

## **SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 19-67**

### **PROCEDURAL HISTORY**

On September 13, 2019, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Nooksack Valley School District (District). The Parent alleged 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 17, 2019, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District Superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On October 10, 2019, OSPI received the District's response to the complaint and forwarded it to the Parent the same day. OSPI invited the Parent to reply with any information she had that was inconsistent with the District's information.

On October 14, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. On October 18, 2019, OSPI received the requested information from the District and forwarded it to the Parent that same day.

On October 14, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District a second time. On October 22, 2019, OSPI received the requested information from the District and forwarded it to the Parent that same day.

On October 22, 2019, OSPI received the Parent's reply. OSPI forwarded that reply to the District on October 23, 2019.

On October 23, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the Parent. On October 23, 2019, OSPI received the requested information from the Parent. OSPI forwarded that information to the District on October 25, 2019.

On October 23, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the Parent a second time. On October 24, 2019, OSPI received the requested information from the Parent. OSPI forwarded that information to the District on October 28, 2019.

On October 22 and 24, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. On October 24 and 25, 2019, OSPI received the requested information from the District. OSPI forwarded that information to the Parent on October 28, 2019.

On October 28, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. On October 28, 2019, OSPI received the requested information from the District. OSPI forwarded that information to the Parent on October 29, 2019.

On October 29, 2019, OSPI received the information from the District that was originally requested on September 17, 2019. OSPI forwarded that information to the Parent on October 29, 2019.

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

OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District on the following dates: October 29, 2019; October 30, 2019; October 31, 2019; and November 1, 2019. OSPI received the requested information from the District on the following dates: October 30, 2019; October 31, 2019; November 1, 2019; and November 4, 2019. OSPI forwarded the received information to the Parent on November 5, 2019.

OSPI's investigator conducted a phone interview of the special education director on October 29, 2019.

OSPI's investigator conducted a phone interview of the following individuals on October 30, 2019: principal, speech language pathologist, and administrative assistant for student services.

OSPI received additional information from the Parent's attorney on the following dates: October 31, 2019; November 1, 2019; and November 4, 2019. OSPI forwarded that information to the District on November 5, 2019.

OSPI's investigator conducted a phone interview of the following individuals on October 31, 2019: special education teacher, paraeducators 2-5, occupational therapist 1, school psychologist 2, and a District social worker.

OSPI's investigator conducted a phone interview of occupational therapist 2 on November 1, 2019.

On November 1, 2019, OSPI determined that additional information would be helpful to the investigation and contacted the District. OSPI received that information on November 5, 2019 and forwarded it to the Parent and the Parent's attorneys on November 6, 2019.

On November 5, 2019, OSPI received additional information from the Parent's attorneys. OSPI forwarded that information to the District on November 6, 2019.

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.

## SCOPE OF INVESTIGATION

This decision references events which occurred prior to the investigation time period, which began on September 14, 2019. 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 time period.

## ISSUES

1. Did the District use proper isolation and restraint procedures since September 14, 2018, including:
  - a. The use of a proper isolation enclosure under WAC 392-172A-02110(1)(b)-(c);
  - b. Discontinuing the isolation and/or restraint as soon as the likelihood of serious harm has dissipated. WAC 392-172A-02110(1)(a); -(2)(a); and,
  - c. Following proper documentation and reporting requirements consistent with RCW 28A.600.485?
2. Did the District follow proper procedures for ensuring parent participation in individualized education program (IEP) meetings since September 14, 2018?<sup>1</sup>
3. Did the District implement the Student's IEP(s) since September 14, 2018?
4. Did the District improperly shorten the Student's school day beginning September 4, 2019?

## LEGAL STANDARDS

Isolation and Restraint Conditions: Isolation and restraint shall be used only when a student's behavior poses an imminent likelihood of serious harm. WAC 392-172A-02110.

Likelihood of Serious Harm: Likelihood of serious harm as defined in RCW 70.96B.010 means: (1) A substantial risk that: (a) Physical harm will be inflicted by a person upon his or her own person, as evidenced by threats or attempts to commit suicide, or inflict physical harm on oneself; (b) Physical harm will be inflicted by a person upon another, as evidenced by behavior that has caused such harm or that places another person or persons in reasonable fear of sustaining such harm; or (c) Physical harm will be inflicted by a person upon the property of others, as evidenced by behavior that has caused substantial loss or damage to the property of others; or (2) The person has threatened the physical safety of another and has a history of one or more violent acts. WAC 392-172A-01109.

Imminent: Imminent as defined in RCW 70.96B.010 means: The state or condition of being likely to occur at any moment or near at hand, rather than distant or remote. WAC 392-172A-01092.

