

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 18-116

PROCEDURAL HISTORY

On December 11, 2018, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Vashon Island 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 December 12, 2018, 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 December 21, 2018, the District requested and OSPI granted an extension of time until January 11, 2019 for the District to respond.

On January 11, 2019, OSPI received the District's response to the complaint and forwarded it to the Parent on January 15, 2019. OSPI invited the Parent to reply with any information she had that was inconsistent with the District's information.

On January 28, 2019, OSPI received the Parent's reply. OSPI forwarded that reply to the District on January 29, 2019.

On January 29, 2019, the OSPI investigator interviewed the Parent via telephone.

On January 31, 2019, the OSPI investigator interviewed the District's director of student services via telephone.

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

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on December 12, 2017. These references are included to add context to the issues under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.

ISSUES

1. Did the District follow transfer procedures as required by WAC 392-172A-03105 when the Student transferred into the District on September 13, 2018, including adopting and implementing the Student's previous individualized education program (IEP) or developing and implementing a new IEP?

2. Did the District provide the Student with a free appropriate public education (FAPE), including considering the continuum of placement options for the Student and implementing an IEP that allows the Student to make progress appropriate in light of his circumstances?

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. 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.

Transfer Students Who Transfer from an In-State School District: If a student eligible for special education transfers from one Washington school district to another Washington school district and has an IEP that was in effect for the current school year from the previous district, the new school district, in consultation with the parents, must provide comparable services to those described in the student's IEP, until the new school district either: adopts the student's IEP from the previous school district; or develops, adopts, and implements a new IEP that meets the applicable requirements in WACs 392-172A-03090 through 392-172A-03110. 34 CFR §300.323(e); WAC 392-172A-03105(4). Districts must take steps to adopt the IEP or develop and implement a new IEP within a reasonable period of time to avoid any undue interruption in the provision of special education services. *Questions and Answers on IEPs, Evaluations, and Reevaluations* (OSERS June 2010) (Question A-4).

Comparable Services: Comparable services means services that are similar or equivalent to those described in the IEP from the previous district, as determined by the student's new district. Individuals with Disabilities Education Act (IDEA), 71 Fed. Reg. 46,681 (August 14, 2006) (comments to the final regulations). Courts have found that whether services are comparable are fact specific. *See e.g., Sterling A. v. Washoe County Sch. Dist.*, 51 IDELR 152 (D. Nev. 2008) (holding that a Nevada district could provide school-based services to a child with a cochlear implant who received home-based services from his former district); *Alvord Unified Sch. Dist.*, 50 IDELR 209 (SEA CA 2008) (finding that an SDC for students with orthopedic impairments was not comparable to a 6-year-old boy's prior placement, as it served students who functioned on a much lower level and did not provide opportunities to interact with typically developing peers); and *Palo Alto Unified Sch. Dist.*, 114 LRP 1431 (SEA CA 2013) (finding that placement of student with pica and food allergies in an isolated classroom was comparable to the in-home placement required by the student's last-implemented IEP).

Continuum of Alternative Placement Options: Each school district shall ensure that a continuum of alternative placements is available to meet the special education and related services needs of students. The district is not required to offer all placement options at each school within the district but must offer a continuum within the district as a whole. The continuum required in this section must: include the alternative placements listed in the definition of special education in WAC 392-172A-01175, such as instruction in general education classes, special education classes, special schools, home instruction, and instruction in hospitals and institutions; and make provision for supplementary services such as resource room or itinerant instruction to be provided in conjunction with general education classroom placement. 34 CFR §300.115; WAC 392-172A-02055. Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a student eligible for special education, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings. WAC 392-172A-01175.

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

Provision of FAPE: An IEP is required to be “reasonably calculated to enable the child to receive educational benefit.” It does not require the absolute best or potential-maximizing education for that child. Rather, the district is obliged to provide a basic floor of opportunity through a program that is individually designed to provide educational benefit to a child with a disability. The basic floor of opportunity provided by the IDEA consists of access to specialized instruction and related services. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). For a district to meet its substantive obligation under IDEA, a school must “offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” An IEP must “aim to enable the child to make progress”, the educational program must be “appropriately ambitious in light of [the student’s] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom,” and the student should have the opportunity to meet challenging objectives. *Endrew F. v. Douglas County School District RE-1* 137 S.Ct. 988, 69 IDELR 174 (2017).

If a school district fails to comply with the procedural elements set forth in the IDEA or fails to develop and offer an IEP that is reasonably calculated to enable a child to received educational

benefits, the district is not in compliance with the IDEA. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176 (1982). Procedural violations of the IDEA amount to a denial of FAPE if they: (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE; and (3) caused a deprivation of educational benefits. 20 USC §1415(f)(3)(E)(ii); see 34 CFR §300.513; WAC 392-172A-05105.

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. The IEP team must consider the parents' concerns and the information that they provide regarding their child. 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 and 9).

Parental Choice Programs: Parents of students with disabilities must be provided the same access to parental choice programs, such as online and charter schools, as the parents of students without disabilities. If the needs of the student can be met in the parent choice program with special education, related services, and additional aids and supports, then a district must provide a FAPE to the student under the program. *Letter to Farmer*, 103 LRP 49606 (2003). State regulations require school districts that offer alternative learning experiences to ensure that they are accessible to all students, including students with disabilities. Alternative learning experiences for students eligible for special education must be provided in accordance with chapter 392-172A WAC. WAC 392-121-182.

Alternative Learning Experience (ALE): An alternative learning experience (ALE) course a public-school option for students to access education in a nontraditional way. An ALE course is a course or coursework that is a delivery method for the program of basic education and is: 1) provided in whole or in part independently from a regular classroom setting or schedule, but may include some components of direct instruction; 2) supervised, monitored, assessed, evaluated, and documented by a certificated teacher employed by the school district or under contract as permitted by applicable rules; and, 3) provided in accordance with a written student learning plan that is implemented pursuant to the school district's policy and rules adopted by the superintendent of public instruction for alternative learning experiences. ALE courses fall into three general categories: 1) "online course" meaning an ALE course as defined in RCW 28A.250.010¹; 2) "remote course" meaning an ALE course that is not an online course where the

¹ Online course means course or grade-level coursework where: 1) more than half of the course content is delivered electronically using the internet or other computer-based methods; 2) more than half of the teaching is conducted from a remote location through an online course learning management system; 3) a certificated teacher has the primary responsibility for the student's instructional interaction; and, 4) students have access to the teacher synchronously, asynchronously, or both.

written student learning plan for the course does not include a requirement for in-person instructional contact time and no minimum in-person instructional contact time is required; and 3) "site-based course" meaning an ALE course where the written student learning plan for the course includes a requirement for in-person instructional contact time. RCW 28A.232.010; WAC 392-121-182. Each student participating in an ALE must have a written student learning plan, weekly contact with a certificated teacher, and be evaluated at least once per calendar month of enrollment by a certificated teacher. Contact may be direct personal contact, in-person instructional contact, or synchronous digital instructional contact (real-time communication using interactive online, voice, or video communication technology.) School districts may accept nonresident students under the school choice enrollment for enrollment in ALEs. WAC 392-121-182.

