

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-76

PROCEDURAL HISTORY

On June 15, 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 Northshore 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 June 17, 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 June 25, 2020, OSPI requested additional information from the Parent. The Parent responded on July 8, 2020 and OSPI forwarded the information to the District on July 9, 2020.

On July 8, 2020 OSPI received the District's response to the complaint and forwarded it to the Parent on July 9, 2020. OSPI invited the Parent to reply. The Parent did not reply.

On August 3, 2020 OSPI requested clarifying information from the Parent. On August 4, 2020, OSPI received the information from the Parent and forwarded the additional information to the District on August 5, 2020.

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

ISSUE

1. Did the District implement the Student's individualized education program (IEP) during the March 2020 through June 2020 school facility closures?

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 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. 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).

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).

FINDINGS OF FACT

Background

1. OSPI received the complaint from the Parent on June 15, 2020. The Parent, in her complaint, alleged the District failed to provide "...enough hours of education. Two hours of per day is not enough for a child this impacted by autism and multiple disabilities. He is falling even more behind academically." The Parent later stated, in additional information provided to OSPI:

During the school closure I asked if 1:1 in home services would be possible at first they said yes, and then suddenly it wasn't an option. The online model of schooling as presented by [District] is ineffective and inaccessible for a child like mine with multiple diagnosis [sic]. He would often log on late, and then when he did, he wouldn't attend to the class, either logging off during the session or looking at his phone during the classes. He was unable to access the curriculum due to his disability, the online 1:1 was ineffective in helping him access the curriculum or support him.
2. From follow up information from the Parent, the Parent indicated she was not provided any training to assist the Student in his remote learning, which might have helped her better assist the Student. However, there was no documentation that the Parent specifically requested training from the District at any time.

2019-2020 School Year

3. During the 2019-2020 school year, the Student attended a District middle school, was in the sixth grade, and was eligible for special education services under the category multiple disabilities.
4. The District's 2019-2020 school year began on September 4, 2019.
5. The Student's October 14, 2019 individualized education program (IEP) was in effect prior to the COVID-19 school facility closures. The Student's IEP indicated that the Student has significant behavior and sensory needs. The IEP included annual goals in the areas of social/emotional, adaptive, behavior, math, reading, and writing. Progress toward the annual

goals would be measured by observations, classroom data/tracking forms, student work product, formal unit math assessments, curriculum assessments, individual reading record, STAR reading tests, and written assessments. The Student's IEP provided the Student with the following specially designed instruction in the special education setting:

- Mental health service: 30 minutes, weekly (provided by a therapist)
- Social emotional: 248 minutes, weekly (provided by the special education classroom staff)
- Behavior: 248 minutes, weekly (provided by the special education classroom staff)
- Math: 248 minutes, weekly (provided by the special education classroom staff)
- Adaptive: 248 minutes, weekly (provided by the special education classroom staff)
- Social emotional: 248 minutes, weekly (provided by the special education classroom staff)
- Behavior: 30 minutes, weekly (provided by the special education staff)
- Reading: 124 minutes, weekly (provided by the special education staff)
- Written language: 124 minutes, weekly (provided by the special education staff)

Supplemental aids and services in the IEP included the following:

- 1:1 Behavior technician (BT): 1,550 minutes, weekly (provided by a behavior technician in a special education setting)¹
- Communication consultation: 30 minutes, monthly (provided by a speech/language therapist in a special education setting)
- Sensory consultation: 90 minutes, yearly (provided by an occupational or physical therapist in a special education setting)
- 1:1 BT: 400 minutes, weekly (provided by a BT in a general education setting)²

The Student's IEP also included a behavioral intervention plan and an emergency response protocol to address the need for restraint and isolation.

6. On March 4, 2020, the District informed all parents in the District that all schools would be closed beginning March 5, 2020, for up to 14 days, in response to COVID-19. The District told parents in the District the transition to online learning would begin on March 9, 2020.
7. On March 12, 2020, the District issued a prior written notice to the Parent, stating the Student's IEP team proposed providing the 1:1 BT services in the Parent's home.
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.
9. On March 19, 2020, according to the District, the agency informed the Parent that BT services at home would begin on March 23, 2020.

¹ The District contracted with a private behavior agency (agency) to provide the BT services.

² The District stated the second behavior technician was needed to manage behavior escalations and implementing the emergency response protocol if the Student eloped or demonstrated dangerous behavior.

