

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 19-64

PROCEDURAL HISTORY

On September 6, 2019, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the grandparent¹ (Parent) of a student (Student) attending the Evergreen School District No. 114 (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On September 9, 2019, OSPI acknowledged receipt of this complaint and forwarded a copy to the District Superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On October 1, 2019, OSPI received the District's response to the complaint and forwarded it to the Parent on October 2, 2019. OSPI invited the Parent to reply with any information she had that was inconsistent with the District's information.

On October 7, 2019, the Parent requested an extension of time to reply to the District's response and on the same day, OSPI granted the Parent's request.

On October 15, 2019, the OSPI investigator interviewed the Parent.

On October 16, 2019, OSPI requested additional and clarifying information from the District, and the District provided the requested information on October 17, 2019. OSPI forwarded the information to the Parent on October 21, 2019.

On October 18, 2019, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on October 21, 2019.

On October 24 and 25, 2019, OSPI requested additional information from the District, and the District provided the requested information on October 25, 2019. OSPI forwarded the information to the Parent on October 28, 2019.

On October 29, 2019, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District the same day.

OSPI considered all of the information provided by the Parent and the District as part of its investigation. It also considered the information received and observations made by the complaint investigator during the interviews.

¹ The complaint was filed by the Student's Grandparent, who is her legal guardian. The Grandparent will be reference throughout this decision as "Parent."

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on September 7, 2018. These references are included to add context to the issues under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.

Additionally, in her complaint, the Parent raised several concerns that are outside the scope of the special education citizen complaint process, including discrimination based on the Student's disability. OSPI included information in the opening letters that the U.S. Department of Education, Office for Civil Rights has authority to investigate allegations of discrimination. Further, the Parent, in additional information, raised new concerns regarding accommodations not *currently* being provided. OSPI notes the original complaint was filed on September 6, 2019 and raised allegations regarding the 2018-2019 school year; as such, the complaint decision will only address amendments to the individualized education program (IEP) and the provision of accommodations during the 2018-2019 school year. Any new concerns will not be addressed as they occurred after the complaint was filed. If the Parent has continuing concerns, OSPI encourages the Parent to address these concerns through the IEP process and request an IEP meeting and/or through IDEA dispute resolution processes.

ISSUES

1. Did the District follow procedures to implement the Student's individualized education program (IEP), including providing accommodations, the Student's FM device, and social skills group during the 2018-2019 school year?
2. Did the District implement the Student's IEP in the least restrictive environment (LRE), including ensuring that the Student had access to nonacademic activities (e.g., lunch and recess) to the maximum extent appropriate during the 2018-2019 school year?
3. Did the District follow procedures for amending the Student's IEP during the 2018-2019 school year?

LEGAL STANDARDS

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. 34 CFR § 300.323(a); WAC 392-172A-03105(1). A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. 34 CFR §§300.320 through 300.328; WAC 392-172A-03090 through 392-172A-03115. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. The initial IEP must be implemented as soon as possible after it is developed. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105.

"When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

Program Modifications: An IEP must include a statement of the program modifications that will be provided to enable the student to: advance appropriately toward attaining his or her annual IEP goals; be educated and participate with other students, including nondisabled students in educational activities; and participate, if appropriate, in general education classroom, extracurricular, and nonacademic activities. 34 CFR §300.320(4); WAC 392-172A-03090(1)(d).

Least Restrictive Environment: School districts shall ensure that the provision of services to each student eligible for special education, including preschool students and students in public or private institutions or other care facilities, shall be provided: 1) To the maximum extent appropriate in the general education environment with students who are nondisabled; and 2) Special classes, separate schooling or other removal of students eligible for special education from the general educational environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.114; WAC 392-172A-02050.

Participation with Nondisabled Peers: To the maximum extent that is appropriate, a student eligible for special education services will be educated in the general education environment with his or her nondisabled peers. 34 CFR §300.114(a)(2); WAC 392-172A-02050. The student's IEP will address how the student will be educated and participate with nondisabled students in the general education classroom and in extracurricular and nonacademic activities. 34 CFR §300.320; WAC 392-172A-03090. If a student is placed outside of the general education environment, the IEP team should consider the student's participation in opportunities that will allow his or her interaction with nondisabled peers, as appropriate to the needs of the student. *Letter to LaHood*, 23 IDELR 558 (OSEP, 1995). The district must take steps, including the provision of supplementary aids and services, to afford a student eligible for special education the equal opportunity to participate in nonacademic and extracurricular services and activities. 34 CFR §300.107; WAC 392-172A-02025.

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

Parent Participation in IEP Development: The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child. This is an active role in which the parents: 1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; 2) participate in discussions about the child's need for special education and related services and supplementary aids and services; and 3) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,472, 12,473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 5). Parents are considered equal partners with school personnel in making these decisions, and the IEP team must consider the parents' concerns and the information that they provide regarding their child in developing, reviewing, and revising IEPs. IDEA, 64 Fed. Reg. 12,472, 12,473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 9).

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

FINDINGS OF FACT

Background: 2017-2018 School Year & Summer 2018

1. The Student attended school in the District and was eligible for special education services under the category emotional behavioral disability.

On May 10, 2018, the Student's individualized education program (IEP) team met to discuss the Student's most recent evaluation and conduct the annual review of the Student's IEP. The May 2018 evaluation report stated the Student continued to be eligible for special education services under the category emotional behavioral disability and noted the Student's "delays in communication" adversely impacted her educational performance in the following areas: "interference with all academic areas, with understanding oral instructions/directions [and] questions, expressing ideas which are incomplete or lack proper sequencing/continuity, inappropriate/off topic response, interrupting/talking out and appearing frustrated by communication difficulties." The evaluation report noted the Student passed a District hearing test in March 2018, and further noted "HEARING: Makes noises, hums, sings, or yells during quiet class times. Speaks too loudly or makes excessive noise during transitions."

The evaluation report noted the Student had “deficits in written language, math calculation and reading fluency” and the Student had behavioral concerns impacting her education. The evaluation report recommended the Student receive specially designed instruction in communication, social/emotional skills, written language, reading, math, and behavioral skills.

2. Also, on May 10, 2018, the Student’s IEP team—including the Parent—met and developed the Student’s annual IEP. The IEP noted, “[Student] is not hearing impaired. She passed her hearing screening. [Student] communicates verbally but has a language delay that adversely affects her ability to communicate effectively in the school setting” and the Student’s behavior impacted her learning and the learning of others. In the present levels, the IEP noted the following: “from a physical health standpoint, she still...has a diagnosis of malnutrition” and “At [Parent’s] request, per doctor’s note [Student] should continue with 3 meals and 3 snacks a day. She will continue to pack snacks to eat throughout the day. Also addressed in accommodations.” The present levels also noted the Student had the following sensory accommodations: sound dampening headphones and Chromebook headphones to quietly listen to music of her choice.

The IEP included annual goals in the areas of reading, written language, math, behavior (work completion), social emotional skills (coping and following directions), and communication. The IEP included the following accommodations, modifications, and supports for school personnel:

Accommodations:

- Classroom – access to an inflated wiggly seat cushion (daily, classroom)
- ALL – Individual or small group setting (testing, school setting)
- ALL – Multiple or Frequent Breaks (testing, school setting)
- ALL – Test Directions Re-read Verbatim (testing, school setting)
- Allowance to have regularly scheduled recesses (daily, school setting)
- Classroom – Allow Extra Time to Respond if Effort is Shown (daily, school setting)
- Classroom – Allow Student Access to Water and Nutrition/Food Items as Needed (during class period, school setting)
- Classroom – Bathroom Access as needed (during class period, school setting)
- Classroom – Break Material into Manageable Parts (during independent work, school setting)
- Classroom – Check Work Frequently to Ensure Understanding (during independent work, school setting)
- Classroom – Cued to Begin Work & Gentle Reminders to Stay on Task (during independent work, school setting)
- Classroom – More than One Day for Classroom Tests (testing, school setting)
- Classroom – Preferential Seating/Alternate Location in Classroom (during class period, school setting)
- Classroom – Reduce Length of Assignments (during class period, school setting)
- Classroom – Reduce Number of Problems (during class period, school setting)
- Classroom – Sensory Breaks as needed (daily, school setting)
- Regular daily scheduled break (daily as needed, school setting)
- Sit on heels in kneeling position or side saddle when on floor (daily, school setting)

Modifications:

- Access/Use of the following: use of a screen reader for textbooks or electronic text (at school for reading practice, classroom)

- Behaviorally Related: management system (daily, classroom)

Supports for School Personnel:

- Occupational therapy collaboration with school personnel regarding sensory strategies (upon teacher request, general ed. and special ed. settings)

The IEP also provided the Student with the following specially designed instruction, to be provided in the *special education setting*, from May 15, 2018 through April 23, 2019:

- Behavioral Skills (concurrent): 15 minutes, 2 times weekly (provided by staff assistant, monitored by special education teacher)
- Communication: 30 minutes, 2 times weekly (provided by speech-language pathologist (SLP))
- Math: 30 minutes, 2 times weekly (provided by staff assistant, monitored by special education teacher)
- Reading: 20 minutes, 4 times weekly (provided by staff assistant, monitored by special education teacher)
- Written Language: 20 minutes, 2 times weekly (provided by staff assistant, monitored by special education teacher)
- Social/Emotional Skills: 30 minutes, 1 time weekly (provided by staff assistant, monitored by special education teacher)
- Behavioral Skills: 5 minutes, 2 times daily (provided by staff assistant, monitored by special education teacher)

The IEP stated the Student would spend 84.3% of her time in the general education setting.