Isolation Enclosure: Any isolation enclosure must be ventilated, lighted, and temperature controlled from inside or outside for purposes of human occupancy. Furthermore, the isolation

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<sup>1</sup> In the course of the investigation of this complaint, the Parent's complaint on this issue was clarified. Specifically, the Parent stated: "IEP meetings were actually moved to exclude occupational therapist 2 which thus inhibited my participation and the flow of information about what was actually happening in the classroom."

enclosure shall permit continuous visual monitoring of the student from outside the enclosure. WAC 392-172A-02110.

Isolation: Isolation as defined in RCW 28A.600.485 means: Restricting the student alone within a room or any other form of enclosure, from which the student may not leave. It does not include a student's voluntary use of a quiet space for self-calming, or temporary removal of a student from his or her regular instructional area to an unlocked area for purposes of carrying out an appropriate positive behavioral intervention plan. WAC 392-172A-01107.

Positive Behavioral Interventions: Positive behavioral interventions are strategies and instruction that can be implemented in a systematic manner in order to provide alternatives to challenging behaviors, reinforce desired behaviors, and reduce or eliminate the frequency and severity of challenging behaviors. Positive behavioral interventions include the consideration of environmental factors that may trigger challenging behaviors and teaching a student the skills to manage his or her own behavior. WAC 392-172A-01142.

Restraint: Restraint as defined in RCW 28A.600.485 means: Physical intervention or force used to control a student, including the use of a restraint device to restrict a student's freedom of movement. It does not include appropriate use of a prescribed medical, orthopedic, or therapeutic device when used as intended, such as to achieve proper body position, balance, or alignment, or to permit a student to participate in activities safely. WAC 392-172A-01162.

Restraint Device: Restraint device as defined in RCW 28A.600.485 means: A device used to assist in controlling a student including, but not limited to, metal handcuffs, plastic ties, ankle restraints, leather cuffs, other hospital-type restraints, pepper spray, tasers, or batons. This section shall not be construed as encouraging the use of these devices. A restraint device does not include a seat harness used to transport a student safely or other safety devices, including safety belts for wheelchairs, changing tables, booster seats, and other ambulatory or therapeutic devices when used for the purpose intended for the safety of a student. WAC 392-172A-01163.

Restraint Device Conditions: A restraint device shall be used only when a student's behavior poses an imminent likelihood of serious harm. The use of a restraint device as defined by RCW 28A.600.485 is subject to each of the following conditions: a) the restraint device must be discontinued as soon as the likelihood of serious harm has dissipated; b) the restraint device shall not interfere with the student's breathing; c) either the student shall be capable of releasing himself or herself from the restraint device or the student shall continuously remain within view of an adult responsible for supervising the student; d) any staff member or other adults using a restraint device must be trained and certified by a qualified provider in the use of such restraint devices, or otherwise available in the case of an emergency when trained personnel are not immediately available due to the unforeseeable nature of the emergency. School districts must follow the documentation and reporting requirements for any use of isolation, restraint, or restraint device consistent with RCW 28A.600.485. WAC 392-172A-02110.

Follow-up and Reporting Requirements: School districts must follow the documentation and reporting requirements for any use of isolation or restraint consistent with RCW 28A.600.485. WAC

392-172A-02110. Following the release of a student from the use of restraint or isolation, the school must implement follow-up procedures. These procedures must include: reviewing the incident with the student and the parent or guardian to address the behavior that precipitated the restraint or isolation and the appropriateness of the response; and reviewing the incident with the staff member who administered the restraint or isolation to discuss whether proper procedures were followed and what training or support the staff member needs to help the student avoid similar incidents. Any school employee, resource officer, or school security officer who uses isolation or restraint on a student during school-sponsored instruction or activities must inform the building administrator or building administrator's designee as soon as possible, and within two business days submit a written report of the incident to the district office. The written report must include, at a minimum, the following information: the date and time of the incident; the name and job title of the individual who administered the restraint or isolation; a description of the activity that led to the restraint or isolation; the type of restraint or isolation used on the student, including the duration; whether the student or staff was physically injured during the restraint or isolation incident and any medical care provided; and any recommendations for changing the nature or amount of resources available to the student and staff members in order to avoid similar incidents. The principal or principal's designee must make a reasonable effort to verbally inform the student's parent or guardian within twenty-four hours of the incident, and must send written notification as soon as practical but postmarked no later than five business days after the restraint or isolation occurred. If the school or school district customarily provides the parent or guardian with school-related information in a language other than English, the written report under this section must be provided to the parent or guardian in that language. RCW 28A.600.485.