FINDINGS OF FACT

Background Facts

1. Prior to fall 2015, the Student lived in and received educational services in his resident school district (resident district). The Student was eligible for special education services under the category multiple disabilities.
2. According to the documentation provided in this complaint, while enrolled in the resident district, the Student had an individualized education program (IEP) that included goals and provided him with specially designed instruction in the areas of math, written expression, social skills, behavioral skills, and occupational therapy. The Student received his special education services in a self-contained setting to address behavioral concerns, and the Student had a behavioral intervention plan (BIP) that focused on the escalating behaviors of work refusal, verbal threats, and physical aggression.
3. In 2015, the Parent withdrew the Student from his resident district and enrolled him in an alternative learning experience (ALE) virtual academy² (online school), which is administered by a different district in Washington (other district). The Student was in middle school and continued to reside in his home town, within the boundaries of his resident district.
4. According to the documentation provided in this complaint, while attending the online school, the Student received "instructional materials through [the online school] and special education services are delivered via video chat format." The Student received specially designed instruction in the areas of math and written language. The Student also received private counseling and speech and language therapy from private providers located in the Student's home town, paid for by the Parent.

² The virtual academy is multidistrict online school approved by OSPI to offer full-time online education to students statewide. The district in which the online school is located describes the school as a "home-based distance learning virtual school."

5. In December 2017, the other district reevaluated the Student and found that he continued to be eligible for special education services under the category multiple disabilities (based on multiple diagnoses including attention-deficit hyperactivity disorder (ADHD) combined type and autism spectrum disorder (ASD)). The reevaluation report also noted that, "while not diagnosed, there are concerns that [the Student] exhibits characteristics consistent with a Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure."

Regarding academics, the report discussed the curriculum and subjects the Student was studying at online school, and noted in at least one subject that the Student performs best with "hands-on learning activities." The report stated that the Student was "estimated to be at or above grade level in terms of reading fluency and comprehension" and that his math skills were "estimated to be consistent with 7th grade instruction...[and] his mother and teacher agree that he is no longer in need of intensive intervention for math." The reevaluation report recommended that the Student received specially designed instruction in written language.

Regarding behavior, the reevaluation report noted that the Student has,

Significant behavioral needs related to impulse control and self-regulation, which impacts his ability to engage in his instruction as well as interact with others without substantial support. He is currently home-schooled and has limited interactions with people outside of his family. This limits his ability to practice appropriate social engagement skills that are necessary to function in the world...His impulsive and explosive reactions to frustration are highly maladaptive and require constant supervision. In a traditional school setting, he would likely require direct supervision most of his day in an environment that would insure his safety and the safety of others.

The report stated that the Student "does not appear to have the ability to regulate his emotions and behaviors nor does he demonstrate skills to evaluate the consequences of his actions." The report stated that the Student required specially designed instruction in social emotional "to focus on appropriate expression of his frustration and following teacher directives" and that there were "significant concerns that [Student's] needs cannot be adequately addressed in a virtual educational setting and he may be better served in a setting that allows for direct interaction with other adults and students." The report stated that "there appears to be very little insight into his behavior and how it impacts others in his environment" and recommended "numerous environmental modifications/accommodations" including, but not limited to:

- Develop a non-threatening relationship with [the Student] to better understand what triggers frustration
- Allow additional, but not excessive, time to process learning
- Set clear rules and expectations each time an individual works with him
- Present instruction in a manner that directly relates to his personal experiences
- Provide instruction for limited amounts of time with frequent breaks
- Limit work expectations to minimize busy work and focus on essential skills
- Give [the Student] some choices during instruction but limit the number of acceptable choices to reduce the amount of mental energy spent.

The report also stated that:

It is acknowledged that [the Student] is enrolled in a home-based, distance learning virtual school that is able to use modifications and accommodations to assist with his learning. [The Student] would benefit from an academic environment that would allow him opportunities to learn and practice behavioral skills within a social context that is not possible in his present school. It is recommended that [online school] staff consult with his family and team of therapists to address the appropriateness of his needs being met in a virtual school.

6. The prior written notice, dated December 7, 2017, stated that "It is acknowledged that [Student's] needs cannot be adequately addressed through a virtual school and [online school] will be working with his family and other resources within his community to help him access comprehensive services that can better meet his needs." The notice also stated that the "recommendations in this evaluation reflect services that can be reasonably addressed in a virtual school but should his educational placement change it is likely he will require more intensive specially designed instruction that will help him access his education" and that the staff at the online school would "continue to work with [the Student] and his family until he can transition into a more appropriate educational placement."
7. On December 7, 2017, the Student's IEP team in the other district developed his annual IEP, which noted that the Student's school was a virtual setting. The December 2017 IEP provided the Student with one annual goal in the area of written language and numerous accommodations and modifications. The IEP also included 30 minutes, twice a week of specially designed instruction in written language from a special education teacher.
8. According to the Parent and the documentation provided in this complaint, the Student's special education services were delivered via a twice weekly video conference call and were provided by a special education teacher.
9. The timeline for this complaint began on December 12, 2017.
10. According to the Parent, at some point, she contacted OSPI and requested a list of Alternative Learning Experience (ALE) programs that offered remote courses, with a "flexible analog curriculum." The Parent explained that the Student does not do well in a primarily digital/video/computer-based learning environment, so they wanted an ALE that used a curriculum with physical textbooks and other paper-based instructional materials. The Parent stated that at the online school the curriculum was limited and not a good fit for the Student. The Parent stated that she saw the District's Family Link Program (program) on the list, contacted them, and was very excited about the program's flexibility.
11. According to the District's website, the program is a "parent-partnership program" that serves students in grades kindergarten through twelfth, and that offers limited services to students receiving primarily homeschool services. Students enrolled in the program also have the

option of attending some classes at the District's elementary, middle, and high school.³ There is no requirement for "in-person instructional contact time"—in other words students are not required to attend the program in person.⁴ However, the program's practice is to have face-to-face monthly check-ins. The District stated that "programs like [online school] meet virtually, but we're not set up that way. It is a rare occasion like sickness that we would conduct a monthly review over the phone."

According to the District's documentation, the program does not provide special education services. Students who are eligible for special education can receive their special education services, per their IEP, at their neighborhood school in the District.

12. According to the Parent's reply to the District's response to the complaint, the program is more appropriately categorized as an "Alternative Learning Experience (ALE) – Remote" (versus a parent partnership program) that "does not require attendance at a physical location and is designed with the intent that students will learn in their home environment."⁵ The Parent stated that the program accepts "Choice transfers from out-of-district students and accommodations are made for those students." These accommodations include submission of work samples by email and weekly meetings conducted with an instructor via a phone call. The Parent stated that while the program "prefers an in-person monthly meeting between students and teachers some leniency/accommodations have been offered if that is not feasible."

The Parent also stated that, in her experience, the program "encourage[d] (and or pressure[d]) parents of students with IEPs with special education services to either 1) set aside/revoke the

³ See generally, <https://www.vashonsd.org/domain/175>.

⁴ The regulations governing ALEs state that "the educational progress of each student enrolled in an [ALE] must be evaluated at least once each calendar month of enrollment by a certificated teacher" and that the progress evaluation "must include direct personal contact with the student." The regulations also stated that after the first month of satisfactory progress, "in subsequent months where progress continues to be satisfactory the evaluation may be communicated to the student without direct personal contact." WAC 392-121-182.