3. On May 16, 2018, the Parent notified the District SLP that, on May 14, 2018, the Student had an auditory processing disorder evaluation at a private clinic.
4. On August 15, 2018, the Parent hand wrote a note, stating she was "requesting an IEP meeting for as soon as possible. [Student's] FM device needs to be in place and added to her IEP." The Parent's note was received by the SLP on the same day. At this time, the Parent provided the District with a copy of the May 2018 auditory processing disorder evaluation report. The private evaluation found the Student had an auditory processing disorder and recommended the following, in relevant part:
 - "Make the signal stand out from the noise" – through the use of a remote-microphone or Frequency Modulation (FM) system during instruction, with the goal to "raise the signal (the teacher's voice) above the ambient noise level";
 - Preferential seating – the Student should be able to see the teacher to lipread and sit away from machines that procedure noise, windows near playgrounds, etc.;
 - Get the Student's attention prior to giving directions;
 - Seat the Student next to a high-achieving student for context and transition cues;
 - Allow Student to work on homework and seat work in a quiet room/environment or create "auditory isolation" (use headphones to listen to nature sounds or music without lyrics);
 - Write assignments on the board; visual reminders;
 - Provide focused auditory training ("binaural (two-eared) listening"), possibly incorporated into speech/language therapy sessions; and,
 - Teach strategies to the Student to improve comprehension and develop self-advocacy skills.

5. The District noted, in response to the Parent’s August 15, 2018 request for an IEP meeting, that staff were not working at that time and would not have been able to arrange an IEP meeting immediately.
6. On August 22, 2018, the audiologist at the District’s educational service district (ESD) emailed the District’s SLP to schedule a time to come to the District and set up FM systems for a few students. The SLP responded there was a student (the Student) for whom they wanted to use a trial FM system.
7. On August 23, 2019, the ESD audiologist (audiologist) confirmed she received the private auditory report and asked, in an email to the SLP, if the Student would “tolerate ear-level pieces or headphones? Is her classroom set up for sound field?” The audiologist stated she agreed with the recommendation to try a “sound field system” based on the private audiologist report or that an FM system would benefit the Student. According to the District’s response to this complaint, around this time, the audiologist began the process of securing an FM device for the Student to try.

2018-2019 School Year

8. During the 2018-2019 school year, the Student attended a District elementary school and continued to be eligible for special education services. The Student’s May 2018 IEP was in place at the beginning of the school year.
9. The timeline for this complaint investigation began on September 7, 2018 and the District’s 2018-2019 school year began on September 10, 2018.
10. The Student’s special education services schedule during the 2018-2019 year was as follows:

	Monday	Tuesday	Wednesday	Thursday	Friday
Reading, Behavior (Concurrent)	English Language Arts (ELA) 3:00-3:30	ELA 3:00-3:30		ELA 11:30-12:00	ELA 11:30-12:00
Written Language					
Math	11:30-12:00	11:00-11:30		2:30-3:00	1:00-1:30
Social/Emotional			9:30-10:00		
Communication	9:30-10:00		9:30-10:00		

The Student was regularly scheduled to attend recess from 10:30-10:55 am and 12:45-1:05 pm, and had lunch from 12:25-12:45 pm.

According to the District, the Student’s placement was primarily in a general education classroom. To receive specially designed instruction, the special education teacher or “staff assistant” (paraeducator) would provide instruction to the Student and three other students eligible for special education services, “separated from the general education students...as identified in the matrix; in all three classroom environments.” The District further stated the

Student's services included a "daily behavioral/social-emotional check in at the beginning and end of the day, specific specially designed instruction in mathematics, reading, and written language delivered in a special education environment via pullout services." The District stated that "behavioral supports were provided concurrently and then in a pullout special education setting with a paraeducator on Wednesdays."

Regarding the provision of services and accommodations, the Student's two general education teachers provided the following information:

- In math, "work was adapted on a daily basis so she would have some access to what we were learning to stay included in the classroom activities, but would work at her level." English language arts work was also adapted to Student's level.
- Extra one-on-one time with the teacher ("any time that she wasn't receiving push-in instruction from the special ed. staff.")
- Teacher would explain instructions individually.
- Teacher would "provide her with initial instruction on her independent work, would stay as she begun the work and answer questions through the first few problems to ensure understanding, and then check back in repeatedly during the worktime."
- Tasks were broken down into parts, instructions repeated, and teacher would check for understanding.
- Teacher would "circle back with her frequently any time she wasn't in a small group with me."
- "We had a basket of noise cancelling headphones (8 or 9 pairs) that all students could access...[Student] would sometimes use them, sometimes not, her choice."²

The Student's special education teacher further stated the Student had access to both noise cancelling headphones and "classical music through headphones" in the special and general education settings. The teacher stated these were, "offered by staff-student chose whether or not to access them."

11. On September 18, 2018, the District's occupational therapist (OT) had a discussion with the Student's teachers regarding strategies and supports for the Student, including: using an "inflated wobble seat" and headphones ("use of Chromebook headphones to access her own music choices during quiet classroom work times is not currently an option, since she needs too much supervision on computer"; but sound dampening headphones continue to be an option).

12. On October 1, 2018, the audiologist emailed the SLP regarding the FM system for the Student. The audiologist stated they did not have any extra FM systems available to test and were "short on FM systems in the [D]istrict currently." The audiologist stated she wanted to "schedule a time that I could come and observe [the Student] though, so that I have a better sense of what might be good for her."

² One of the Student's general education teachers stated she "wasn't aware of the music strategy until late in the year...I did offer music to her after that, but it was so late in the year and we were doing so many group activities that there were only a few occasions where we implemented the strategy." The teacher stated, "I did often play calming music in the classroom during workshop work time throughout the year for the entire class."

13. Between October 9 and 11, 2019, District staff and the audiologist emailed regarding procuring an FM system for the Student.
14. Between October 16 and 19, 2019, District staff—including the elementary special education coordinator (special education coordinator) and the special services budget secretary—and the audiologist emailed regarding the FM system. The emails indicated the audiologist was unclear whether the FM system would be a trial and “when and how we can put an FM system on [the IEP].” The coordinator responded this would be an IEP team decision.
15. On October 19, 2018, the Parent emailed the SLP, the Student’s general education teachers, and the Student’s IEP case manager/special education teacher (IEP manager). The Parent stated she spoke with the audiologist and there seemed to be a miscommunication. The Parent wrote, “At the end of last school year the day after [Student’s] IEP meeting, I made the team aware of the assessment [Student] was having for sensory processing disorder. I submitted the report and doctor recommendations that indicated the FM device would be supportive in the school setting,” and she stated, “I submitted an IEP meeting request [to] assure [sic] this was taken care of on August 24th 2018 in hopes to have the FM device officially added to her IEP so that when she began this year she would have it to decrease frustration, meltdowns, etc.” The Parent stated she had spoken with several people who mentioned the Student “trying one” (FM system) and stated she was confused as to why this would be a trial because the school was telling her they needed to try the FM system before adding it to the Student’s IEP and the District was telling her the FM system needed to be in the Student’s IEP before the District would buy one.
16. Also, on October 19, 2018, the IEP manager emailed the audiologist and asked if there was an “extra FM for a trial for this student to gather data and deem if it is appropriate to incorporate into her IEP?” and, “if not, can we hold an IEP meeting (you included on the team) to review the outside medical documents and consider if this would be a necessary support for the student to access her education?”
17. On October 22, 2018, the IEP manager emailed the Parent and stated she had spoken with the audiologist. The IEP manager stated she hoped to have a clear plan soon, but wanted to schedule a meeting to “review paperwork and consider adding an FM system to her IEP.”
18. On October 24, 2018, the audiologist responded to the IEP manager’s October 22, 2018 email, stating she “was able to find an FM system from another district that we can borrow for [Student].” She stated, “it is a headphone FM set, so it is not a personal ear level device for her, but this will still give us an idea of how well she does with an FM system.” The audiologist stated she would set up the system and observe the Student “for a little bit to see how she does with it initially” on October 29, 2018.
19. On October 29, 2018, the IEP manager emailed the Parent and stated the audiologist was there that day “trying out a borrowed FM system and observing [Student.]” The IEP manager asked the Parent for dates and times to schedule an IEP meeting. The Parent responded with several dates she was available.