10. On March 21, 2020, according to the District, the Parent inquired with the agency about remote learning options for the BT services because the Parent was "in the extremely high risk group" and the family had been quarantined.
11. 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.
12. Also, on March 23, 2020, the District provided the Parent with prior written notice that the District was stopping in-person BT services to the Student at home. The notice stated the BT services were discontinued because the District could not ensure the health and safety "of your son, your family, and our employee." The notice stated BT services would be provided remotely to the Student. According to the District, the agency informed the Parent that the agency could provide "remote learning support via video conferencing" that would support the Student with all his classwork.
13. On March 24, 2020, according to the District, the District offered the Parent alternative scheduling hours for the BT services. The Parent wanted to start out with fewer hours and that the hours be provided in the afternoon.
14. On March 25, 2020, according to the District, the District superintendent "informed families that the District would not be providing customary third quarter progress reports because such reporting would likely provide inaccurate information, as well as increase stress for students, families, and teachers..."
15. On March 30, 2020, the agency provided the Parent with the Student's weekly schedule, including BT services. The services included the following specially designed instruction by the special education teacher and general education services:
 - Math specially designed instruction: 40 minutes
 - History specially designed instruction: 40 minutes
 - Social skills specially designed instruction: 40 minutes
 - English specially designed instruction: 40 minutes
 - General physical education: 40 minutes
 - General education science: 40 minutes
 - BT services: 40 minutes, 3 times per week
 - Office hours with the special education teacher
16. On March 31, 2020, the District superintendent sent an email to all parents of students with disabilities. The email stated, in part:

Special education staff will follow the schedule published by the district, which can be found here: <https://www.nsd.org/northshorelearns/schedules>. They will be thoughtful and creative in providing educational services that are safe, possible and reasonable within this model. IEP teams can consider the need for compensatory services upon buildings re-opening, and school resuming in the classroom. Considerations for Extended School Year (ESY) will continue as usual through the IEP process.

17. Also, on March 31, 2020, according to the District, at the request of the Parent, BT services were changed to the morning due to the Parent's preference for a specific BT. The Student began receiving his general education and special education services the same day.
18. From April 1 to June 19, 2020, the District kept data on the Student's behavior in the following areas:
- Requesting access
 - Requesting attention
 - Requesting compromise
 - Requesting escape
 - Requesting help
 - Skill-based treatment
 - Following individual directions
 - Home time on task (beginning April 22, 2020)
 - Aggression
 - Property destruction
 - Tease/taunt/threat
 - Verbal refusal

The data indicated that the Student made progress in almost all areas of behavior.

19. The District was on spring break from April 6 to April 10, 2020.
20. On April 6, 2020, the Governor extended the March 13, 2020 school facility closure directive through the remainder of the 2019-2020 school year.
21. 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
 - Grades K-1: 45 minutes
 - Grades 2-3: 60 minutes
 - Grades 4-5: 90 minutes
 - Grades 6-8: 20 minutes per class (2.5 hours maximum)
 - Grades 9-12: 30 minutes per class (3 hours maximum)
22. On April 13, 2020, the District held an IEP meeting via video conference, during which the Student's IEP team developed new annual goals for the Student. The April 2020 IEP provided the same special education services except for the 1:1 BT services in the general education setting, which were increased from 400 minutes weekly to 650 minutes weekly. The prior written notice, dated April 14, 2020, included no proposals or denials related to the Student's IEP.

The meeting notes included the following points of discussion, in part:

- "Academic goals: [Case manager] discussed difficulty with measuring academic goals with high number of absences and with behavior challenging."
- "Parents feel that this is the best year [Student] has had at school, despite attendance issues..."
- "Parents feel that [agency] services have been helpful and that [Student] enjoys sessions afterward."
- "[Parent] shares that it can be difficult for reading and writing tutoring."
- "[Case manager] asks what they see in high school and post high school--parents share that school has been so difficult; Dad has concerns about peer relationships (turning people off, making fun of him)."

23. Also, on April 13, 2020, the agency emailed the Parent in response to an inquiry about extending the BT service hours in the afternoon, but decreasing the services in the morning to three days a week to permit the Student to sleep. The District via the agency approved the additional hours in the afternoon, but after finding out the preferred BT was not available, the Parent declined the additional hours in the afternoon.
24. On April 15, 2020, the agency emailed the Parent, stating the BT services could be increased one hour a day in the morning so that the Student could catch up on his assignments.
25. Beginning around April 15, 2020 until the end of the 2019-2020 school year, District staff and the agency provided almost daily lesson plans, schedule updates, and progress information to the Parent via email.
26. On April 20, 2020, according to the District, the District mental health specialist contacted the Parent to begin weekly Zoom sessions. The District stated the Parent did not respond to weekly contacts from the District, or join the Zoom sessions.
27. On April 21, 2020, the special education teacher emailed the Parent, the agency, the BT, and general education teacher about how the Student was progressing. The email, in part, stated:
With the combined effect of missed school and Covid-19 I have been very concerned about catching [Student] up to or at the minimum much closer to grade level before he exits Middle school. As I join in his zoom meetings and observe his attitude, behavior and work I am encouraged a good deal and feel this regular routine and structure as well as access to academic content will carry over into the new school year and serve him well.³
28. On May 3, 2020, the District provided a prior written notice regarding "continuous learning plan during distance learning period." The notice stated:
Due to the COVID-19 school closure, educational services are being provided through distance learning. Just as general education services have been reduced during this time, special education services will not be the same as provided when school is in session. As a result, we identified and prioritized special education services in order to provide continuous learning that can be implemented during this time.
- The notice listed the following IEP priority areas:
- Reading
 - Writing
 - Math
 - Social/Emotional
 - Behavior
 - Adaptive
 - Communication
29. On May 5, 2020, according to the District, the Student's daily scheduled was changed to provide the Student with an opportunity to earn time off as a reward.
30. On June 15, 2020, OSPI received the Parent's complaint and opened this investigation.