Evidentiary Weight: According to the Office of Special Education and Rehabilitative Services (OSERS), "it would not be inconsistent with the IDEA...for a State to use a 'preponderance of the evidence' standard in making independent determinations as to whether a public agency violated a requirement of Part B of the IDEA." *Letter to Reilly*, 64 IDELR 219 (OSERS 2014). Merriam-Webster's Dictionary of Law defines the phrase "preponderance of the evidence" as "the standard of proof...in which [a] party [wishing to establish a factual premise] must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not." MERRIAM-WEBSTER'S DICTIONARY OF LAW 377 (1996).

Parent Participation in IEP Meetings: Parents of a child with a disability will participate with school personnel, in developing, reviewing, and revising the student's individualized education program (IEP). This is an active role in which the parents: provide critical information regarding the strengths of their child, and express their concerns for enhancing their child's educational program; participate in discussions about their child's need for special education, related services, and supplementary aids and services; and join with 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. 12473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 5). An IEP team is composed of, in part, any individuals who have knowledge

or special expertise regarding the student, including related services personnel. 34 CFR §300.321(a); WAC 392-172A-03095(1). An IEP meeting invitation inform the parents of the provisions relating to participation by other individuals on the IEP team who have knowledge or special expertise about the student. 34 CFR §300.322; WAC 392-172A-03100(3).

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction who is eligible to receive special education services. A school district must 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 child with a disability and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

Missed IEP Services: In the situation "where the student is absent from school because of the family's or physician's decision that the student not attend school...the general rule is that, if the school district makes IEP services available to the student at the normally scheduled time, the school district is not obligated to make other arrangements to provide services." In the situation "where the student cannot receive the services in his or her IEP due to reasons associated with participation in school-sponsored activities or the unavailability of needed personnel...the school district generally will be responsible for making alternative arrangements for providing IEP services." *Letter to Balkman*, 23 IDELR 646 (OSERS 1995), *explicitly reaffirmed by Letter to Copenhaver* (OSERS 2008).

Compensatory Education: A state educational agency is authorized to order compensatory education through the special education citizen complaint process. *Letter to Riffel* 34 IDELR 292 (OSEP 2000). Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 56 IDELR 31, (9<sup>th</sup> Cir. 2011). There is no requirement to provide day-for-day compensation for time missed. *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9<sup>th</sup> Cir. 1994). "There is no statutory or regulatory formula for calculating compensatory remedies. However, generally services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting. It is common in Washington for such one-to-one services to be calculated at half of the total hours missed." *In re: Mabton School District*, 2018-SE-0036. The award of compensatory education is a form of equitable relief and the IDEA does not require services to be awarded directly to the student. *Park ex rel. Park v. Anaheim Union School District*, 464 F.3d 1025, 46 IDELR 151 (9<sup>th</sup> Cir. 2006).

Requirements for Physical Education: Each student eligible for special education services must be afforded the opportunity to participate in the general physical education program available to students who are not disabled, unless the student is enrolled full time in a separate facility or the student needs specially designed physical education, as described in the student's IEP. If the student requires specially designed physical education, the district will ensure that the school either provides the services directly or makes arrangements with a private program. 34 CFR §300.108; WAC 392-172A-02030.

FAPE and Shortened School Day: Students eligible for special education services should attend school for the same amount of time as students without disabilities, unless the IEP team decides that a shortened school day is necessary to ensure access to a free appropriate public education (FAPE). See *Shoreline School District No. 412*, 55 IDELR 178 (OCR 2010) (Finding that a student with a disability has the right to the same length school day as a nondisabled student).

IEP Development for a Student with Behavioral Needs: In developing, reviewing and revising each student's IEP, the team must consider the use of positive behavioral interventions and supports and other strategies to address the student's behavior. 34 CFR §300.324(a)(2); WAC 392-172A-03110(2). This means that in most cases in which a student's behavior impedes his or her learning or that of others, and can be readily anticipated to be repetitive, proper development of the student's IEP will include positive behavioral interventions, strategies, and supports to address that behavior. IDEA, 64 Fed. Reg. 12,475, 12,479 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 38). A functional behavioral assessment (FBA) and behavioral intervention plan (BIP) must be used proactively, if an IEP team determines that they would be appropriate for a child. For a child with a disability whose behavior impedes his or her learning or that of others, and for whom the IEP team has decided that a BIP is appropriate, the IEP team must include a BIP in the child's IEP to address the behavioral needs of the child. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-1 and E-2).