20. Also, on October 29, 2018, the audiologist emailed the IEP manager and SLP and asked the Student's teacher to fill out two questionnaires (one immediately and one in two weeks), to collect data to determine "if the FM is beneficial."
21. Between October 29 and November 20, 2018, the District collected progress data regarding the implementation of the FM system.
22. On November 27, 2018, the District's OT had a discussion with one of the Student's general education teachers about sensory supports in the classroom. The OT's notes indicated the Student was using the "wobble seat," but no other sensory equipment. The OT noted the Student occasionally brought toys to school to use as "fidgets," but these are often distracting and she does better with "naturally occurring fidgets pencils, erasers, etc."
23. On November 28, 2018, the District initiated an "assessment revision" and invited the Parent to a meeting scheduled for December 18, 2018, to discuss the assessment revision.
24. On December 3 and 4, 2018, the District's OT had a discussion with the Student's teachers regarding sensory supports for the Student, including: the "wobble seat," preferential seating, varied motivators, and a timer. The notes stated, "in Learning Support, [Student] is eating snacks as she works (or as she avoids work), so snacks are working as her 'fidget' in that class setting."
25. In a document, dated December 5, 2018, the Parent wrote the following regarding the Student's experience with school:³

[Student] and I had a talk about school and how she feels about it. How she gets through a given day. [Student] told me school is confusing to her...She told me watching the other kids helps her know what she should be doing. (Indicating she really doesn't know what is going on most of the time and this causing her stress, she doesn't know what to do.) She also said even the steps the teacher puts on the board are confusing to her. She feels stressed because she never knows what is going on. (Again she tries to figure out what is going on by seeing what the other kids are doing). She has problems at recess because it is overwhelming and too loud, too stimulating (yet she loves the recess time) she often goes to a quiet spot...to get away from the noise...

...

Thank you for all your help and for caring about my granddaughter and her well-being!
26. On December 6, 2018, the Parent provided consent for the District's "assessment revision" to address the "concerns of adaptive skills outside of the school setting," below which the Parent added "how these effect [sic] her learning, social and emotional at school." The Parent also wrote in the following: "FM device was very helpful – remember ears hear well, brain does not...She is always confused and stressed at school even if she looks 'okay'..."

³ It is not clear when and how this document was provided to the District; however, it was included with documentation related to the Student's December 18, 2018 IEP, which indicated it was reviewed as part of the assessment revision and IEP development process.

27. On December 13, 2018, the District completed progress reporting regarding the Student's progress on her May 2018 IEP goals. The progress reporting indicated the Student was making sufficient progress on her two reading goals, her written language goal, her math goal, her social/emotional coping skills goal, and her three communication goals. The Student was not making progress on her behavior work completion goal and the comments noted, "work production and attention remain difficult for [Student]. Team will consider modifying goal." The Student was making insufficient progress on her other social/emotional goal.
28. On December 14, 2018, the IEP manager emailed the Parent a draft version of the Student's IEP, per the Parent's request.
29. In a document titled "IEP Meeting," dated December 18, 2018, the Parent shared her feedback and concerns regarding the Student's education program for the IEP team to consider. The Parent's feedback and concerns included the following, summarized, in part:
- The Student's report regarding the FM system was "quite different than the teacher's observations" and the Student "felt that it helped her understand what the teacher was saying."
 - The Parent emphasized the Student had an auditory processing disorder, meaning the Student can hear, but cannot process what she hears in the same way as others.
 - Asked whether the FM system trial could be extended.
 - Requested the following be added to the IEP: teachers refrain from tapping on the desk to get the Student's attention; use of "first...then" sentences; and, physical activity breaks.

The Parent also emphasized, in an interview, that the Student reported the FM system did help her hear and understand.

According to additional information from the District, this document was considered by the IEP team at the meeting that day.

30. On December 18, 2018, an IEP meeting was held to discuss the Student's assessment revision, which the Parent attended. The report stated the Student passed a vision and hearing screening in December 2018. The report included updated information regarding the Student's adaptive skills and stated the Student continued to qualify for special education services under the category emotional behavioral disability.

As part of the assessment revision, the audiologist wrote the Student had recently been diagnosed with "Auditory Processing Disorder (APD)"⁴ by a private clinic and that her hearing difficulty was reported as "having difficulty in quiet and noise, and that she had frequent need for repetition, and often mishears what is said." The clinic recommended an FM system "at school for help hearing the teacher in the classroom;" however, the audiologist noted, "an FM

⁴ The audiologist's report noted APD is a "disorder in which peripheral hearing sensitivity is within the normal limits, however, sounds, especially speech, is not processed in the central auditory system as it should. Speech can be difficult to understand, and difficult to process with APD. Speech in noise, is especially difficult to process, because it can be difficult to differentiate the speech and noise. There are some treatment options for APD, however, there are no cures, and many treatment options may work for one student, and not for another."

system is one option for helping students with APD, however, it does not help every child in the classroom.” The audiologist noted the team agreed to trial an FM system in the classroom and provided the following information about the trial:

- The Student was seen on October 29, 2018 to set up the FM.
- The FM was set up with personal headphones for the Student to use.
- The Student was observed during her speech therapy session with the FM system.
- The Student was excited to use the FM at school and while she initially indicated the headphones bothered her ears, she continued to wear them without issue.
- The “Screening Instrument for Targeting Education Risk” (SIFTER) was given to the Student’s teacher to fill out pre-FM system and the “Listening Inventory For Education” (LIFE) was given to the teacher post-FM trial.
- The Student wore the FM system during school hours from October 29 through November 20, 2018.
- The LIFE indicated “no significant change, or benefit of use with the FM system.”

The audiologist stated, “due to the outcome of the trial, an FM system is not recommended in the classroom” because the Student “did not receive benefit from the FM, and it did not improve attention, focus, ability to understand and follow directions, rate of learning etc.” The audiologist recommended the Student continue to receive “learning support, communication and counseling services,” as well as “preferential seating, written instruction, closed captioning, and verbal re-instruction.” The audiologist recommended “encouraging self-advocacy and use of listening strategies to help improve comprehension, and communication break-downs.”

31. Also, on December 18, 2018, the Student’s IEP team—including the Parent—developed a new annual IEP for the Student. The IEP noted the IEP team considered the FM system recommended by the private audiology clinic and incorporated the ESD audiologist’s report, including information about the Student’s auditory processing disorder. The December 2018 IEP included updated present levels, information on the Student’s progress, and annual goals. The present levels continued to note the Student had a diagnosis of malnutrition. The IEP included the following new or changed accommodations (in addition to those accommodations that were on the May 2018 IEP):

New/Changed Accommodations:⁵

- Extra time for processing
- Verbal re-instruction (during class period)
- Closed captioning (during video)
- Ask comprehension questions to check for understanding (during instruction)
- First-then
- [Changed] Classroom – Movement Breaks as needed (daily, school setting)

The IEP included the same modifications and supports for school personnel as found in the May 2018 IEP. The December 2018 IEP also provided the Student with the following specially designed instruction, to be provided in the *special education setting*:

⁵ The December 2018 IEP also included several accommodations for standardized testing. No concerns were raised about these accommodations; therefore, they are not detailed in this decision.

- Behavioral Skills (concurrent): 20 minutes, 4 times weekly (provided by staff assistant, monitored by special education teacher)
- Communication: 30 minutes, 2 times weekly (provided by speech-language pathologist)
- Math: 45 minutes, 2 times weekly (provided special education teacher)
- Reading: 20 minutes, 4 times weekly (provided by special education teacher)
- Written Language: 20 minutes, 2 times weekly (provided by staff assistant, monitored by special education teacher)
- Social/Emotional Skills: 30 minutes, 1 time weekly (provided by special education teacher)

The IEP stated the Student would spend 82.5% of her time in the general education setting.

32. The District's response included a document, dated December 18, 2018, that included the Parent's signature next to a checked box for the statement, "**I AGREE** with the Individualized Education Plan [sic]." (Emphasis in original.)
33. On December 19, 2018, the special education coordinator emailed the Parent the revised IEP and a copy of a prior written notice, dated December 18, 2018. The prior written notice stated the following accommodations were added or changed, per the Parent and occupational therapist's requests:
- Adding extra processing time;
 - Adding verbal re-instruction during class;
 - Adding the use of closed captioning during videos;
 - Adding asking comprehension questions to check for understanding;
 - Adding use of first/then language for addressing Student; and,
 - Changing sensory breaks to movement breaks.