³ According to the Student's October 2019 IEP, the Student missed 28 days of school during the 2018-2019 school year.

31. June 19, 2020 was the last day of the 2019-2020 school year for the District.

32. On June 23, 2020, the District issued a special education progress report about the Student's progress toward his April 2020 IEP goals. The progress was as follows:

- Self-regulation: Emerging skill
- Self-advocacy: Insufficient progress
- Transition behavior: Insufficient progress
- Safety behavior: Emerging skill
- Following directions: Emerging skill
- Math calculation: Sufficient progress
- Math reasoning: Sufficient progress
- Reading comprehension: Sufficient progress
- Written language: Insufficient progress

CONCLUSIONS

Issue One: IEP Implementation – The Parent alleged the District's failure to implement the Student's individualized education program (IEP) resulted in the Student's special education needs not being met.

Under normal circumstances, a district must implement IEPs as written. However, during the school closures due to the COVID-19 pandemic, because of health and safety concerns, districts were not necessarily expected to implement IEPs as written. IEP services should have been implemented to the extent possible, including the provision of specially designed instruction, and based on the student's individualized needs. If a service was not implemented, a district should have documented why it could not be implemented and what other options were considered. Districts should have clearly communicated to parents what services were being offered and were expected to collaborate with parents about the implementation of the services, including parent capacity to assist in service implementation and the potential need for parent training. Special education services must have begun by March 30, 2020, as districts began "continuous learning," per expectations from OSPI. Districts were expected to continue to monitor student progress toward annual goals and report progress to parents. Like special education services, the district may not be able to measure progress in the method stated in the IEP because of remote services. However, districts should still have reported what progress they could, even if an alternative method was used to gather progress information.

Here, the Student's October 2019 IEP provided for specially designed instruction in the areas of mental health, social emotional, behavior, math, reading, and written language. The Student also received support from two behavior technicians (BTs), a communication consultation, and a sensory consultation. In March 2020, the District's facilities closed temporarily because of the COVID-19 and subsequently closed for the remainder of the school year. The District was required to begin providing specially designed instruction to the Student by March 30, 2020, as the District began providing remote instruction to all students. Because of COVID-19, the District was required to implement the services on the Student's October 2019 IEP to the extent possible. Since some services could not be implemented or implemented in the same way on a remote learning platform, the District was required to document through the IEP, a continuous learning plan, or

some other form the services that were going to be implemented and inform the Parent of the plan.

In this case, the District documented the remote services to be provided on the Student's IEP. The District provided the Parent with a schedule of the services to be provided, which indicated that the Parent knew of the services to be provided by March 30, 2020. The District was in almost daily communication with the Parent about service implementation, including increasing BT services, and shifting the time of the services. The District's documentation included correspondence with the Parent, schedules, and behavior data, showing that the District substantially provided services to the Student. In the complaint, the Parent stated the amount of services that were being provided were not enough to meet the Student's needs. But the District provided 40 minutes a class, including special education instruction, which exceeded the recommendation from OSPI's April 2020 guidance for remote instruction for sixth graders. The recommendation was for 20 minutes per class, including both special education and general education instruction. The documentation showed the District provided services, which were individualized based on the Student's needs and substantially implemented.

Regarding BT services, the District initially agreed to provide BT services to the Student at home. However, as COVID-19 worsened and school facilities closed, more health and safety measures were instituted, the District reasonably discontinued the in-home services. The District, along with the agency, attempted to implement remote BT services, including increasing the hours at the Parent's request and working with the Parent to provide her preferred BT and preferred schedule. While not ideal, the BT services were provided to the extent possible given the circumstances.

The District also monitored the Student's progress toward his annual goals and the BT kept daily data on behavior, including time on task, aggression, verbal refusal, and other areas. The June 2020 progress report, based on the April 2020 IEP, indicated that the Student was making sufficient progress in math and reading, demonstrating an emerging skill in self-regulation, safety behavior, and following directions, and insufficient progress in transition behavior, self-advocacy, and written language. This is, keeping in mind, that the Student was not expected to meet the goals after the IEP was updated only two months earlier. While not probative, the Parent reported that at least up to the April 2020 IEP meeting, this year had been the Student's most successful year.

Based on the District proposing special education services that were based on the Student's IEP, continually providing the Parent with opportunity for input, substantially implementing the services, cooperatively working with the Parent to resolve implementation issues, and monitoring the Student's progress, no violation is found.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this ____ day of August, 2020

Glenna Gallo, M.S., M.B.A.
Assistant Superintendent
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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.)