Functional Behavioral Assessment (FBA): An FBA focuses on identifying the function or purpose behind a child's behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP team in developing a behavioral intervention plan (BIP) that will reduce or eliminate the misbehavior. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-2). The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP, which includes behavioral intervention services and modifications that are designed to address and attempt to prevent future behavioral violations. *Letter to Janssen*, 51 IDELR 253 (OSERS 2008).

An FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. As with other evaluations, to conduct an FBA, the district must obtain the parents' consent and complete the FBA within thirty-five (35) school days after the district received consent. 34 CFR §300.303; WAC 392-172A-03015. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-4). Once the need for a reevaluation is identified, a district must act "without undue delay and within a reasonable period of time;" and the U.S.

Department of Education, Office of Special Education Programs (OSEP) has indicated that waiting several months to seek consent is generally not reasonable. *Letter to Anonymous*, 50 IDELR 258 (OSEP 2008). The IDEA does not specify who is qualified to conduct an FBA, for example there is no requirement that a board-certified behavior analyst, or any other specific individual, conduct an FBA. *Letter to Janssen*, 51 IDELR 253 (OSERS 2008).

Behavioral Intervention Plan (BIP): A BIP is a plan incorporated into a student's IEP if determined necessary by the IEP team for the student to receive FAPE. The BIP, at a minimum, describes: the pattern of behavior(s) that impedes the student's learning or the learning of others; the instructional and/or environmental conditions or circumstances that contribute to the pattern of behavior(s) being addressed by the IEP team; the positive behavioral interventions and supports to reduce the pattern of behavior(s) that impedes the student's learning or the learning of others and increases the desired prosocial behaviors and ensure the consistency of the implementation of the positive behavioral interventions across the student's school-sponsored instruction or activities; and the skills that will be taught and monitored as alternatives to challenging behavior(s) for a specific pattern of behavior of the student. WAC 392-172A-01031.

## FINDINGS OF FACT

### Background Information

1. On February 26, 2016, the District completed a reevaluation of the Student. In regard to the Student's hearing capability, the February 2016 reevaluation read, in part:

Student is a highly impacted little boy with autism and other health impairments-hearing.

...

**Area of Evaluation: Fine Motor**

Child has...severe to profound hearing loss.

...

**Area of Evaluation: Medical-Physical**

Student's mother reports the hearing loss in the right ear is moderate and the loss in the left ear mild....Student was evaluated at the Pediatric Developmental Medicine Autism Center of Children's Hospital John Hopkins Medicine in St. Petersburg in 2014. A report dated 4/14/14 indicated a severe to profound hearing loss bilaterally in the presence of abnormal middle ear function for each ear.

In regard to the Student's communication skills, the February 2016 reevaluation read, in part:

**Area of Evaluation: Cognitive**

Attempts were made on 1/15/16 and 1/22/16 to administer portions of two cognitive assessments to Student...He demonstrated little speech. His mother reported he actually does use words when they are looking at a picture book together and she is reading to him...[His mom] began to print letters and he made letter sounds as she drew them. He vocalized many different vowel-consonant combinations...He imitated the word 'bear' and the word 'go.' His mom reported he does not use words at home to make his wants known but he watches her carefully when she communicates with him using sign language...He engaged with her when she made letters of the alphabet, trying to approximate each name. Some vocalizations were accurate and some unintelligible but all were purposeful attempts



to approximate the name...Student is displaying delays in communication...that are considerable.

...

**Area of Evaluation: Oral Language**

...

Receptive Language: Student exhibits normal breathing. He reacts to loud noises. He does not turn his head when someone is speaking with him. He does not smile at a person who is interacting with him consistently. He tends to look past or through you when trying to interact with him.

Expressive Language: Student makes other noises other than crying. He produces vowels. He laughs out loud. He produces more than three consonants. Although his verbalizations are minimal. He does not spontaneously greet others or say farewell.

**2017-2018 School Year**

2. On March 9, 2018, the Student's IEP team developed a new individualized education program (IEP) for the Student. The Student's March 2018 IEP included annual goals in the following areas: adaptive; cognitive 1; cognitive 2; cognitive-writing; social/emotional; arrival routine level 2; oral language; fine motor; gross motor.

