriately access and receive the intended benefits of her IEP services.

On September 9, 2020, the Student's IEP team met to review the findings of the rubric, to discuss the Parent's request for in-person services, and to determine how the Student's services would be delivered during the fall of 2020. At the meeting, the IEP team agreed the Student's educational needs could not be met using a 100% remote learning model and developed a "modified learning plan" with the goal of providing a hybrid of in-person and remote services once the District began permitting in-person services. The modified learning plan was recorded in a prior written notice (PWN). The IEP modified learning plan was intended to be temporary and the Student's March 2020 IEP was to be fully implemented as written once all students returned to in-person learning. The modified learning plan offered the Student special education and related services through a combination of virtual instruction, online videos and learning, online educational materials, and support provided online to the Parent. During the time period under review for this complaint (September 9-21, 2020), the District only offered remote services to all students. Because the modified learning plan for use during periods of fully remote instruction only offered services during the school day and without in-person adult support—which according to the in-person services rubric completed by the IEP team, meant the Student would likely be unable to access any instruction or services—the Student was unable to access any of the special education services offered by the District during this time.¹¹

The services included in the Student's IEP modified learning plan contain fewer overall minutes of instruction than those included in the Student's March 2020 IEP, and it is not clear how the modified services aligned with the services on the Student's IEP. The Student's March 2020 IEP provided the Student with 150 minutes weekly of specially designed instruction each in the areas of math, written expression, and reading, 562 minutes weekly in adaptive behavior, and 563 minutes weekly in social/behavior. The Student's IEP additionally provided the Student with 30 minutes weekly of OT services and 30 minutes bi-weekly in communication. However, during 100% remote instruction—the environment the Student was in during the time period under review for this complaint—the modified learning plan provided the Student with 100 minutes weekly of "group calendar time" (which focused on both social skills and math), 150 minutes weekly of "specialist time" (physical education, music, and library time), and 150 minutes weekly

¹¹ The District began providing some in-person services on November 2, 2020.

of individual instruction in “academic skills.” The Student was also provided 30 minutes weekly of OT and communication services; however, the PWN indicated the number of minutes could be changed by the provider based on the Student’s individual needs, including endurance and stamina for virtual learning. Upon returning to a hybrid model, the modified learning plan indicated the Student would begin receiving the following services in-person: 120 minutes weekly of specially designed instruction in social/behavior, 90 minutes weekly of specially designed instruction in math, and 60 minutes weekly of specially designed instruction in reading and writing combined. It was noted that the Student would continue to receive specials (physical education, music, and library) as she did in the 100% remote model, and that the Student would also receive remote academic instruction for 150 minutes weekly by a special educator teacher or paraeducator. Although the services provided in the hybrid model were more clearly aligned with the Student’s IEP than those provided in the fully remote model, the PWN did not explain all of the changes (e.g., why the Student’s specially designed instruction in reading and writing was reduced from 150 minutes weekly in each area to 60 minutes combined total, why the Student was not offered adaptive behavior instruction, or what services from the March 2020 IEP [both in quantity and targeted IEP goals] the services of “specials” and “academic skills” were intended to replace).

The PWN documented the IEP team’s determination that the Student was unable to receive FAPE from a fully remote education model and stated its intention to provide the Student some in-person services when the District began permitting them. However, the PWN did not explain why its decision to not provide in-person services also required the specific changes proposed in the modified learning plan—including a reduction in some instructional minutes in some areas and a change in the type of services being provided in other areas. It was also not clear how the IEP team intended the services offered in the modified learning plan to meet each of the Student’s individualized goals. As previously stated, while a District may utilize a PWN during alternate models of instruction during the pandemic to document temporary amendments, it must still implement the IEP to the greatest extent possible.

Here, in response to the Parent’s request for in-person services and concerns that the Student was unable to access her special education services, the IEP team met and documented in a PWN that the Student was unable to benefit from a fully remote plan. At the same meeting, the IEP team developed a modified learning plan that described the special education services the Student would receive until in-person services for all students could resume. However, the modified learning plan shows the IEP team decreased the quantity of minutes of specially designed instruction provided on the Student’s March 2020 IEP and made other changes to the type of the special education services it offered the Student pending its ability to return to in-person services without clearly articulating on the PWN its reason for doing so, other than saying the Student was currently unable to access or benefit from the services being provided to her due to the Student’s need for some in-person services, and that the District was not offering in-person services at that time to any student. The description of the services provided more closely aligned with the Student’s schedule than with the Student’s needs. The PWN further did not show the IEP team considered all possible alternatives to in-person support, other than to say it was not providing

in-person services for any student, which is not sufficient to show the determination was individualized to the Student.

OSPI accordingly finds the District to be in violation for not implementing the Student's IEP because the modified learning plan does not provide the services outlined in the IEP to the greatest extent possible. Further, the Student does not appear to have received the special education services outlined in the modified learning plan either, given the Student's disability-related challenges with engaging in remote learning without adult support. The District will be required to have an IEP team meeting to discuss what is required to implement the Student's March 2020 IEP to the greatest extent possible, including what accommodations and supports the Student requires. The District will be required to provide the Parent with a PWN, containing all required elements. The District will also be required to provide compensatory services to the Student for the services the Student was unable to access from September 9 through September 22, 2020, as follows: 1.5 hours of specially designed instruction in math, reading, and written expression, and 4.5 hours of specially designed instruction in adaptive behavior and social/behavior.¹²

Additionally, it is noted that on the PWN, the District indicated the Student could not receive more instructional minutes online than was permitted by the District's policy for remote learning. OSPI reminds the District that its determination of services provided for each student must be individualized and a blanket policy on the number of minutes a student with a disability may be provided instruction or services online is not in compliance with the IDEA.