⁵ OSPI notes that ALE is a course level designation and an ALE program is a school, or program within a school, that offers ALE courses or course work. Students can take a single ALE course as part of their broader educational experience or a student could take multiple ALE courses that make up the entirety of their educational program. ALE courses fall into three categories: online courses, site-based, and remote course. Remote courses are an ALE course or course work that is not an online course where the written student learning plan for the course does not include a requirement for in-person instructional contact time. The District's Family Link Program, by its description, is considered a remote course because it does not have a requirement that students attended courses in person.

IEP or 2) put the IEP on hold.”⁶ The Parent stated that the only option for students with IEPs is to receive their special education services at a local school in the District. The Parent stated that “this offer of services is disingenuous and counter to the design and implementation of the [program] as a remote learning option, and implicitly disenfranchises out-of-district students by its geographical constraints/limitations.” Further, the Parent stated, the District “compounds this unrealistic requirement by refusing to offer any transportation services to out-of-district special education students thereby imposing a significant financial burden as well.”

13. According to the District, there are five nonresident transfer students enrolled in the program—the Student and four others. The District’s director of student services (director) stated that none of these students are eligible for or receive special education services, and that the other students are from two other districts in the south sound region of Washington. The director stated that the program was designed to serve families in the District and that the District does not advertise or necessarily intend for the program to draw a statewide enrollment.

Summer 2018

14. The summer of 2018, the Student attempted to transfer into the District to enroll in the program. Initially, the District denied the Student’s transfer and the Parent appealed the decision to OSPI. According to the District’s response, in late August 2018 the Parent “obtained an administrative decision from the Office of Administrative Hearings (OAH) to allow the Student to enroll as a non-resident transfer” into the program.
15. On August 29, 2018, the District’s executive assistant to the superintendent emailed the director to let her know that the Parent called to complete her enrollment into the program and asked for a call back. The director called the Parent later in the day.
16. On August 30, 2018, the director emailed the Parent as a follow up to their phone conversation of the previous day. The director stated that someone from the program would be calling her to get the Student registered for the program and that someone from the District’s middle school would be calling to get the Student registered at the middle school. The director stated that the Parent would “hear from the Special Education team at [the middle school] in the next couple days about [the Student’s] schedule for his special education services.”
17. According to the documentation provided by the District in response to this complaint, on August 30, 2018, the Parent reported to the registrar at the middle school that she would be enrolling the Student in the program, but not at the middle school.

⁶ While not directly at issue in this complaint, OSPI reminds the parties that a district should not require or request that a parent revoke consent for special education services nor should parents be expected to put services “on hold” or set an IEP aside to enroll in an ALE program.

2018-2019 School Year

18. The District's school year began on September 4, 2018.
19. On September 4, 2018, the general education teacher emailed the director and stated that she met, that day, with the Parent and the Student to complete the enrollment paperwork for the program. The general education teacher stated that she thought the next step was to hold an IEP meeting and stated that the Parent suggested having a meeting via a conference call.
20. On September 5, 2018, the director emailed the Parent and let her know that special education services for students enrolled in the program were provided at a student's neighborhood school, which for the Student would be the middle school. The director proposed scheduling an IEP team meeting upon the Student's enrollment at the middle school.
21. On September 18, 2018, the District's middle school received the Student's enrollment forms.
22. On September 20, 2018, the Parent emailed the special education teacher and stated that it was "imperative that you understand that it not a viable option for [the Student] to commute to [the District] to receive instruction and that some other solution needs to be arranged for delivery of services." The Parent stated:

First and foremost is the safety and well-being of my son. It became apparent back in 2015 that attending a brick and mortar school was having an adverse impact on [the Student] and that the ongoing inability of the school to adequately support him or manage his severe anxiety was injurious to him physically, emotionally, and mentally. For this reason, for the last 3 years we have been working with [online school] based out of [other district]...During this time [the Student] has received special education services from a Special Education teacher via Skype. While Skype instruction is not without its weaknesses it has proven to be serviceable and [the Student] has made progress. What is known for certain is that [the Student] works best with one-on-one instruction, in an environment that is familiar and safe to him, and that limited transitions and the ability to take breaks as needed by rejoining to the security of his room where he can self-calm is paramount.

The Parent stated that she looked forward to "discussing an appropriate plan for [the Student's] special education instruction with you."

23. On September 21, 2018, the director emailed the Parent and copied the other special education team members on the email (including the special education teacher and the middle school principal). The director attached a prior written notice to the email, which she stated responded to the Parent's request to consider "a different solution for special education instruction other than at [middle school]" and invited the Parent to an IEP meeting scheduled for either September 27 or 28, 2018.

The prior written notice proposed to continue the Student's IEP. The notice stated that the Student was enrolled in the program and that the Parent had "requested that IEP services be delivered." The notice stated that for students enrolled in the program, IEP services are

delivered at the student's home school—the middle school. The notice stated that the Student's "IEP dated 12/07/2017 currently calls for 60 minutes a week of services in written language. The district agrees to deliver these services at...middle school. The special education teacher has reached out to [the Parent] to find a time for this instruction that works for both the district and the family." The notice further stated that the District rejected the option of delivering the services elsewhere because the Student "came to us from the [online school]. The option of delivering the services via video chat format was considered and rejected as [middle school] is not a virtual school. The IEP services available at [middle school] are comparable to the prior IEP services."

24. According to the District's response, it offered the Student comparable services until a new District IEP could be developed.
25. Based on the documentation provided in the complaint, after several emails regarding scheduling, an IEP meeting was scheduled for October 29, 2018.
26. The District's documentation included a draft IEP, dated October 29, 2018. The draft IEP included information from the Student's December 2017 IEP and included one measurable annual goal and provided specially designed instruction in written language. The draft IEP included one accommodation—dictation to a scribe, daily, in the classroom and home.

The draft IEP stated that the Student would spend 98.33% of his time in the general education setting and listed his placement as "home school placement by parents." The IEP stated:

[The Student] transferred to [District] in September 2018 from the [other district]. He is currently enrolled and receiving all his general education instruction in the [program]. [Program] is a 'Parent Partner Program' of the [District] serving students in grades k-12. Parents are the primary educators of their children. [Program] certificated teachers work with parents to create individual learning plans for their students, develop teaching strategies and learning activities, find curriculum and access other district services. If parents would like their student to receive services outlined in their IEP, those services are delivered at the child's home school. For [Student], this would be...middle school.

27. On October 29, 2018, the Student's Parents met with the director, a special education teacher, the middle school principal, a general education teacher, a private behavior therapist, and the Parent's advocate to review the Student's current services, current evaluation, and consider options for the delivery of special education.

According to the District's response, at the meeting, the Parent shared her "concerns with Student accessing his IEP services at [the middle school]." According to the Parent's complaint, traveling to and attending the middle school, in person, for services is not appropriate "due to [the Student's] disability and would cause him harm and disruption to his educational progress." According to the District's response, the "team also discussed other potential service delivery options, including Student participating in the parent-partnership program" in his resident district."