The March 2018 IEP provided the Student with the following specially designed instruction in a *special education setting* from April 10, 2018 through March 8, 2019:

- Oral Language: 30 minutes 3 times a month (to be provided by a speech language pathologist)
- Fine Motor: 10 minutes 2 times a month (to be provided by an occupational therapist)
- Cognitive: 180 minutes 5 times a week (to be provided by a paraeducator)
- Adaptive: 95 minutes 5 times a week (to be provided by a paraeducator)
- Social/emotional: 63 minutes 5 times a week (to be provided by a paraeducator)
- Gross motor: 10 minutes 2 times a month (to be provided by an occupational therapist)

The March 2018 IEP provided the Student with the following related service in a *special education setting* from April 10, 2018 through March 8, 2019:

- Sensory: 10 minutes 1 time a month (to be provided by an occupational therapist)

The March 2018 IEP provided the Student with the following supplementary aids and services in a *special education setting* from March 9, 2018 through April 9, 2018<sup>2</sup>:

- Instructional Assistant: 345 minutes 5 times a week (to be provided by a paraeducator)

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<sup>2</sup> According to the District, the "April 9, 2018" end date for the provision of paraeducator support was "a typographical error [and] all members of the IEP team understood that the 1:1 paraeducator would be provided through March 8, 2019. The 1:1 paraeducator support continued to be provided through the 2018-2019 school year and for the 2019-20 school year." On this point, it is also of note the 'Support for School Personnel' portion of the March 2018 IEP stated the Student will be provided with "one assistant to one student" through March 8, 2019.

In regard to the Student's hearing capability, the March 2018 IEP read, in part: "The Student is hearing impaired and has hearing aids."<sup>3</sup>

In regard to the Student's communication skills, the March 2018 IEP read, in part:

**Team Considerations**

...

This student...is being taught using total communication: verbal, sign, pictures, print.

...

**Present Levels: Social/Emotional**

...

Student is learning to work within a group of six students when the academic content is presented with total communication (smartboard, sign, verbal).

...

**Present Levels: Oral Language**

...

Student has been making nice progress with speech therapy. He has been using total communication (sign, gestures, augmentative tech including Proloquo2go and smart board, verbal, and written). Student prefers to be verbal, but it appears that sign helps him understand...He is reluctant to imitate oral motor positions/sounds, but this is improving with multiple trials. He is using books to help him learn to read, write, sign and increase vocabulary.

**Measurable Annual Goals**

Annual Goal: Cognitive: By 3/8/2019, when given numbers to 120 Student will count by 10s forward and backwards, build, read, count (verbal/sign/augmentative) improving base 10 skills from 0/3 times for each number set to 3/3 times for each number set, as measured by teacher documentation for 2 data points.

Annual Goal: Cognitive: By 3/8/2019, when given functional words and pictures, Student will receptively identify a written word by matching it to the corresponding picture when given the verbal/sign cue to 'match word to picture'...

Annual Goal: Cognitive-Writing: By 3/8/2019, when given writing times Student will draw and write about one topic improving written language skills from drawing a picture on one topic with a label 2/2 trials to writing a simple sentence about one topic 2/2 trials as measured by teacher benchmark assessments in two different settings.

Annual Goal: Arrival Routine: Level 2: By 3/8/2019, when given Arrival Routine, Student will look at an adult and use total communication 'Hi, name,' walk to classroom, take off coat-backpack, and ask for 'help,' 'want help,' if needed, improving adaptive skills from standby assistance to independent as measured by teacher documentation two data points.

Annual Goal: Oral Language: By 3/8/2019, when given an opportunity to communicate Student will use total communication skills (verbalizations, gestures, sign language, and/or augmentative communication) improving his ability to communicate and moving up on the Project Data Communication goals from a score of 5 to a score of 8 as measured by SLP data...Student will imitate...'ling' sounds...Student will increase his sound awareness by

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<sup>3</sup> The special education director confirmed that "the Student has hearing aids for both ears."

recognizing when music stops/starts or will seek to find source of noise...Student will answer 'yes' [or] 'no' [to] concrete questions –“is this a \_\_\_?” / “is this the color\_\_\_?”

The March 2018 IEP provided the Student with, in part, the following accommodations in all settings each day: modification of instruction: visual aids (pictures, flash cards, etc.); modification of instruction: total communication; modification of instruction: check for understanding of instructions/directions; presentation: sign language—ASL or SEE; and response: total communication.

The 'Present Levels: Social/Emotional' portion of the March 2018 IEP read, in part: “[Student] is able to parallel play at recess<sup>4</sup>, within PE, and during integrated music.” The 'Special Education and Related Services' portion of the March 2018 IEP read, in part: “This student will participate with non-disabl[ed] peers for recess.”