The prior written notice also included the following additional information, in relevant part:

- "The IEP team agreed at the evaluation meeting in May 2018 that [Student's] behaviors are addressed through the IEP and not needing an FBA."
- "The team decided that based off of the FM trial, teacher surveys and recommendations of the ESD Audiologists that an FM in the classroom setting would not be appropriate for [Student] at this time. Other recommendations of accommodations were included to address and lessen the delays of Auditory Processing Disorder."
- "Parent shared that [Student] has been recommended to receive more time with an SLP through a medical provider. She will also go through testing at [hospital]."
- Parent shared that "...tapping on the table to get her attention. [Student] can easily move from a learning moment to a moment of anxiety...tapping on the table can do this. Having [Student] look at the person who needs her attention is a better solution for keeping [Student] in a learning moment."
- "Parent shared that using first/then language and not taking away recess as a consequence for work completion are strategies to support [Student's] access to her learning."

The coordinator, in his email, encouraged the Parent to share results of further SLP sessions and testing, and that "an IEP team can be called to consider any of that information as it pertains to the IEP, if necessary."

34. In an interview with the Parent, the Parent stated there was no discussion at the IEP meeting about removing the accommodation: "allowance to have regularly scheduled recesses (daily, school setting)." This accommodation was on the Student's May 2018 IEP, but was not included on the December 2018 IEP. The Parent stated she did not bring up the accommodation because she assumed it—like other accommodations—would continue to be on the IEP.

In additional information provided by the District, the District stated the IEP team *did* discuss the recess accommodation at the December 18, 2019 IEP meeting. The District stated, "the focus was on getting to the purpose of the need to not miss recess and also consider/address that the student was moving to middle school within the IEP year and there isn't a recess at that level." The District stated the purpose was identified as a need for "sensory/movement" and the team "addressed that in an accommodation for movement breaks."

35. In her complaint, the Parent stated the IEP team "waited until [Student's] counselor and the [Parent's] peer support person left the room before discussing replacing sensory breaks with movement breaks" and that she felt "bullied and pressured into signing the form even though I clearly disagreed with the change." The Parent stated, "the team tried to convince me that movement breaks and sensory breaks are the same thing, which they are not."

36. The District was on break December 24, 2018 through January 1, 2019.

37. On January 3, 2019, the Parent called and emailed the special education coordinator regarding extending the trial for the FM system. In her email, the Parent expressed concern that the Student's use of the device was not monitored and therefore, not always used properly. The Parent asked if they could "re-due [sic] the trial with more observation, with the correct volume etc."

In an interview, the Parent further explained she believed the FM system trial was flawed because the District used a type of headphones that bothered the Student's ears and therefore, she would take the headphones off. The Parent also pointed out the volume was an issue because it needed to be adjusted daily, and was not. The Parent stated she believed the trial was inaccurate, which was why she requested a second trial.

38. On January 4, 2019, the special education coordinator forwarded the Parent's January 3, 2019 email to the audiologist and school team. The audiologist responded and stated she reviewed the email and tried to get ahold of the Student's private audiologist. The audiologist stated, "I am still waiting to hear back from her, because I want to make sure that she and I are on the same page." The audiologist stated she stood by the report included in the IEP and did not believe an FM system was going to benefit the Student. The audiologist stated, "the difficulty is that APD is not her only diagnosis, and her other diagnoses can affect her ability to benefit from the FM." She further stated:

There is a volume control on the FM piece that [Student] wears, however, it would turn down everything, including the teacher's voice. The concerns of hearing the teacher breathing, or talking to other students, is unfortunately something that every student using

an FM encounters. Many of my other students with hearing loss report their teacher forgets to turn it off when they talk with other students...I could provide another trial with the FM system, however, I am not able to provide regular observation of its use, as I cover 16 school districts, so I don't have the time to check in regularly throughout the couple week trial. I am interested in hearing what the rest of the team thinks, as they work with [Student] regularly, and were part of the original trial.

39. On January 22, 2019, the audiologist emailed the SLP and IEP manager and stated she spoke with the private audiologist. The audiologist stated, "we have decided to do another FM trial, if that works for you." She also stated, "we will do the pre and post questionnaires again, and I will try to stop by as often as is feasible for me. I will also make sure that the volume is comfortable for her, and will encourage her to keep the volume at that level." The audiologist stated she did not think they would find anything different than the previous trial, but stated, "but to make sure, I'm willing to do it again. Thoughts? Are you willing to do it again?"

The IEP manager replied they were willing and stated, "particularly if the FM is from the doctor so that we can follow the recommendation as close as possible. More information and data would be helpful given the parent's requests."

40. On January 29, 2019, the audiologist emailed the IEP manager and SLP, stating the private audiologist's device would not be ideal and the FM system the Student used previously would be the best option. The audiologist stated she would set up the system and would "stay and work with her on it for about an hour and observe how she is using it" on February 6, 2019.
41. On February 6, 2019, the FM system was set up. The audiologist emailed the IEP manager, SLP, and general education teacher the "pre and post questionnaires" and stated she planned to pick up the device and questionnaires on February 26, 2019. The audiologist asked the teachers and SLP to "let [her] know if you come across any issues, or if you have any feedback."
42. On February 27, 2019, the audiologist emailed the special education coordinator regarding the second FM trial, which ended the previous day, February 26, 2019. The audiologist stated, "the questionnaires indicated no benefit from the FM system. Her teacher also reported that they had to remind her more often this time to wear it, and she complained of the 'crackling' sounds from the microphone again." The audiologist stated, "due to the results of the trial, and considering her complex medical history, I don't recommend the use of the FM system for [Student]. I will call [Parent] and let her know the results of the trial."
43. The Parent, in an interview, stated the second trial was also inaccurate because the District did not fix the issues she had pointed out (i.e., the type of headphone and volume). The Parent stated the special education coordinator told her they could not use "cupping headphones" because it was a safety issue—the Student needed to be able to hear the teacher; however, the Parent pointed out the Student was allowed to use sound reducing headphones.
44. Also, on February 27, 2019, the Parent emailed the Student's teachers about the Student's snack schedule. The Parent stated she wanted to clarify because sometimes the Student misunderstood, but the Student reported she had to go to "learning support to have her

snacks when she is hungry...because it's not [fair] to the other kids for her to eat in class." One of the Student's general education teachers responded that the Student had a morning snack in the classroom when the entire class has a snack. The teacher also stated, the Student "often takes snacks with her [in the] morning and afternoon when she goes to learning support and any time she goes to [SLP] for speech. For additional snacks needed beyond that we have arranged that she can take a snack break any time she needs one in the learning support classroom." The teacher stated both she and the other general education teacher had the same policy regarding snacks.

45. On March 14, 2019, the Parent emailed the Student's private audiologist the following:

I wanted to let you know that the school denied the FM device for the second time. They said, there was no change in her behavior and again, it is more of a distraction for her. Even though we are not doing this for 'behavior' its [sic] so she can hear and understand well. They only adjusted the volume one time, on the first day. No one checked in with her each morning to see if her volume was good for her. (I was told they don't have time to do that) even though her volume range changes daily. The head phones they use hurt her ears, so she needed to take them off to give her ears a break, they assumed (without asking her or I) she took them off because they were not working for her.

[Student] says, she can understand better with them and she is less confused, but the volume was either to [sic] loud or to [sic] soft.

I was told by the district that just because a doctor recommends it, that doesn't mean they have to provide it. I feel like they are not doing the trial to best fit my granddaughter's special needs...She needs the teacher to ask her, 'hey [Student], how is your volume today. Do you need help adjusting your headphones?'" etc. I was told again by [IEP manager] that teachers don't have time to focus on one student to do that every day...

46. On March 22, 2019, according to the Parent's complaint, both recesses were taken away from the Student. According to the Parent, the Student's general education teacher said another student "needed a break from [Student]" and therefore they "removed [Student's] recesses."

According to the District's response, the Student was removed from recess "due to interactions with another student."

47. On March 25, 2019, the Parent emailed the principal following a phone call they had the previous Friday (March 22, 2019). The Parent wrote she was "not happy [Student] lost her recesses over this. As well, [it's] in her IEP that removing her recess is not appropriate...I do not feel that what she did was deserving of any punishment..." The Parent stated it would have been appropriate to talk to the Student about her actions and "how it can make others feel."

48. Also, on March 25, 2019, the Parent emailed the Student's general education teachers, asking for clarification as to why the Student's recesses were taken away on March 22, 2019. The Parent stated, "it is my understanding after talking to [principal] that [Student] was not in any trouble. Also, it is stated in her IEP that her recess can't be taken away from her. So this was a clear violation of her IEP."

The general education responded and stated, "I'm sorry that I took away her recess on Friday. I felt that the boy involved needed a break from her after the incidents earlier in the week." To which the Parent replied, asking what incidents the teacher was referring to and why those incidents had not been discussed with her.