28. In a phone interview with the Parent, she stated that the IEP team did not discuss each option and why the options were or were not appropriate for the Student. Instead, the Parent stated that she shared her concerns and proposed options for the delivery of the Student's special education services. According to the Parent, the District indicated it would seriously consider the options proposed by the Parent. The Parent also stated that the District indicated that using resources for any of the options would be "creating a new program" for the Student.
29. In a phone interview with the director, she stated that at the IEP meeting she invited conversation around service delivery options and the Parent proposed several different options. The director stated that they did not make a decision at the meeting because the District wanted to look at and consider each option based on the Student's needs and the feasibility of the proposal. The director stated that it was very important to her to give serious thought and consideration to everything, including the current information the District had about the Student and the information contained in his evaluation.
30. On October 30, 2018, the director emailed the Parent (and copied the general education teacher, special education teacher, and principal) and thanked her for meeting the previous day, and for the Parent's "out of the box thinking about possibilities for [the Student]." The director stated that she was doing research, thinking about the Parent's requests, and reviewing the Student's information. The director stated that she would send the Parent a response by early next week and "in the mean-time we continue to offer the program that is outlined in his current IEP dated 12/7/2017, 60 minutes a week of SDI in the area of written language." The director stated that the Parent "mentioned yesterday that you did not believe that [resident district] had a parent partnership program that you could access." The director stated "They do! It appears to be a very interesting program that includes an online component...I do not know how the district serves students with IEPs in that program." The director provided the Parent with the contact information for the resident district's special education director and a link to the resident district's parent partnership program.
31. Also on October 30, 2018, the general education teacher responded and stated that a challenge with the resident district's parent partnership program was their attendance requirement, which required students to attend a certain number of hours of on-campus classes and opportunities a week. The general education teacher stated "it might be worth talking to them to see if they would make an exception based on [the Student's] evaluation."
32. According to the prior written notice, dated November 6, 2018, at the October 29, 2018 meeting the team discussed and the District offered the following specially designed instruction, to be provided at the District middle school:
- Written Language: 60 minutes, 1 time per week
 - Social Emotional/Behavioral: 30 minutes, 1 time a week

The prior written notice stated that "the addition of social/emotional/behavioral instruction is a change to his current IEP. His current evaluation dated December 7, 2017 indicates that he needs instruction in this area. It was not provided in his previous program because of the

service delivery model.” At the meeting, according to the notice, the Parent requested that the following be considered:

- District provide services to the Student “via a video based instructional method”⁷;
- District provide services in the Student’s home; and,
- Provide instruction at a site located in the Student’s home town, but away from the home— “possibly contracting with an off site tutor.”

The District also proposed that the Student receive instruction five days a week at the District middle school “in response to the parent’s concern that [the Student] needs a consistent program with clear expectations.” The Parent “strongly” objected to that option.

According to the prior written notice, the District considered and rejected the Parent’s proposed options because “there is no evidence that [the Student] would require any of these delivery models as a result of his disability.” The notice also stated:

The district’s offer of 60 minutes a week of SDI in written language and 30 minutes a week of social/emotional/behavioral skills is a reflection of his current IEP and evaluation. The IEP team could reconvene to adjust those time recommendations based on the progress he makes in the course of instruction. The IEP team agreed to reconvene on November 14, 2018 to finalize the IEP. Until that time the district continues to offer the IEP that is in place from the sending district dated 12/7/2017.

33. In a phone interview with the director, the director stated the District reviewed the Student’s evaluation and the options, including contacting the resident district and doing research on the resident district’s parent partnership program (information which the director stated that she sent to the Parent). Regarding each option, the director provided the following reasons why the District ultimately rejected the option:

- Video based instructional method: The evaluation speaks to and the Parent has provided information that video instruction is not appropriate for the Student. Further, the District does not provide computer video instruction as part of any program, so doing this for the Student would be to create a program specially for the Student.
- In-home services: The evaluation speaks to the Student’s need to be around peers and in-home tutoring would not provide this for him. Further, the District stated that the Student’s disability in general is not one that would generally make the Student unable to access the classroom.
- Services in another location in home town: The same reasoning as related to in-home services.

The director also stated that one of the concerns the Parent had was the need for consistency of instruction over time, which is why the District proposed expanding the amount of time the Student would receive services at the middle school.

34. On November 7, 2018, the director sent the Parent the prior written notice (dated November 6, 2018 and described above) in response to the October 29, 2018 IEP meeting. The director

⁷ Based on information provided in the complaint, this is understood to mean synchronous digital classes where the teacher instructs the student via video conference call—similar to how the Student received his specially designed instruction at the online school.

confirmed that they had another IEP meeting scheduled for November 14, 2018 and stated that she would send a draft of the proposed IEP the next day.

35. On November 8, 2018, the director emailed the Parent (and copied the general education teacher, special education teacher, and principal) a copy of the Student's draft IEP and asked the Parent to review and provide her input. The director stated that as the Student was now 15-years-old the team wanted to do some informal vocational assessments to begin the transition process. The director asked if she could send the Parent a "parent questionnaire" and a "student questionnaire." The director asked the general education teacher if she had a chance to review any of the Student's writing and if she would be "able to send some anecdotal information on how he is doing in writing sentences and paragraphs at this point in time? Also, would you mind providing a bit of information as to what you see as [the Student's] strengths based on your work with him?"
36. On November 9, 2018, the Parent emailed the director and requested that the IEP meeting—scheduled for November 14, 2018—be rescheduled in December. The Parent also wrote, "I will also state for the record, that we are in disagreement as to the need to accommodate my son's special needs in order to access special education services outside of a conventional brick and mortar setting such as [middle school], which has already been proven in the past to be ineffectual and detrimental." The director responded that the Student's IEP was due by December 7, 2018 and suggested meeting dates prior to December 7, 2018. After several email communications back and forth between the Parent and various District staff, the Student's IEP meeting was rescheduled for December 17, 2018, per the Parent's request and in order to accommodate the team members' schedules.
37. On November 14, 2018, the Parent's private behavior consultant⁸ (consultant) provided the Student's IEP team with a letter regarding the Student and in response to the District's "rejection of the family's requests for alternative and reasonable service delivery methods." According to the letter, the consultant had been working with the family and participated in the October 29, 2018 IEP meeting. The consultant stated that after the meeting the District "emphasized multiple times that the options put forth by the [Parent] would be seriously considered" and that he was "extremely disappointed and confused to read that the school district has rejected all of the proposals given by the [Parent]. I also was concerned that the Prior Written Notice was notably absent of specific concerns the parents have to the proposal of the district."

The consultant stated that the Student had fetal alcohol spectrum disorder (FASD) and received services under the category autism. The letter stated that at the IEP meeting, the Parent made it clear that going to the middle school in the District once a week was not an option due to "the stress it would cause him, resulting in 1) an increase mental health symptoms, 2) a decrease in his learning abilities, and 3) an increase in severe challenging

⁸ In his letter, the behavior consultant stated that he specialized in "Fetal Alcohol Spectrum Disorders (FASD) and have a decade of experience with all developmental disabilities, including Autism and intellectual disabilities."

behaviors at school, in the community, and at home.” The letter stated that “in the Prior Written Notice the district stated that all of the options were rejected because ‘there is no evidence that [the Student] would require any of these delivery models as a result of his disability’. I find this incredibly confusing and frankly wonder that the district *would* accept as ‘evidence’, given all that we already know.”