Issue 2: Amending Student's IEP – The Parent alleged the District failed to follow procedures when making changes to the Student's IEP for the 2020-2021 school year. In particular, the Parent alleged the District changed the Student's placement during the summer of 2020 without following proper procedures.

Changes to an IEP may be made by an IEP team at an IEP team meeting, or if agreed to by a parent and a school district, the IEP team may decide not to convene an IEP team meeting and instead develop a written document agreeing to amend or modify the student's current IEP without a meeting. Regarding placement, school districts must provide parents an opportunity to participate in issues impacting the educational placement of their child. Under the IDEA, educational placement refers to educational programming, including programming changes that would change the amount of time a student spent in the general education setting. Once the IEP team determines the type of placement appropriate to meet the student's needs, the IEP team may delegate the classroom assignment to the school administration, if there is more than one classroom that fits the description of an appropriate educational program for the student.

¹² Because OSPI requires compensatory services to be provided individually by a special education teacher, compensatory services are being ordered at the rate of approximately one half the amount indicated in the Student's March 2020 IEP. Although the Student's March 2020 IEP also calls for 30 minutes weekly of communication services and 30 minutes biweekly of occupational therapy, which were not provided from September 9-22, 2020, the impact of these services being denied on the Student's receiving of a FAPE is believed to be minimal, and therefore, no compensatory services are being ordered in these areas.

However, that determination must be consistent with the placement team's decisions about the appropriate educational setting for the student.

The Student's March 2020 IEP provided that the Student was to receive all services in a special education setting. During the summer of 2020, the Parent received emails from the Student's former special education teacher that the District had determined the Student would benefit from increased time in the general education setting and that the Student would be transferring from the "functional academics" class to the "functional academics/social communication" class. The Parent was further introduced via email to a teacher she was told would be the Student's general education teacher, and that the Student would attend specials (physical education, music, and library) with general education students and a paraeducator. In her complaint, the Parent alleged the District predetermined the Student's change in placement without following the appropriate amendment procedures.

On September 9, 2020, the Student's IEP team met to discuss the Student's program during remote learning for the upcoming school year. According to the District's response, the Parent was mistaken in her understanding that the Student's placement was changed during summer 2020 and that upon attending the IEP meeting on September 9, 2020, the IEP team did not offer any general education services to the Student, and the Student never received any general education service. According to the District, the Student continues to remain full time in a special education setting. The District provided confirmation of this to OSPI by demonstrating that despite the change in name to the Student's program, the Student continued to receive all services in a special education setting. OSPI finds no violation.

CORRECTIVE ACTIONS

By or before **December 11, 2020, December 21, 2020, and May 21, 2021**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

IEP MEETING

By or before **December 18, 2020**, the Student's IEP team will meet. At the meeting, the IEP team must address the following topics:

1. Any amendments necessary to the modified learning plan.
2. The special education services and supports necessary to implement the Student's IEP to the greatest extent possible during the hybrid learning model (and the services and supports necessary in the event the District must return to a fully remote model).
3. Whether the Student's in-person instructional time is currently adequate or should be increased in order to provide the Student with a free appropriate public education (FAPE).
4. Whether the Student requires different or additional supports during the remote (synchronous or asynchronous) portions of the week during a hybrid model—e.g., the District should reconsider the Parent's request for a paraeducator during remote instruction.

The IEP team should also discuss the potential need for recovery services from the remote learning during spring of 2020.

OSPI notes that all decisions regarding the development of the Student's IEP, including any amendments, should be made based on the Student's specific, individualized, disability-related needs, regardless of the overall model the District is currently operating in for all students, and regardless of its building schedule. It is possible that health and safety guidelines limit the overall number of students that can receive in-person instruction, but that for this specific Student, more in-person time may be feasible, even considering health and safety guidelines. Further, the individualized, student specific reasons for making any changes to the Student's IEP should be clearly documented in the PWN.

By **December 21, 2020**, the District will provide OSPI with: i) a prior written notice, summarizing the group's discussion and decisions concerning the above matters and any modifications to the modified learning plan; ii) a copy of the Student's amended IEP (if relevant); iii) any relevant meeting invitations; iv) a list of people, including their roles, who attended the meeting; and, v) any other relevant documentation.

COMPENSATORY EDUCATION

By or before **December 4, 2020**, the District and the Parent will develop a schedule for providing the following compensatory education to the Student: 1.5 hours of specially designed instruction in math, 1.5 hours of specially designed instruction in reading, 1.5 hours of specially designed instruction in written expression, 4.5 hours of specially designed instruction in adaptive, and 4.5 hours of specially designed instruction in social/behavior.

The District will provide OSPI with documentation of the schedule for services by or before **December 11, 2020**.

The compensatory education will occur in a one-on-one setting and be provided by a certificated special education teacher. The instruction will occur outside of the District's school day and may occur on weekends or during District breaks. If the District's provider is unable to attend a scheduled session, the session must be rescheduled. If the Student is absent, or otherwise does not attend a session without providing the District with at least 24 hours' notice of the absence, the District does not need to reschedule. *The services must be completed no later than **May 14, 2021**, including those needing to be rescheduled.*

No later than **May 21, 2021**, the District shall provide OSPI with documentation that all of the compensatory education has been completed. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled by the District or missed by the Student.

The District either must provide the transportation necessary for the Student to access these services, or reimburse the Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must provide reimbursement for

round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **May 21, 2021**.

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.

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.)