3. As of March 2018, the Student had made the following progress on the goals included in his March 2018 IEP:
  - **Fine Motor:** Emerging Skill
  - **Gross Motor:** Emerging Skill
  
4. As of June 2018, the Student had made the following progress on the goals included in his March 2018 IEP:
  - **Adaptive:** Sufficient Progress
  - **Cognitive 1:** Emerging Skill
  - **Cognitive 2:** Sufficient Progress
  - **Cognitive-writing:** Emerging Skill
  - **Social-emotional:** Sufficient Progress
  - **Arrival Routine:** Level 2: Emerging Skill
  - **Oral Language:** Emerging Skill

### **2018-2019 School Year**

5. At the start of the 2018-2019 school year, the Student was eligible for special education under the category of autism and was in the first grade.
6. The District's 2018-2019 school year began on August 29, 2018.
7. The Student's schedule for the 2018-2019 school year it attached to this complaint decision and labeled **Exhibit A**.

In regard to the Student's 2018-2019 schedule, “the Student had sensory breaks designated on his daily schedule...the location of the sensory time and activities were not specified. The Student has sensory related goals in his IEP.”<sup>5</sup>

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<sup>4</sup> The special education teacher explained that parallel play “means that a student will play around/beside other students, but they are not playing together.”

<sup>5</sup> The Student's 2019-2020 schedule also included sensory breaks and the District said the aforementioned statement is equally applicable to the Student's 2019-2010 schedule. See below.

8. During the 2018-2019 school year, there were thirteen students in the Student's special education classroom.
9. According to the District, during the time period relevant to this complaint, three different paraeducators provided the Student with the 1:1 paraeducator support included in his various IEPs: paraeducator 1-3.

Paraeducator 1 was the Student's main paraeducator—in other words, the paraeducator that Student worked with for a majority of the school day. Paraeducator 2 stepped in to work with the Student when paraeducator 1 took a lunch period or work break. Paraeducator 3 would occasionally work with the Student; paraeducator 3 worked with the Student whenever paraeducator 1 was absent.

According to the District, two other paraeducators worked in the Student's classroom during the relevant time period, but these two paraeducators provided services to other students—in other words, they did not work with the Student. These two other paraeducators were: paraeducator 4 and paraeducator 5.

10. In the fall of 2018, occupational therapist 1 was assigned to provide occupational therapy services to the Student. According to the District, the Student received occupational therapy services in a location other than his special education classroom.
11. According to the Parent's reply, the Student demonstrated increasingly challenging behaviors as the 2018-2019 school year progressed:

As the school year progressed, I noticed that Student was exhibiting extremely aggressive behaviors in relation to school. For example, when Student would get off the bus, he would be in an agitated state which included hitting and biting me, a behavior that is highly unusual for him. This agitated state would often last for a number of hours after Student arrived home from school. The behaviors off the school bus were escalating and became a daily occurrence. Things became so bad that I had to plan activities such as taking Student swimming or to his grandmother's house immediately after school to help him calm down...Eventually, Student became so agitated in relation to school, he started to display significant school refusal behaviors and would sign to me 'no school' and 'different school.'

According to the Parent, the Student demonstrated increasingly challenging behaviors as the 2018-2019 school year progressed, in large part, because District staff used a "big white belt...to anchor Student to his chair." The Parent's complaint also read: "Student would come home wearing the belt they used to strap him down to chairs."

The Parent's reply to this complaint included a picture of the Student wearing what appears to be a large, white sensory belt. According to the Parent, this picture was taken by a District staff member, at school, during the 2018-2019 school year.

According to the District:

As reported by the teacher, principal and paraeducators, in 2018-2019 Student would arrive at school and as part of his arrival routine would get the sensory belt and fasten it himself

around his waist. Student was able to fasten and unfasten the sensory belt on his own and could remove it any time. The Student liked to put on the sensory belt to feel more secure. The Student was not required to wear the belt, but chose to wear it.

There is no evidence that the belt was co-designed to be used with a chair. The label on the front of the sensory belt [the Student used] says, 'Elgin.' The Elgin website appears to offer a belt similar to the belt worn by the Student, which is describes as a gait/walking belt. See <https://www.elgindivision.com/elgin-gait-/-walking-belts-with-handles/><sup>6</sup>

In the investigation of this complaint, OSPI's investigator asked the special education director questions concerning the use of the sensory belt during the 2018-2019 school year. OSPI received the following answers:

**Question:** The District states that, in 18-19, the Student would fasten the "sensory belt" to himself as part of his morning routine. Did District staff members ever check to see if the Student had put the belt on too tight? (The Parent states that, many times, when the Student got home, he had marks from the belt on or around his waist area.) If so, who checked? And was it a consistent check or only every once in a while?

**Answer:** District staff including the Student's special education teacher and paraeducator closely monitored the student every day. They did not observe the belt being overly tight or otherwise causing the Student any difficulties. As described above, the belt was an optional sensory item the Student chose to wear.