The behavior consultant stated that, in the IEP meeting, “the family clearly stated...that the travel to and from the school does not work for [the Student’s] brain, nor would he be able to effectively learn.” The consultant provided an extensive list of reasons why traveling to the District was not a viable option, based on his disability, including the following points (in part):

- “The travel time is at least an hour each way and is incredibly overstimulating. **Overstimulation is a part of [the Student’s] disability, Autism.**”
- “Travel times are inconsistent and reliant on non-district public transportation services...it is important for Autistic people’s brains to have things consistent and predictable. It is therefore not unreasonable to say that [the Student’s] **difficulties with inconsistency are the direct result of his disability, Autism.** Given that [the Student] would already be in a very overstimulated environment, expecting him to regulate and problem-solve delays and inconsistency is unreasonable.”
- “The journey has multiple transitions...Autistic people are known for struggling with transitions due to the complex executive functioning skills it requires...[the Student’s] **difficulties with transitions are the direct result of his disability, Autism...** Given that we already discussed how travel times will be inconsistent and how he will be in a constant state of overstimulation for *at least* 2 hours a day, expecting [the Student] to also regulate continual transitions is unreasonable.”
- The Student “has a significant amount of anxiety before stressful events, even events that he is looking forward to...anxiety not only impacts his overall ability to learn in the days prior to a stressful event, but it impacts his behaviors significantly.”
- The Student’s “anxiety impacts his cognitive skills...his ability to learn, *even if he wants to do well...***reducing anxiety is an essential support for [the Student’s] disability, Autism,** as we would not expect any Autistic child to learn effectively while anxious.”
- “Ability to learn will be impacted by the trip...an Autistic person’s skill abilities are dependent on how much regulation they’ve been using...this regulation is difficult due to neurological, cognitive, motor, and sensory processing difficulties.” Expecting the Student to “take the trip and encounter all that I have previously mentioned—and to then expect him to do any kind of learning, which is in of itself extremely cognitively demanding—is unreasonable. **Changing expectations and environment so that learning can happen is an essential support for [the Student’s] disability, Autism.**”
- “Behaviors at school will be impacted by the trip.” And, “because [the Student] will already be using his executive functioning skills and energy to regulate a weekly journey that is unreasonable for his brain, we can expect an increase in challenging

behaviors while at the school. **This is a well-known aspect of [the Student's] disability, Autism.** This can happen even when [the Student] wants to do well."

- The consultant stated, that in his experience working with IEP teams in similar situations, "school districts consistently say they understand these concerns, and yet respond to challenging behaviors with suspensions, expulsions, more IEP meetings, displacement, and more stress. In other words, they respond as if [the Student] is making intentional choices, rather than that he is being put in unreasonable situations."
- The Student's "mental health is impacted by significant and ongoing stress." And exposing the Student to "the hundreds of settings events and triggers of a ferry trip is unreasonable. **Because of [the Student's] disability, Autism,** he is not able to cope with mental health symptoms in the same way as his neurotypical peers, nor are traditional therapy or medications effective...the response, then, must not be to expose the Autistic student to continual triggers to their mental health, but rather change the environment and our approach so that they can learn effectively with a level of stress they are able to regulate."
- The Student has a "history of early childhood trauma...Autistic people...also struggle regulating their stress and will be more impacted by 'smaller' stressors than neurotypical peers. This trauma may also impact [the Student's] mental health..."

(Emphasis in original.)

The letter stated that the District considered the following Parent proposals: 1) the District provide services to the Student via a video based instructional method; 2) the District provide services directly in the Student's home; or, 3) provide instruction at a site located in the Student's home town, but away from home. The consultant stated, "given how the concerns I mention in this letter are directly related to [the Student's] disability of Autism, I hope that the way these strategies alleviate these disability-based concerns becomes clear." And stated that all three proposals take less time per school day and were considerably less overstimulating, and:

- "All three can be more predictable and do not rely on outside transportation services"
- All three provide fewer transitions, and those transitions can be much more easily practiced and problem-solved due to their ability to be consistent and flexible"
- Anxiety "would likely be significantly less, especially as it becomes routine"
- "All three proposals allow [the Student] to learn in an environment and context that we know work for him"
- "All three prevent stress that may lead to challenging behaviors at a school site"
- "Fewer adults interacting with [the Student] mean that they can be more specifically trained in how to respond if challenging behaviors come up, rather than an unfamiliar staff who happens to be on site responding to [the Student] with traditional, ineffective methods (which would likely only cause further escalation and behaviors which [the Student] will then be punished for)"

The consultant stated that he had not gone into how the Student's "other developmental disability, FASD, impacts his behaviors, though it is just as interwoven into his behaviors and inability to regulate stress as Autism is."

38. Also on November 14, 2018, the Student's private mental health counselor (counselor) wrote the District a letter in support of the Student receiving his specially designed instruction via "video based instructional method as an accommodation based on his disabilities."⁹ The counselor stated that, in therapy, she and the Student had been working on "social, emotional and behavioral skills through the use of psycho-educational materials" and that she had been assisting the Parent "to develop environmental supports and am addressing many of [the Student's] compulsive and sometimes aggressive behaviors and anxiety symptoms." The counselor further stated:

I have observed that [the Student] is more successful when engaged in an individual, one on one instruction in a controlled environment free of distractions. It is documented that [the Student] was not successful academically or behaviorally in a typical special education setting provided by past traditional public school attendance. I have personally observed that [the Student] predictably has greater difficulty focusing on learning activities before and after trips for several days. He tends to get over stimulated and fatigued by extended travel associated with additional sensory stimulus and changes in schedule. He also experiences anxiety about the change to his schedule.

The letter also stated:

It is important to note that many of [the Student's] behaviors could be interpreted by strangers to be aggressive because he is more rooted in fantasy than reality as a result of his autism...making his behavioral responses very unpredictable and erratic...This is based on his difficulty to generalize learning to different situations associated with FASD. This often results in him making threats or aggressive stances with no concept of how to actually carry them out or how his actions may be interpreted by others. He is obsessed with weapons...This makes him especially vulnerable in many situations. Also, he obsesses on taking things that do not belong to him and requires close one on one supervision...His fetal alcohol effect symptoms do not allow him to learn the value of money or ownership. In addition, he has difficulty generalizing learning to different environments and does not easily learn from consequences...

The counselor stated that she appreciated the District's commitment to "face to face learning", but that she felt that her weekly sessions with the Student "meet that requirement and also address his IEP goal of learning social, emotional, and behavioral skills in a controlled environment with one on one instruction." The counselor stated that the District's proposed IEP would "completely disrupt and diminish his home based teaching sessions and are likely to be detrimental to him or others" and that "this could be effectively be accomplished by skype or phone and better fit his mental health and educational needs."

⁹ The counselor stated that she had been treating the Student on a weekly basis for over two years, and that she had twenty years of experience working with children and adults with disabilities. She stated that she also had experience teaching students with disabilities.

39. On December 17, 2018, the Parents met with the middle school principal, the director, a general education teacher, and a special education teacher. The Parents' advocate participated by phone. Next to the Parents' names on the signature line, the Parents wrote: "this signature indicates disagreement with this proposal."