49. Later, on March 25, 2019, the Parent emailed the special education coordinator regarding recess and stated the principal "assured" her the Student was "not in any trouble...yet her teacher took both her recesses away, which is violation of her IEP."
50. On March 26, 2019, the principal responded with details regarding the incident. The principal noted the Student "*was not and is not 'in trouble.'*" (Emphasis in original). The principal clarified a few incidents occurred earlier in the week and the other student involved asked the Student to stop, because "he was upset." The principal stated this was what she shared with the Parent during their phone conversation. The principal further stated, "I didn't know at the time that [Student] had recess with [teacher]," and the Student and teacher "threw a ball and took a walk around the field together fulfilling the sensory and scheduled break. Knowing it now, I understand your frustration over recess. [Teacher] explained to me that she made sure [Student] had exercise and sensory motor activity."
51. Also, on March 26, 2019, the District completed progress reporting, which indicated the Student was making sufficient progress on all of her December 2018 IEP goals.
52. The District was on break April 1-5, 2019.
53. On April 8, 2019, according to the Parent's complaint, the Student's recess was taken away due to an incident that allegedly occurred in the lunch room. The Parent stated the Student was not in the lunch room at the time and "another student said [Student] did something that was not true, when [Student] tried to explain it, no one would listen, causing her to get upset."

According to the District's response, the Student had an "interaction during lunch in the lunchroom with another student that involved throwing eggs." The District stated the principal discussed the behavior with the Student during lunch and then the Student participated in recess.

The District's incident form included the following description:

Threw egg in someone[s] plate and when ask to apologize she said 'no.' Then [staff person] asked her to go to side table she said no cause [sic] she has IEP and can't miss recess. Also yell back as [sic] us saying she doesn't have to. Covering her ears and not listening.

54. Also, on April 8, 2019, the principal emailed the Parent in response to a voicemail the Parent had left that afternoon. The principal stated she would work on a plan "so [Student] will get her recess."

The Parent responded with concerns that the school staff were not accommodating the Student's disability. The Parent stated, "all her teachers know that taking things away from

[Student] is a huge trigger for her. Yet it keeps happening..." The Parent further stated, "it is against the law for [Student's] recesses to be taken away!!"

55. On April 10, 2019, the Parent emailed the Student's teacher and asked, "just wondering if you have apologized to my granddaughter yet for WRONGLY taking away her recesses and breaking the law by violating her IEP?...It is against the law to not abide by an IEP. My granddaughter knows her rights and I fully support her telling them to you and all staff until you respect her, her disabilities and the law." (Emphasis in original.)
56. On April 10, 2019, the Parent requested the Student's IEP team convene for an "emergency IEP meeting" to discuss the incidents that had occurred during recess and lunch.
57. On April 11, 2019, the District offered April 15, 2019 as a possible meeting date and the Parent responded, proposing other dates. The Parent also stated, "I would prefer to talk with [special education coordinator] before this meeting. It was my understanding he is here to advocate for her/us."

According to the District's response, following a subsequent discussion with the special education coordinator, the Parent and the coordinator determined an IEP meeting was not necessary.

58. On April 20, 2019, the Parent emailed the Student's two general education teachers, the IEP manager, and the principal with concerns regarding the Student. The Parent stated the Student had been struggling and felt like "no one likes her."
59. On April 22, 2019, the special education coordinator emailed the Parent regarding a conversation they had that morning. The coordinator stated, "what I learned today is your request is to have [Student] access recess outside as part of your request to ensure [Student] doesn't miss a recess" and they discussed other social activities for the Student. Finally, the coordinator stated one of the Student's general education teachers would be the point person for communication moving forward.
60. Also, on April 22, 2019, one of the Student's general education teachers responded to the Parent's email. The teacher shared the following, summarized in part:
 - The teacher would work to find opportunities for the Student to engage in "structured social situations (non-class time) with her peers;" and,
 - The teacher and Student agreed the Student would go to the learning support classroom for 5-10 minutes at the end of each day. The IEP manager has "a supervised time in her room for students that are waiting for their bus...where they are able to talk and play games."

The teacher stated, "we will continue to monitor this situation closely. Please let us know any feedback she shares with you at home."

61. On April 24, 2019, the Parent responded to the special education coordinator's April 22, 2019 email and stated she spoke with the Student about the ideas for social opportunities and the Student stated she wanted to do the "last 5-10 minutes each day to be with peers."

62. On May 10, 2019, the Parent emailed the IEP manager, general education teachers, SLP, principal, and special education coordinator with concerns that the Student was not receiving snacks as outlined in her IEP. The Parent also expressed concern that a specific schedule for snacks was previously included in the Student's IEP and had since been taken out, and instead listed as "as needed." The Parent stated this was frustrating as she had "fought to have scheduled snack times listed in her IEP" and removing the schedule was done without her consent.⁶
63. On May 13, 2019, the IEP manager responded with the snack schedule and stated snacks were available to students whenever needed. The Parent responded to the IEP manager in three emails on May 13 and 14, 2019. She thanked the IEP manager for the schedule and asked if the snack times were listed on the Student's desk for a visual reminder. The Parent stated that "there was a reason we had worked so hard to have the scheduled times listed in the IEP. You are bound to them that way, I requested the times to be listed in the IEP." The Parent stated the snack times were in the IEP, and then "they were removed and replaced without my consent [sic]." The Parent also stated she was going to file a complaint with OSPI and get an attorney.
64. On May 14, 2019, the IEP manager forwarded the Parent's emails to the principal and special education coordinator.
65. Between May 13 and 17, 2019, according to the Parent's complaint, the Student was not allowed to attend morning recess during testing.
66. Between May 13 and 17, 2019, according to the District, the District was conducting District-wide standardized testing. The District stated the Student did have lunch and recess during this time period; however, the lunch and recess schedule were different than her regular classroom's schedule due to the testing.
67. On May 20, 2019, according to the Parent's complaint, the Student was not dismissed for lunch in time to eat her lunch.
68. On May 21, 2019, the Parent emailed one of the Student's general education teachers regarding missed recesses. The Parent stated the previous week (week of May 13, 2019), the Student missed "most of her 10:30" recess and "had great anxiety over this and that it will happen again." The Parent stated the day before, May 20, 2019, the Student "got recess, but

⁶ Regarding the snack accommodation, the District stated, "Snacks have been a need due to nutritional issues and recommended by the doctor." The Student's IEPs have not included goals, but included information in the present levels and accommodations. The Student's September 2017 IEP included, "[Student's] grandma packs her lunch daily along with 4 snacks. She is allowed to eat these throughout the day. She will have a snack in the afternoon at approximately 2:30. Staff will inform [Student] that it is snack time" and provided the following accommodation: "Classroom – Allow Student Access to Water and Nutrition/Food Items as Needed, During Class Period, general education and special education." The District stated, "As [the Student] grew she needed snacks more and it evolved into several times per day."

didn't get to go to lunch till it was over she got one bite of her sandwich and she said the lady said it was time for [general education teacher's] class to go."

The general education teacher responded and stated:

I checked in with Learning Support and will reply on their behalf about the lunch mix-up yesterday. The staff member who was working with [Student] mistakenly looked at the early release schedule and thought she was due for lunch at 12:45. We have put some additional safeguards in place in Learning Support in the form of alarms to make sure that doesn't happen again."

69. In information provided by the District, the District stated the Student was late for lunch on May 20, 2019 due to a "schedule error by a substitute and some errors on the watch the student wears for alarms on lunch, recess, etc."
70. On June 3, 2019, according to the District's response, the Student "demonstrated behavior toward [her] teacher and had social group time discontinued." According to the incident report form included in the District response, the Student "came in [IEP manager's] room and asked if she could have a mint. I asked if she was ready to problem solve. She said no I'm never going to. On her way out [Student] said 'your job is sad. You are a stupid b****.'" According to the District's school wide information system (SWIS) database, the consequence for the behavior was a loss of privileges.
71. On June 4, 2019, the District completed progress reporting on the Student's December 2018 IEP goals. The progress reporting indicated the Student had mastered one of her reading goals and her written language goal, and on her other reading goal, she made progress, but progress was "hampered by new circumstances," as described in the comments: "Student refused to complete assessment after multiple attempts made with accommodations. Spring i-Ready Reading results show that [Student] is at 3rd grade level of reading comprehension." On her math, communication, and behavioral skills goals the Student made sufficient progress; however, on her social/emotional skills goal she made no progress.
72. On June 5, 2019, according to the Parent's complaint, one of the Student's general education teachers told the Student she was "no longer allowed to go to learning support because of an 'incident.'" The Parent stated she received no communication about the incident, but believed it had something to do with the Student feeling overwhelmed and unsupported. According to the Parent, the IEP manager "refused to let [the Student] back in the classroom until she apologized, including standing in the doorway, refusing to let [Student] in" and that this was a "clear trauma trigger."
73. On June 5, 2019, the Parent emailed the IEP manager, expressing her frustration that the IEP manager would not contact or communicate with her. The Parent expressed concern regarding a prior incident where the Parent felt the IEP manager was not instructing the Student, not following the IEP, and then sent the Student to the office. The Parent then stated, "today, two weeks later she goes to the learning support room before the bus as usual to be greeted by you in the doorway telling her she is not aloud [sic] in there until she apologies to

you for yelling at you, two weeks ago.” The Parent stated the IEP manager needed to apologize to the Student and it was not acceptable to take away the Student’s social time.⁷

The IEP manager responded to the Parent’s email, stating she shared the Parent’s information with the special education coordinator and attached the incident form.