**Question:** In 18-19, once the Student had put the sensory belt on himself, was the sensory belt ever taken off during the course of the school day? If so, when and why? For how long? If it went back on after being off for a while, who put it back on?

**Answer:** The Student removed the sensory belt during the course of the day, when using restroom and before putting coat on for recess. He chose to put the belt back on after using the restroom or removing his coat after recess. The Student fastened and unfastened belt on his own.

**Question:** The District mentions that, in 18-19, the Student liked to wear the sensory belt because it made him feel secure. Was there a goal related to reducing the Student's reliance on the sensory belt? Was this a topic/concern that was ever discussed by either the IEP team as a whole or even just District staff members?

**Answer:** The Parent was present for and participated in the February 25, 2019 IEP meeting. She and the remaining members of the IEP team acknowledged that the Student liked the belt because it made him feel more secure. His use of the belt was not required and was voluntary. The District is not aware of any restriction in the IDEA that prohibits a student from wearing or using sensory items that are beneficial to him.

**Question:** The District states that, in 18-19, the Student could put his sensory belt on and take it off on his own. When was the Student first able to do this? Did the Student put his sensory belt on completely unassisted?

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This link describes the product as follows: "The Elgin Heavy Duty Walking Belt is a unique patient assisting tool that offers patients and caregivers true confidence...4" wide with Velcro closure, two vertical handles on the sides, one horizontal handle on the back....Nylon webbing is extremely soft against the skin and extra durable."

**Answer:** The Student used the sensory belt unassisted throughout the 18-19 school year.

**Question:** Where in the classroom was the sensory belt stored each night? Where did Student go in the classroom each morning to retrieve the sensory belt?

**Answer:** The sensory belt was stored in the Student's cubby in the classroom or at his work station, the Student routinely retrieved the sensory belt each morning from his cubby or work station. On some occasions the Student's parent requested the belt be sent home with him, which the District permitted.

**Question:** The Parent believes that the Student had excellent coordination but that District staff believed the Student had poor coordination. Is this an accurate statement re: District staff members' beliefs about the Student's coordination?

**Answer:** The district is not aware of any staff member who believed the Student has poor coordination.

**Question:** Did the "sensory belt" limit Student's movement at all?

**Answer:** The sensory belt did not limit the Student's movements.

**Question:** If the Student ever fell over, and the Student was wearing the "sensory belt," did District staff grab hold of the "sensory belt" as an easier way to pick the Student up?

**Answer:** Staff would not use the sensory belt to pick up the Student.

12. According to the District, during the 2018-2019 school year:

The Student also had seating preferences, a child's wood rifton chair with a front buckling strap. This chair is designed to support positioning and providing security and stability for children with sensory and strength needs. Staff reported Student used the chair at his work place, seating himself and buckling the front buckle of the strap. Student was able to buckle and unbuckle and leave the chair at anytime...The Student used the rifton chair during academic/instructional work times in the classroom at his...table...the Student was [first able] to buckle and unbuckle himself during his first grade year—2018-2019.

According to the Parent's reply, "the [rifton] chair is never mentioned in Student's IEP and seems outlandish considering Student cannot use buckles independently and he has never shown a preference for being strapped into chairs."

According to the Parent's attorneys: "Parent had not heard of the use of a rifton chair until [she received] information...from the District's response to [this complaint]. Parent responded that she had not seen one and that such a chair would not have been appropriate."

13. According to speech language pathology records, the Student received 3 half-hour speech language therapy sessions in September 2018 and 1 half-hour session in October 2018.

According to the District, the Student received speech language therapy services in a location other than his special education classroom. According to the speech language pathologist, the speech language pathologist was absent for two of the scheduled speech language therapy sessions in October 2018.

14. According to occupational therapy records, the Student received no fine motor, gross motor, or sensory services in September 2018. According to the records, the Student was absent on the two days sessions in these areas were scheduled to occur.

According to occupational therapy records, on October 1, 2018, the Student received: 10 minutes of sensory; 10 minutes of gross motor; and 10 minutes of fine motor. And on October 23, 2018, the Student received: 10 minutes of gross motor; and 10 minutes of fine motor.

15. As of November 2018, the Student had made the following progress on the goals included in his March 2018 IEP:

- **Adaptive:** Sufficient Progress
- **Cognitive 1:** Emerging Skill
- **Cognitive 2:** Sufficient Progress
- **Cognitive-writing:** Sufficient Progress
- **Social-emotional:** Sufficient Progress
- **Arrival Routine: Level 2:** Sufficient Progress
- **Oral Language:** Sufficient Progress
- **Fine Motor:** Sufficient Progress
- **Gross Motor:** Sufficient Progress

16. According to speech language pathology records, the Student received zero half-hour speech therapy sessions in November 2018.