The present levels section of the IEP included information from the Student's December 2017 reevaluation, including that the Student required specially designed instruction "to focus on appropriate expression of his frustration and following teacher directives. There are significant concerns that his needs cannot be adequately addressed in a virtual educational setting and he may be better served in a setting that allows for direct interaction with other adults and students." The IEP noted that the Student's previous IEP did not include goals in the area of social emotional skills, even though "his evaluation did determine he was eligible for those services" and the IEP team "included a behavior goal in his IEP and we are planning for 30 minutes a week of instruction. This is a minimal level of service and may be adjusted as we can evaluate his progress." The IEP noted that "parents have indicated that they feel his current therapist is providing sufficient instruction in social skills and that would prefer that the district not provide this service."

Under the heading for writing in the present levels section, the IEP noted that the Student previously received "60 minutes a week of [specially designed instruction] SDI in writing. The district has offered those services at...middle school for one hour a week. The parents have not made [the Student] available for instruction since he enrolled" and "as a result we do not have current performance data in the area of written language." The Student's general education teacher from the program reported that "she has seen evidence of a three sentence paragraph written by [the Student.]" And, the Parent reported that she scribes for the Student and provides him verbal cues. The Parent stated that she "does not use verbatim scribing and he will resist adding punctuation and capitalization. The parent reports that without verbal cuing, [the Student] is able to correctly punctuate his sentences with 50% accuracy."

Based on an interview with the Parent, the IEP included an age appropriate transition assessment listing the Student's needs, strengths, preferences, interests; a projected graduation date of June 2025; post-secondary goals and outcomes in education/training, employment, and independent living; and, included a course of study. The December 2018 IEP included an annual goal in written language and an annual goal in social/emotional. The IEP also included the following accommodations and modifications:

- Allow for breaks during testing (all testing situations)
- Dictation to a scribe (daily)
- Rephrase test questions and directions (all testing)
- Scribe (all testing)
- Print version of computer-based tests (for required State tests).

The December 2018 IEP provided the Student with the following specially designed instruction in the special education setting:

- Written Language: 60 minutes, 1 time per week
- Social/Emotional: 30 minutes, 1 time per week

The IEP stated that the Student would spend 150 minutes per week in school, 90 of those minutes in special education, and would spend 40% of his time in the general education setting. Under the description of services, the IEP stated that the Student's special education services would be provided at the District middle school.

40. According to the District's response, the District continued to decline an alternative service delivery model as not being disability-based.
41. According to the prior written notice, dated December 18, 2018, at the IEP meeting the Parent provided the IEP team with the two November 14, 2018 letters (described above)—one from the Student's counselor and one from a behavior consultant. Both practitioners "wrote in support of the parent's request that the district provide special education services using an off-site service delivery model such as home tutoring, at a site near their home, or video based instruction." The District stated it considered and rejected the option of "providing a video based program, home based instruction and off-site instruction" because the Student's "current evaluation does not support that there is a disability related reason for an alternative setting for him." According to the notice, the District proposed reevaluating the Student "considering the family's move to the [program] is significantly different than the previous parent choice program at the [online school] and the parents desire to consider an alternative special education delivery service model." The notice stated that the "parents were not supportive of that idea at this time."
42. According to the District, it read the letters from the behavior consultant and counselor, but did not consider the information further. The District offered to conduct a reevaluation, in which it would consider the letters further, but otherwise only considered the information in the December 2017 evaluation.
43. According to the Parent, the District thanked her for the additional information (letters from the behavior consultant and private counselor), but indicated that it did not have to consider the additional information and that the District was only required to consider the Student's current evaluation.
44. The District's response stated that the Student and Parent have a weekly phone call on Thursdays with the program's general education teacher, and that the Student, Parent, and general education teacher meet "face to face once a month." The District's response included a contact log for the program, which indicated that the general education teacher checked in with the Student by phone roughly weekly regarding his assignments and work. The file also included monthly progress reviews and evaluations from the program, which indicated the progress the Student was making, and which assignments had been completed.

45. The Parent explained that she and the Student travel, in person, to the District for the monthly evaluation meetings. The Parent stated that these meetings come at a cost as the Student's anxiety is such that he gets no productive work done the day before the meeting, the day of, or the day after the meeting. The Parent stated that due to the Student's anxiety the monthly trip to the District impacts and disrupts at least three days of the Student's education.

CONCLUSIONS

Issue 1: Transfer Procedures – The Parent alleged that the District failed to provide the Student special education services after he transferred to the District in September 2018 and did not offer services comparable to the services the Student was previously receiving. When a student eligible for special education services transfers from one Washington school district to another Washington school district, the new district, in consultation with the parents, must provide comparable services to those described in the student's IEP, until the new district either: 1) adopts the student's IEP from the previous school district; or, 2) develops, adopts, and implements a new IEP that meets the requirements in State regulations.

Consultation with Parents

In late August 2018, the Student enrolled in the District as a nonresident transfer¹⁰ to attend the District's Family Link Program (program)—a remote course ALE program run by the District. Between August 29 and September 5, 2018, the Parent and the District were in contact regarding the Student's enrollment in the District. Based on the emails, the Student needed to enroll in the program and enroll in the District's middle school for his special education services, which would be scheduled by the special education team at the middle school.

The Parent enrolled the Student in the program on September 18, 2018 but declined to enroll him in the middle school. On September 20, 2018, the Parent emailed the District and outlined the reasons why it was not an option, based on the Student's disability, for the Student to commute to the District to receive special education instruction. The Parent stated that she looked forward to discussing an appropriate plan with the District. On September 21, 2018, the District provided the Parent with a prior written notice in response to the Parent's request to consider a different method of special education instruction. The notice stated that for students enrolled in the program, IEP services are delivered at the student's home school, here the middle school. The notice proposed to offer 60 minutes a week of specially designed instruction in written language, delivered at the middle school—services comparable to his December 2017 IEP, which provided 30 minutes, twice a week of specially designed instruction.

There is no indication that the District met the requirement outlined in the WAC that the District, *in consultation with the Parent*, must provide comparable services to those described in the Student's IEP. Here, the documentation indicates that prior to the Student submitting his

¹⁰ The Student enrolled after the Parent appealed the District's original transfer denial to OSPI and prevailed in a hearing in front of an administrative law judge.

enrollment paperwork, the District stated that for students enrolled in the program special education services could only be accessed at a student's neighborhood school—thus, the District missed this initial requirement to consult with the Parent regarding what comparable services looked like or entailed. Further, the prior written notice indicates that while the District stated it was responding to the Parent's concerns, the decision that services would be provided at the middle school had already been made by the District. The District *offered* comparable services, but the District did not offer these services *in consultation* with the Parent. Therefore, OSPI finds that the District failed to follow the required transfer procedures. The District will be required to prepare and disseminate written guidance on transfer procedures.

Comparable Services

Comparable services mean services that are similar or equivalent to those described in the IEP from the previous district, as determined by a student's new district. What is comparable is a fact specific analysis and comparable services do not have to replicate or be identical to the services provide under the previous IEP. Guidance from case law indicates that services have been found to be comparable when schools have provided school-based services rather than home-based services and that an isolated classroom placement was comparable to an in-home placement. One court found that a placement that placed a student with students who functioned at a much lower level and did not provide opportunities to interact with typically developing peers was not comparable.

The Student's December 2017 IEP provided the Student with 30 minutes, twice a week of specially designed instruction in written language from a special education teacher; and, according to the documentation in the complaint these services were provided via a twice weekly video conference call between the Student and the other district special education teacher. The District offered comparable services: 60 minutes a week of specially designed instruction, delivered at the middle school. The prior written notice stated that the District rejected the option of delivering the services elsewhere because the Student "came to us from the [online school]. The option of delivering the services via video chat format was considered and rejected as [middle school] is not a virtual school. The IEP services available at [middle school] are comparable to the prior IEP services."