The Parent replied in multiple emails that staff was not properly following the Student’s IEP and that the team continually “triggered and traumatized” the Student. The Parent also disputed the IEP manager’s explanation of the incident.

74. Also, on June 5, 2019, the Parent emailed one of the Student’s general education teachers and stated the Student said she was not being allowed to “go to learning support, because of an incident...I assume we are talking about the one [where IEP manager] was and is accusing [Student] of raising her voice at her 2 weeks ago?” The Parent asked why the Student was not allowed to go to learning support, especially given that the Parent was not provided information about this incident nor was a meeting schedule to discuss the same. Finally, the Parent stated the Student should not be removed from learning support without notifying her and the Student “has the right to receive a fair and reasonable education in an environment conducive to her learning disabilities.”

75. On June 6, 2019, the general education teacher responded to the Parent’s June 5, 2019 email, stating:

All of the students at our school who are on IEPs that designate learning support services receive a fluid mixture of push in and pull out services. Based on the individual daily needs of the child, the activities taking place in the classroom, or various other circumstances, on one day a student might receive support in the learning support classroom, on another day they might receive specially designed instruction with other students on IEPs in the co-op while on other days it might be deemed best for the child’s support services to be given by the special education teacher or a staff assistant in the home classroom. All of these settings are considered to honor the IEP.

At the present time [Student] is receiving the majority of her learning support services here in our classroom. I don’t perceive this arrangement as a punishment. I perceive this as what is currently best for [Student] academically and socially/emotionally because the home classroom is the environment in which she is currently doing best. She is continuing to receive the full continuum of her services...

76. On June 6, 2019, the Parent replied to the general education teacher’s email and stated this is not what was discussed at the Student’s IEP meetings, nor was this on the IEP. The Parent again stated the Student was not being allowed to “go to learning support because of the incident.” The Parent emailed a second time and stated she spoke with an advocate, who told her “in order to remove [Student] from learning support or change her learning support setting that is listed on the IEP you have to have an IEP meeting with parent present, this

⁷ Based on the documentation in this complaint, the prior incident the Parent is referring to may be an incident that occurred on May 24, 2019, where the Student received a referral for “disrespect and defiance” in the IEP manager’s classroom.

parent has to be in agreement with the requested new arrangement other than the agreed upon learning support room listed in the IEP.”

77. On June 6, 2019, the IEP manager emailed the special education coordinator, general education teacher, and principal regarding the Parent’s June 6, 2019 email. The IEP manager stated:

The only change that was made-is she does not come to my room at the end of day which was an additional social time offered by the team a while ago to accommodate [Parent’s] concerns and in no way linked to her IEP. She continues to receive the full continuum of her services...The past 2 weeks she has been receiving [specially designed instruction] SDI inside her general ed classroom and in the pod area. She actually came in Learning Support yesterday by her own accord and then I walked her to her bus.

78. On June 7, 2019, the general education teacher forwarded the Parent’s June 6, 2019 emails to the special education coordinator, principal, IEP manager, SLP, and the other general education teacher. The principal responded and asked the special education coordinator how he would like them to respond to the Parent. The coordinator asked if they could send the Parent the Student’s schedule to show it aligned with her IEP.

The principal replied they could and stated:

From my understanding, [Student] is not forbidden from [learning support] but just from the added social time at the end of the day. This added time is not in her IEP, but was one way to help [Student] socialize with peers. Instead, she is staying in class and socializing in there because of the end of the year activities. She has been in [learning support] this very week.

79. According to the Parent’s complaint, the Student was denied her social skills group at the end of every day for the remainder of the school year.

80. The District’s 2018-2019 school year ended on June 14, 2019.

CONCLUSIONS

Issue One: IEP Implementation – The Parent alleged the District failed to implement several parts of the Student’s individualized educational program (IEP). A district is required to have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. The district must ensure it provides all services in a student’s IEP, consistent with the student’s needs as described in that IEP. However, a district does not violate the IDEA unless it is shown to have materially failed to implement a student’s IEP—meaning, there must be more than a minor discrepancy between the services provided and those required by the IEP.

Accommodations – The Parent specifically alleged the Student was not being allowed to eat four snacks a day, that teachers were not reminding the Student to access her snacks, and the Student was being sent out of the classrooms to another room to eat. Program modifications and accommodations must be part of a student’s IEP, if necessary, to allow the student to advance

appropriately toward attaining her annual IEP goals; be educated and participate with other students, including nondisabled students in educational activities; and participate, if appropriate, in general education classroom, extracurricular, and nonacademic activities.

Several times throughout the year, the Parent raised concerns that the Student was not allowed to eat snacks or was being sent out of the classroom to eat snacks. In both IEPs in place during the investigation time period (May and December 2018 IEPs), the Student had an accommodation that read: "Classroom-Allow Student Access to Water and Nutrition/Food Items as Needed (during class period, school setting)." The May 2018 IEP also included the following, in the present levels: "At [Parent's] request, per doctor's note [Student] should continue with 3 meals and 3 snacks a day. She will continue to pack snacks to eat throughout the day." The December 2018 IEP did not contain the same level of detail and merely continued to note the Student had a diagnosis of malnutrition and that she accessed snacks throughout the day.

When the Parent raised concerns, the Student's teachers responded with the Student's snack schedule and an explanation of when she ate snacks in the classroom, learning support room, and speech language therapist's room. The teachers stated the Student was able to take a snack break whenever she needed one in the learning support classroom. Other documentation from the occupational therapist also indicated the Student was accessing her snacks. The District stated the Student had access to her snacks and it communicated the Student's snack schedule to the Parent.

While the Student's IEP did not actually include a specific schedule for snacks, based on documentation in this complaint, it appears the District regularly provided snacks. While it is possible there were occasional instances when the Student missed a snack, the documentation indicates the Student was being provided snacks at school and that any missed snacks were a minor discrepancy from the IEP. Further, despite the fact the IEP accommodation did not specify the number of snacks—unlike the statement in May 2018 present levels—based on the schedule provided, it appears the Student was generally accessing at least 3 snacks a day. OSPI does note, based on the Student's health needs, having access to regular meals and snacks is extremely important and OSPI encourages the District to ensure the Student is consistently being provided this accommodation. Overall, OSPI finds no violation with regard to the implementation of the Student's snack accommodation.

The Parent also raised concerns the Student was not being provided the following accommodations: use of headphones with music during quiet work time, and repeating instructions to ensure understanding/comprehension questions to check understanding.

Regarding the use of headphones, somewhat confusingly, the May 2018 IEP listed the use of sound dampening or headphones to listen to music in the present levels, but not in the accommodations/modifications section of the IEP. The Student's December 2018 IEP did not include information about the use of headphones or music. Regardless, the documentation in this complaint indicates this accommodation seemed to be something school staff agreed the Student could access, but it was not provided consistently. The occupational therapist's September 2018 notes indicated listening to music was not an option because the Student needed too much supervision on the computer, but that sound dampening headphones continued to be an

option—although, this does not indicate if the Student was actually accessing this accommodation. Further, information from the Student’s teachers indicate the classroom had noise cancelling headphones the Student sometimes chose to use. However, one of the Student’s teachers indicated she wasn’t aware of this accommodation until late in the 2018-2019 school year—after it was no longer in the IEP—indicating this accommodation was not consistently provided earlier in the year, even when it was in the IEP. Given this confusion, the inconsistency in the Student’s IEPs, and the documentation that the provision of the accommodation was inconsistent, OSPI finds the District in violation regarding this particular accommodation. The District will be required to hold an IEP meeting to discuss the accommodations in the Student’s IEP and the implementation of those accommodations.

Regarding instruction, the Student’s teachers provided information that they adapted the Student’s work to her level, provided extra one-on-one instruction outside the provision of specially designed instruction, explained instructions individually and repeated instruction, checked-in repeatedly during work time, broke instruction into parts, and checked for understanding. Some information from the Parent about the Student’s experience in school—e.g., the Student did not understand directions on the board, felt confused/overwhelmed/stressed by what’s going on—calls into question whether the accommodations were always effective for the Student. However, it does appear the Student’s teachers were providing accommodations related to checking for understanding and repeating instruction. While OSPI finds no violation here, OSPI recommends the District consider and discuss with the Parent whether accommodations need to be added or changed given their effectiveness.

Social Skills Group – The Parent alleged the Student was removed from her social skills group/learning support classroom without holding an IEP meeting or amending the IEP.