Here, the situation is analogous to a school offering school-based services instead of home-based services. The District offered comparable services when it offered the same number of minutes of specially designed instruction and in the same area of instruction. While the District's offered service delivery method—in person at the middle school—was different than the Student's previous school—weekly video conference calls—there is no requirement that comparable services be identical. OSPI finds that the District offered comparable services under the Student's transfer IEP and finds no violation.

Issue 2: Provision of a Free, Appropriate Public Education (FAPE) – The Parent alleged that the District failed to provide the Student a FAPE because it continues to only offer delivery of special education services at the District middle school.

A FAPE consists of instruction that is specifically designed to meet the needs of a student with a disability and this education program is provided in conformance with an IEP designed to meet the student's unique needs. A key tenant of special education is that students should be educated in the least restrictive environment; thus, educational placement decisions must be determined annually by the Student's IEP team. Each school district shall ensure that a continuum of alternative placements is available to meet the special education needs of students. A district is not required to offer all placements at every school but must offer a continuum within the district. The continuum of placement options includes the alternative placements listed in the definition of special education, such as: instruction in general education classes, special education classes, special schools, home instruction, and instruction in hospitals and institutions. A district must also provide for supplementary services such as a resource room or itinerant instruction to be provided in conjunction with general education classroom placement.

Placement Options: Initial Enrollment

The District's ALE program (program) does not provide special education services. As not every school in a district is required to provide the full continuum of placement options, it is not a violation of the IDEA that the program does not offer special education, because special education services are offered in other placements.

The documentation provided in this complaint indicates that from the Student's initial attempt to transfer into the District, the District maintained that for students enrolled in the program special education services are provided at a student's neighborhood school. On September 20, 2018 the Parent emailed the District and stated that having the Student attend the middle school for his special education services was not a viable option (safety, well-being, adverse impact on education based on disability and anxiety). The Parent stated that while instruction via video conferencing was not "without its weaknesses" it had "proven to be serviceable" and the Student made progress. On September 21, 2018, the District provided the Parent with a prior written notice rejecting the Parent's proposals for the following reasons: 1) for students enrolled in the program, IEP services are delivered at the student's home school; and 2) because the middle school is not an online school (like the Student's previous school).

At this point, the District did not sufficiently consider or discuss with the Parent a continuum of alternative placements. Neither the District's policy that students in the program receive special education at their neighborhood school nor the statement that the middle school is not a virtual school and therefore cannot provide remote instruction are not individualized reasons based on the Student's unique disability related needs. The District failed to make an individualized decision and failed to sufficiently consider a continuum of placements. For the period between the Student's enrollment through October 29, 2018, OSPI finds a violation. The District will be required to hold an IEP meeting and give full consideration to a range of placement options for the Student.

Placement Options: October 29, 2018 IEP Meeting

On October 29, 2018, the Student's IEP team met and the Parent shared her concerns and proposed options for the delivery of the Student's special education services, including: video based instructional method (similar to the video conference call method the Student's previous school used); services provided in-home; and, services provided at another location in the Student's home town. The District also raised the possibility of the Student participating in his resident district's parent-partnership program or coming to the middle school an increasing number of days per week. According to the Parent, she shared that traveling to and attending the middle school for services was not appropriate "due to [the Student's] disability and would cause him harm and disruption to his educational progress." According to the District, while conversation was invited at the meeting no decisions were made because the District wanted to consider each option proposed, based on the Student's needs and the feasibility of each proposal.

The documentation in this complaint does indicate that the District considered the Parent's proposed options to some degree. On November 6, 2018, the District provided the Parent with a prior written notice that listed the Parent's proposals for the delivery of instruction and stated that the District was rejecting the options because "there is no evidence that [the Student] would require any of these delivery models as a result of his disability." While the prior written notice did not provide detail beyond this statement, in a phone interview with the director, she provided more detail as to why each option was rejected by the District. The director also stated that one of the concerns the Parent had was the need for consistency of instruction over time, which is why the District proposed expanding the amount of time the Student would receive services at the middle school.

The District stated—in the November 6 prior written notice—that the District's offer of a FAPE reflected the Student's current (December 2017 transfer) IEP and his December 2017 evaluation. Further, the District stated that the reasoning behind rejecting the Parent's proposals came primarily from the Student's evaluation. OSPI notes that the Student's evaluation and other information about the Student can be read to support both the Parent's and the District's position, see for example:

- The evaluation noted that the Student does well with hands-on learning activities.
- The evaluation described significant behavioral needs and challenges engaging in instruction and interacting with others without substantial support.
- The evaluation noted that in a traditional school setting that Student would require direct supervision most of the day (making a traditional school setting challenging).
- The evaluation stated concern that the Student's social emotional/behavioral needs cannot be adequately addressed in a virtual educational setting and that the Student *may* be better served in a setting that allows for direct interaction with other adults and students.
- The evaluation noted that there is little insight into the Student's behavior and how it impacts others in his environment.
- The evaluation stated that the Student would benefit from an academic environment that would allow him opportunities to learn and practice behavioral skills within a social context that is not possible with the online school.

- The Parent stated that the Student does not do well in a primarily computer-based learning environment, but also stated that the video conferencing method used by the online school worked well enough and that the Student made progress.

The District also stated that it would be worth talking to the resident district's parent partnership program to see if that program would make an exception to the requirement that students attend a certain number of hours of on-campus classes each week "based on [the Student's] evaluation." It is interesting that the District used the Student's evaluation here to suggest an exception to an in-person attendance requirement, while also stating that the Student's evaluation supports his need to attend the District's middle school in person.

While OSPI is not in a position to make a definitive conclusion about the Student's needs, OSPI finds that the evaluation and other information in the complaint arguably support both the Student's need for a non-traditional setting and for the Student to have a program that facilitates interaction with peers/adults. Further, the District also uses the evaluation to support in person attendance at the District and also a potential exception to the resident district parent partnership program attendance requirement.

The District also stated that to provide the Student with instruction via a video conferencing method would be to create a program specially for the Student, because the District does not provide instruction in that manner for other students. OSPI finds that this justification falls flat as the IDEA requires an *individualized education program* for students eligible for special education services—an IEP is just what the District describes "a program specially for a student." While the District may not provide instruction in this method for any other students currently, that does not preclude serious consideration of this as an option based on *this* Student's unique disability-based needs.

Finally, the Student's IEP team did not consider the broader context of the Student being enrolled in an ALE program. Parents of students with disabilities must be provided the same access to parental choice programs, including ALEs, as the parents of students without disabilities. Here, the Parent deliberately selected and enrolled the Student in a remote-course ALE run by the District. The ALE program's courses are designed to be accessed remotely and there is no requirement for in-person instructional contact time. And, the ALE, by its very nature, is an alternative approach to traditional school. The District must respect the Parent's choice to enroll the Student in a non-traditional educational program and, at minimum, the IEP team's consideration of the continuum of placements must factor in that the Student's participation in a remote-course ALE.

The documentation in this complaint indicates that after the October 29, 2018 meeting the District did give some consideration to a few placement options; however, the District's consideration and reasoning was inadequate given the above discussion. The District relied on an evaluation that can be interpreted multiple ways, improperly stated that it cannot create a specialized program for the Student, and failed to consider the ALE context. OSPI finds a violation based on the District's failure to adequately consider a continuum of placement options for the Student. As stated above, the District will be required to hold an IEP meeting.

Placement Options: December 17, 2018 IEP Meeting

After the October 29, 2018 IEP meeting, the Parent continued to express her disagreement with the Student's placement at the middle school for his special education services. On November 14, 2018, the Student's private behavior consultant and private mental health counselor wrote detailed letters, which were provided to the Student's IEP team by or at the December 17, 2018 IEP meeting. The letters included information about why traveling to the middle school for his special education services was not an option based on the Student's disability, anxiety, and mental health. The behavior consultant, in particular, outlined a series of reasons and factors related to the Student's autism that made traveling to the District a challenge and potentially harmful to the Student's health and educational progress. The behavior consultant's letter also outlined why the Parent's proposals would be more successful.

On December 17, 2018, the Student's IEP team met and finalized an IEP for the Student, with which the Parent disagreed as it continued to offer the Student's specially designed instruction at the middle school. After the meeting, in a prior written notice (dated December 18, 2018), the District stated it considered and rejected the Parent's proposals because the Student's "current evaluation does not support that there is a disability related reason for an alternative setting for him." The District also proposed initiating a reevaluation and stated that the Parent declined to do a reevaluation. According to the District, it did not consider the information from the behavior consultant and counselor's letters further because the District believed it could not consider the letters unless it initiated a reevaluation incorporating the letters.

The District's documentation does not provide the specific data or information regarding how the different placement options might have an adverse educational impact on the Student, nor does the documentation include a discussion of the Parent's reasoning behind her proposals and her assessment of the Student's needs. Although districts do not need to adopt parental input, they must document their consideration of such input. In developing a student's IEP, the parents of the student are expected to be equal participants along with school personnel and play an active role in which the parents provide information regarding strengths, express concerns, participate in discussions related to the student's need for special education (and related services and supplementary aids/services), and participate in discussions related to how the student will be involved and progress in the general curriculum, among other topics. The IEP team must consider the parents' concerns and the information parents provide regarding their student.

As discussed above, the Student's evaluation provides support for both the Parent's proposals and the District's reasoning. Further, there is nothing in the IDEA or State regulations that prevent a district from considering information about a student outside of the evaluation process. The IDEA's focus on the importance of parent participation is so that parents have an opportunity to provide critical information regarding their child. This ongoing dialogue may mean that a parent provides information outside of the formal evaluation process. Again, nothing prohibits the District from considering the Parent's information and the letters from the private providers. And, even if the District was correct in its belief that it could only consider this information as part of a

reevaluation, the District could have initiated a reevaluation based on a review of existing data—which does not require parent consent. Here, OSPI finds that the District violated the IDEA by failing to consider the Parent's additional information. The District will be required to conduct a reevaluation based on a review of existing data.

CORRECTIVE ACTIONS

By or before **March 15, 2019, April 5, 2019, and April 19, 2019** the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

By or before **March 15, 2019**, the District will complete a reevaluation based on a review of existing data (unless the Parent consents to additional assessments). This reevaluation will, at minimum, include a review of the November 14, 2018 letters provided by the Parent's behavior consultant and the counselor.

By or before **March 29, 2019**, the District will hold an IEP meeting with the Parent to discuss the reevaluation, and reconsider and discuss the continuum of placement options for the Student. The IEP team will also consider the Student's need for additional special education services based on the time lost due to the ongoing disagreement about placement. The District will document each option discussed, what data and information was considered for each option, the potential benefits or adverse impact of each option, and the IEP team's decision related to the Student's placement for the provision of specially designed instruction and amount of additional special education instructional time needed.

The team may wish to consider the following suggested options, including those options already put forth by the Parent:

- Synchronous digital/video or video conference call instruction;
- In home services (analogous to a homebound placement);
- Services at a different location in the resident district;
- Contract with a private provider or an inter-district agreement with the Student's resident district or other local school district to provide services;
- Instruction at the District when the Student comes to the District for his monthly ALE evaluation meeting; and/or,
- Instruction designed, monitored, and evaluated by the special education teacher but provided by the Student's general education teacher.

By or before **April 5, 2019**, the District will provide OSPI with: 1) a copy of the reevaluation report; 2) meeting invitations; 3) the IEP, if amended; 4) prior written notice; 5) meeting agenda and meeting notes; 6) the amount of additional special education instructional time needed; and, 7) any other documentation considered by the Student's IEP team.

DISTRICT SPECIFIC:

By or before **March 8, 2019**, the District will develop written guidance on the transfer procedures specified in WAC 392-172A-03105 and the District's policy and best practices for ensuring that the offer of comparable services is made "in consultation with parents." The guidance, after OSPI review and approval (described below), will be provided to all District special education administrators, special education certificated staff, and principals.

By **March 15, 2019**, the District will submit a draft of the written guidance to OSPI. OSPI will approve the guidance or provide comments by March 22, 2019 and provide additional dates for review, if needed.

By or before **April 12, 2019**, the District will provide the written guidance to the above listed individuals and ensure that the staff have an opportunity to review the guidance and ask questions. By **April 19, 2019**, the District will provide OSPI with documentation that the staff has reviewed the written guidance. The documentation will include an official human resources roster of the required staff, so OSPI can cross-reference the list with the actual recipients.

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

RECOMMENDATIONS

OSPI notes that the fact that the Student is a nonresident transfer student attending a remote-course ALE program is an important element of this complaint. This complaint raises questions about the obligation to provide special education services for nonresident transfer students attending such programs.

The ALE in question here is a remote-course ALE with no requirement for in-person instructional contact time (other than monthly evaluation meetings). The ALE has five nonresident transfer students enrolled (including the Student). In an interview with the District's director of student services, she stated that the ALE was designed to serve students and families that reside in the District. The director stated that while there are nonresident transfer students enrolled, the District does not advertise or necessarily intend for the program to draw a statewide enrollment. The ALE does not provide special education services and the District's policy is that students who are eligible can receive their special education services, per their IEP, at their neighborhood school.

The facts illustrate that, here, the District does not necessarily have the systems in place to serve nonresident transfer students who are eligible for special education, who enroll in the ALE, and who cannot—for disability related reasons—attend a District school in person. Here the District is required, as discussed above, to base its decisions on the Student's unique disability-based needs regardless of whether or not he is a resident or a nonresident transfer enrollee. OSPI takes the District at its word that the ALE is not necessarily intended to serve nonresident transfer students;

however, OSPI recommends that the District assess its capacity to provide special education services and the continuum of placement options available to nonresident transfer ALE enrollees.

If a district does intend to draw, accept, and enroll nonresident transfer students from a statewide enrollment pool into a remote-course ALE program, then that district has an obligation to meet the basic education needs of statewide students. A student's basic education needs include providing special education. These districts must ensure that there is a system in place to serve statewide students and a continuum of placements that reflect the realities of a statewide enrollment—students who for disability *or* geographic reasons, cannot receive special education services at a traditional brick and mortar school setting.

Dated this ____ day of February 2019.

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

THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

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