The Student’s December 2018 IEP provided the Student with specially designed instruction in social/emotional skills for 30 minutes per week. The Student received this social/emotional instruction on Wednesdays in a 30-minute pull-out session. In late April 2019, the Student started participating in a “social skills group,” which meant the Student spent the last 5-10 minutes of each day in the learning support classroom where the IEP manager had “supervised time...for students that are waiting for their bus...where they are able to talk and play games.” The Student began participating in this after the Parent expressed concerns about the Student struggling with social connections. This was not added to the Student’s IEP because the Student was not receiving specially designed instruction during this time. It was, instead, an extra time for a social activity with peers.

On June 3, 2019, the Student lost the privilege of attending the end-of-day social group following a behavioral incident. According to the Parent, the Student said she was no longer allowed to go to learning support at all. The Parent believed this was a violation of the Student’s IEP. The District attempted to clarify—although it appears there was misunderstanding—that the Student continued to receive her specially designed instruction. The District stated the Student received the majority of her services in the general education classroom and received specially designed instruction with a small group of other students with IEPs. The District also noted, due to end of

year activities, the Student was socializing with her peers at the end of the day in her classroom instead of the learning support room.

Ultimately, as the end-of-day social time was not part of the Student's IEP, the loss of this privilege did not result in a failure to implement the Student's IEP. While the Parent may disagree with how the District handled the behavioral consequence, this is not a violation of the IDEA. OSPI finds no violation.

FM Device – The Parent alleged the District failed to accommodate the Student's auditory processing disorder by denying the Student the use of an FM system. This allegation was originally opened as an IEP implementation issue. Upon investigation, OSPI learned the FM system was not part of the Student's IEPs, but was instead requested by the Parent in August 2018. As such, this issue is more properly analyzed in terms of whether the District followed procedures for responding to the Parent's request for a change to the Student's educational program. Parents are considered equal partners with school personnel in making these decisions, and the IEP team must consider the parents' concerns and the information they provide regarding their child in developing, reviewing, and revising IEPs.

In May 2018, the Student was diagnosed with an auditory processing disorder. The Parent provided the District with the private auditory evaluation report in August 2018 and requested an IEP meeting to add an FM device—per the private evaluation's recommendation—to the Student's IEP. Based on the documentation in this complaint, shortly after the Parent provided the report, the District and the educational service district (ESD) audiologist (contracted to work with the District) began discussing doing a trial of an FM system for the Student. Due to a shortage of FM systems in the District, there was a delay in obtaining an FM system for the Student. This delay appeared to be compounded by confusion regarding whether the IEP team needed to meet first or whether the FM system trial needed to occur first (*see e.g.*, October 16-19, 2018 emails from the audiologist, stating she was unclear whether the FM system would be a trial and "when and how we can put an FM system on [the IEP]"; email from the special education coordinator, stating this was an IEP team decision; Parent's October 19, 2018 communication, indicating staff told her they both needed to try the FM system before adding to the Student's IEP and that it needed to be in the Student's IEP before the Student would have access to an FM system.)

On October 29, 2018, the Student began using an FM system on a trial basis and the District proposed scheduling an IEP meeting. The Student's IEP team met on December 18, 2018 and discussed the FM system trial, which lasted from October 29 through November 20, 2018.

The District's report on the FM system noted the Student's teachers stated the FM system provided no "significant change, or benefit of use" and the Student "did not receive benefit from the FM, and it did not improve attention, focus, ability to understand and follow directions, rate of learning etc." The District did not recommend the Student use the FM system in the classroom. Conversely, the Student reported she was often confused at school, that she watched other students to help know what to do, and that the Student said the FM device was helpful—it "helped her understand what the teacher was saying."

Consistent with the private report, the audiologist recommended the Student continue to receive “learning support, communication and counseling services,” as well as “preferential seating, written instruction, closed captioning, and verbal re-instruction.” The audiologist recommended “encouraging self-advocacy and use of listening strategies to help improve comprehension, and communication break-downs.” The Student’s December 2018 IEP did add accommodations for extra processing time, verbal re-instruction, closed captioning for videos, and ask comprehension questions.

Subsequently, the District—in consultation with the Student’s private audiologist—agreed to do a second trial from February 6-26, 2019. The District reported the second trial also indicated no benefit and the District stated it did not recommend the use of the FM system for the Student. The Student’s teachers “indicated no benefit from the FM system. Her teacher also reported that they had to remind her more often this time to wear it, and she complained of the ‘crackling’ sounds from the microphone again.” And, the ESD audiologist stated, “due to the results of the trial, and considering her complex medical history, I don’t recommend the use of the FM system” and that the Student’s “other diagnoses can affect her ability to benefit from the FM.”

The District did respond to the Parent’s concerns and information about the Student’s auditory processing disorder, although OSPI is concerned about the length of time it took for an IEP meeting to occur. While some delay is understandable given the shortage of FM systems and the need to gather data, the Parent did notify the District in August 2018 that the Student was diagnosed with an auditory processing disorder. The Student’s IEP team did not meet until December 18, 2018—four months later—to discuss the new information provided by the Parent. The District’s decision to trial the FM system, gather data, and conduct an assessment revision was appropriate given the new information presented by the Parent and OSPI finds no flaw in the District’s procedures for carrying out those steps.

However, given that the District eventually declined to provide the Student with an FM system, OSPI believes the District could have taken steps to address the Student’s auditory processing disorder sooner. While other accommodations were added to the Student’s IEP in December 2018, this again was four months after the Parent provided the District with the Student’s new diagnosis. Further, OSPI is concerned that there is very little documentation that any of the accommodations added to the Student’s IEP specifically to address auditory processing, according to the District, were implemented. In retrospect, the District should have held an IEP meeting much earlier in the fall to discuss the Parent’s new information, the Student’s needs, and interim supports while the FM system was being tested. So, again, while OSPI finds the steps the District took (FM trial, assessment revision) reasonable and that the District followed procedures to conduct the assessment revision, OSPI believes the District could have acted sooner and reminds the District, in future, to respond to parent requests in timely manner.

The Parent expressed concerns about the FM trials, including: that the device was not monitored; there were problems with the volume and lack of volume adjustment for the Student; and, the trials used a type of headphones that hurt the Student’s ears and therefore, she would take them off. The Parent again emphasized the Student said she could understand better with the FM system, but the volume was often too loud or soft. The Parent also expressed concern that the

second trial was an exact repeat of the first and the District did not seem to take any of the Parent's concerns into consideration when conducting the second trial. Further, some of the staff statements (e.g., "considering her complex medical history, I don't recommend the use of the FM system" and "the Student's other diagnoses can affect her ability to benefit from the FM") could indicate the FM trial was not individualized based on the Student's unique needs. While generally, OSPI would defer to the expertise of the audiologist who set up the trial, OSPI is concerned the District did not consider the Parent's input when setting up the second trial and did not seem to consider the Student's other disabilities/diagnoses in structuring the trial. The Student's auditory processing disorder does not exist in isolation, and thus, cannot necessarily be tested in isolation. If the District believed the Student's other diagnoses would impact the FM trial, the District should have adjusted the trial or put in place additional supports to accommodate the Student's other needs. As such, it is impossible to tell if the Student truly did not benefit from the FM system or whether the trial was flawed. Thus, OSPI finds a violation based on the District's failure to consider the Parent's input and failure to properly address the other aspects of the Student's disability in the trial. The Student's IEP team will meet to discuss if a further FM trial is warranted or if other supports and services would be more appropriate to address the Student's auditory processing disorder.

Issue Two: Least Restrictive Environment & Nonacademic Activities – The Parent alleged the District took away the Student's recess and lunches as punishment. To the maximum extent appropriate, a student eligible for special education services will be educated in the general education environment with peers without disabilities. The district must take steps to afford a student eligible for special education the equal opportunity to participate in nonacademic and extracurricular services and activities with peers, such as lunch and recess.

During the 2018-2019 school year, the following occurred related to the Student's access to recess and lunch:⁸

- March 22, 2019: The Student was removed from recess "due to interactions with another student."
- April 8, 2019: An incident at lunch required the Student to discuss her behavior with the principal during lunch.
- May 20, 2019: Student missed lunch due to a schedule mix-up by the staff person working with the Student.

Based on the documentation, the Student attended recess and lunch the vast majority of the time during the 2018-2019 school year. The Student did miss recess once, on March 22, 2019, and the Parent made clear she did not agree with this as a consequence for the Student's behavior, and believed this was a violation of the Student's IEP. The Student also missed part of lunch on April 8 and on May 20, 2019. On April 8, 2019, the Student was required to discuss a behavior incident with the principal during lunch, but then participated in recess, according to the District. On May

⁸ The Parent also alleged the Student was not allowed to access recess May 13-17, 2019. The District explained that the Student did access lunch and recess during this time period, but on a different schedule based on the District's District-wide standardized testing. OSPI believes the Student did access lunch and recess during this time period.

20, 2019, the Student missed all or part of lunch due to a scheduling error and the District stated it put in place additional safeguards to ensure that the mistake did not happen again.

Ultimately, the Student missed one recess and two lunches during the school year. While it is clear the Student missing recess was a major concern for the Parent, it is also clear the District attempted to work with the Parent (*see*, statements from the principal about working on a plan to ensure the Student accessed her recess, and the Parent and special education coordinator's discussions about the topic) and put in place safeguards to help ensure lunch was not missed. While students should be consistently accessing lunch and be given time to eat, the missed recess and lunches, in this case, do not amount in a change to the Student's least restrictive environment and did not deprive her of the opportunity to participate with nondisabled peers in nonacademic and extracurricular activities.

OSPI further notes the Student's December 2018 IEP—in place during these incidents—did *not* have an accommodation related to recess, unlike the Student's previous IEP (the May 2018 IEP included the accommodation: "allowance for regularly scheduled recesses.") At the time of the incidents, there was no accommodation related to recess; thus, the District did not fail to implement the Student's IEP. Overall, OSPI finds no violation of the IDEA related to the Student's least restrictive environment and access to nonacademic opportunities.

Issue Three: IEP Amendment – The Parent alleged the District amended the Student's IEP without discussing the changes with her or receiving her permission to make the changes.

After the annual IEP team meeting, the IEP team may develop a written document to amend or modify a student's IEP with an IEP meeting or with an agreement to not convene the IEP team. Parents are considered equal partners with school personnel in making these decisions, and the IEP team must consider the parents' concerns and the information that they provide regarding their child in developing, reviewing, and revising IEPs. The IEP team should work toward consensus, but the district has ultimate responsibility to ensure the IEP includes the services the student needs in order to receive a free appropriate public education (FAPE). If the team cannot reach consensus, the district must provide the parents with prior written notice of the district's proposals or refusals, or both, regarding the student's educational program and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.

Here, the December 18, 2018 IEP was the only IEP developed during the time period under investigation. In her complaint and other communications, the Parent stated the following changes were of specific concern:

- Removing an accommodation to eat in a small group setting daily;
- Removing a nutrition goal considered "met";
- Removing a schedule for snacks from the Student's IEP;
- Removing the recess accommodation; and,
- Substituting movement breaks for sensory breaks.

First, the accommodation to eat in a small group setting does not appear in either the Student's May 2018 or December 2018 IEPs; therefore, while this accommodation may have been removed

from an earlier IEP, it was not done so during the time period under investigation. If the Parent believes this accommodation is still needed, OSPI recommends the Parent request an IEP meeting to discuss the Student's accommodations.

Regarding the removal of a nutrition goal, all of the Student's District IEPs have included some amount of information about nutrition. The Student did not have an annual goal related to nutrition in her May or December 2018 IEP; therefore, if there was wording related to nutritional goals in previous IEPs, any changes are also outside the scope of this complaint investigation.

The Parent also alleged the District improperly removed a specific schedule for snacks that was previously included in the Student's IEP. The Student's September 2017 (although outside the investigation time period) provided that the Student had four daily snacks and that the Student was allowed to eat these throughout the day, and provided the Student with the following accommodation: "Classroom – Allow Student Access to Water and Nutrition/Food Items as Needed, During Class Period, general education and special education." In both the IEPs in place during the investigation time period (May and December 2018 IEPs), the Student had the same snack accommodation as the 2017 IEP. The May 2018 IEP also included the following, in the present levels: "At [Parent's] request, per doctor's note [Student] should continue with 3 meals and 3 snacks a day. She will continue to pack snacks to eat throughout the day. Also addressed in accommodations." The December 2018 IEP did not contain the same level of detail, but noted the Student had a diagnosis of malnutrition and accessed snacks throughout the day.

While the May 2018 IEP included additional detail in the present levels, both the May and December 2018 IEP included the same snack accommodation. Neither IEP included a specific schedule; therefore, there is no documentation to support the allegation that the schedule for snacks was improperly removed from the IEP. As such, the District did not improperly amend the Student's IEP regarding the snack accommodation and OSPI finds no violation. If the Parent wishes the IEP to include a specific schedule for snacks, the Parent is encouraged to raise this as a topic of discussion at an IEP meeting.

The Student's May 2018 IEP included the following accommodation: "Allowance to have regularly scheduled recesses (daily, school setting)." This accommodation was removed from the December 2018 IEP. The Parent and District disagree as to whether the IEP team actually discussed this accommodation at the meeting. The District stated, "the focus was on getting to the purpose of the need to not miss recess and also consider/address that the student was moving to middle school within the IEP year and there isn't a recess at that level." The District stated, the purpose was identified as a need for "sensory/movement" and the team "addressed that in an accommodation for movement breaks." The Parent stated the accommodation was not addressed and that she did not bring up the accommodation because she assumed it would—like other accommodations not discussed—remain on the IEP.

The Parent also stated she disagreed with the change from sensory breaks (May 2018 IEP "sensory breaks as needed") to movement breaks (December 2018 IEP). The Parent stated she felt the

District “bullied and pressured [her] into signing the form”⁹ even though she disagreed with the change and “the team tried to convince me that movement breaks and sensory breaks are the same thing, which they are not.” OSPI believes there was some degree of miscommunication or misunderstanding here because the Parent’s December 18, 2018 “IEP Meeting” document appeared to request that some sort of physical activity or movement break be added to the Student’s IEP. Perhaps the Parent’s intent was that physical activity or movement breaks be added *in addition to* the already existing accommodation of sensory breaks, and this distinction was lost in the IEP team discussion. OSPI can see how the District believed it was granting the Parent’s request to add a movement break (and address her concerns about recess), and at the same time, acknowledges the Parent continues to have concerns regarding these changes.

Regarding both removal of the recess accommodation and the change from sensory breaks to movement breaks, these changes are IEP team decisions. In this case, it appears the IEP team made the decision to change the Student’s accommodations and the Parent disagreed. While a parent is an equal member of an IEP team, and an IEP team should work toward consensus, there may be times when a member or members of the IEP team disagree with elements of the final IEP. A district has the ultimate responsibility to offer a FAPE and to notify a parent of prior written notice of the district’s proposals or refusals regarding a student’s educational program. Here, the District did that through the development of the December 2018 IEP and subsequent prior written notice. A parent’s disagreement with the outcome does not always mean a district failed to follow procedures to develop an IEP. OSPI finds no violation related to the recess and sensory/movement accommodations. OSPI does encourage the District to revisit these accommodations at the Student’s next IEP meeting as it is clear the Parent continues to have concerns.

CORRECTIVE ACTION

By or before **December 6, 2019**, the District will provide documentation to OSPI that it has completed the following corrective action.

STUDENT SPECIFIC:

By or before **November 29, 2019**, the Student’s IEP team will meet to address concerns raised in this complaint. The IEP team will discuss and document discussion of, at minimum, the following topics:

- The headphone/music accommodation and how this is documented in the Student’s IEP;
- A further FM trial or other supports/services specifically designed to address the Student’s auditory processing disorder; and,
- How the accommodations are being implemented.

⁹ OSPI does note the District’s response contained a form the Parent signed, stating she agreed with the IEP. OSPI reminds the District that there is no requirement in Washington that parents sign something to indicate their agreement with an IEP. While not required, the use of such a form is generally fine. However, OSPI notes that in this situation, the Parent stated she felt “bullied and pressured” into signing and reminds the District that it should make clear to parents they are not required to sign such a form and that declining to sign will not impact their student’s receipt of special education services.

OSPI strongly recommends the IEP team also revisit other accommodations mentioned in this decision as it is clear the Parent continues to have concerns. OSPI recommends the District and Parent consider holding a facilitated IEP meeting through Sound Options. Or, OSPI encourages the District and the Parent to consider having an IEP meeting—at least in part—led by the Student, to encourage her to have a voice in determining how she can be successful at school.

By **December 6, 2019**, the District will submit to OSPI: 1) a copy of the meeting invitation; 2) a copy of any prior written notices; 3) a copy of the agenda or topics discussed at the meeting; 4) a copy of any IEP amendment; 5) a copy any notes from the meeting; and, 6) any other related documents.

DISTRICT SPECIFIC:

None.

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

RECOMMENDATIONS

The District did note in its response that “a review of records and evidence collected...revealed that there were multiple communication breakdowns between the parent and the school throughout the 2018-19 school year.” The District stated, “evidence indicates that the breakdowns occurred on all sides.” The District further stated it would be providing written guidance to the Student’s IEP team on strategies to improve communication. OSPI agrees that the documentation indicates there was a communication breakdown, particularly at the end of the school year. While OSPI will not be requiring guidance related to communication, OSPI recommends the District provide this guidance. OSPI also strongly recommends the District consider using an IEP facilitator for future IEP meetings to help facilitate communication on the IEP team.

Dated this ____ day of November, 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.)