According to the speech language pathologist, in November 2018: the speech language pathologist was absent for one scheduled session; the Student was absent for two scheduled sessions; school was not in session on the day that one of the sessions was scheduled to take place; and school conferences were taking place on the day one of the sessions was scheduled to take place.

According to occupational therapy records, on November 5, 2018, the Student received: 10 minutes of sensory; 10 minutes of gross motor; and 10 minutes of fine motor. And on November 16, 2018, the Student received: 10 minutes of gross motor; and 10 minutes of fine motor.

17. According to speech language pathology records, the Student received 1 half-hour speech language therapy session in December 2018. According to the speech language pathologist, school was not in session on two days that two of the sessions were scheduled to take place.

18. According to occupational therapy records, the Student received no fine motor, gross motor, or sensory services in December 2018. According to the records, occupational therapist 1 was absent on the day a session in each these areas was scheduled to occur.

19. The District's response contains a 'Notice of Meeting' dated December 10, 2018. According to this document, on that date, the following individuals were invited to participate in a February 25, 2019 meeting to make an eligibility determination for the Student: Parent, principal, general education teacher, occupational therapist 2, special education teacher, speech language pathologist, school psychologist, and school nurse.

20. According to speech language pathology records, the Student received 3 half-hour speech language therapy sessions in January 2019. According to the speech language pathologist, in January 2019, the Student was absent on one of the days that a therapy session was scheduled to take place.
21. According to occupational therapist 1's records, the Student received no fine motor, gross motor, or sensory services in January 2019. According to the records, occupational therapist 1 was absent on the day a session in each these areas was scheduled to occur.
22. Occupational therapist 2 was hired by the District starting January 3, 2019. According to the District, in the spring of 2019, occupational therapist 2 was the individual assigned to provide occupational therapy services to the Student. However, according to the special education director, "the District was unable to locate a [service provider log] for January 2019 through June 2019 for occupational therapist 2." In the course of this investigation, occupational therapist 2 told OSPI that she was unable to locate her service provider log for the Student for the spring of 2019.
23. On January 7, 2019, the special education teacher emailed the school psychologist 1 and the administrative assistant for the District's psychology office, stating, in part: "Student is due for evaluation. He does not have functional communication."
24. On January 14, 2019, the special education teacher emailed the speech language pathologist, occupational therapist 1, the school psychologist 1, and the administrative assistant for the District's psychology office, stating, in part: "I am not sure it will be easy to assess executive functioning for Student as he needs a non-verbal test."
25. The District's response contains 'Review IEP Invitation' dated January 31, 2019. According to this document, on that date, the following individuals were invited to participate in a February 25, 2019 meeting to review the Student's existing IEP and develop a new IEP: Parent, principal, general education teacher, occupational therapist 2, special education teacher, and the speech language pathologist.

The Parent responded to the District on February 1, 2019, stating she could attend the IEP meeting scheduled for February 25, 2019.

26. As of February 2019, the Student had made the following progress on the goals included in his March 2018 IEP:
 

<ul style="list-style-type: none"> <li>• <b>Adaptive:</b> Sufficient Progress</li> <li>• <b>Cognitive 1:</b> Emerging Skill</li> <li>• <b>Cognitive 2:</b> Sufficient Progress</li> <li>• <b>Cognitive-writing:</b> Sufficient Progress</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Social-emotional:</b> Sufficient Progress</li> <li>• <b>Arrival Routine: Level 2:</b> Sufficient Progress</li> </ul>
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27. According to speech language pathology records, the Student received 2 half-hour speech language therapy sessions in February 2019. According to the speech language pathologist, in February 2019, the Student was absent on one of the days a therapy session was scheduled



to take place on and school was not in session on another day a therapy session was scheduled to take place on.

28. During the investigation of this complaint, occupational therapist 2 submitted a notarized<sup>7</sup> declaration that she witnessed viz-a-viz the Student being restrained. The Declaration read, in part:

On February 4, 2019 I entered the special education teacher's classroom to perform an occupational therapy evaluation on the Student, a six-year-old student who is deaf with high-functioning autism. This was the first time I met Student, and I noticed when I entered the class that Student was restrained to a chair. The restraint consisted of a belt approximately 5 inches wide secured around Student's waist, which was attached to another substantial strap secured to the chair. Student was unable to stand or move freely while restrained.

Student appeared to be enraged by the restraint and frequently banged with his fists on the table and occasionally banged his head on the table.

The special education teacher was not in the classroom at the time, so I asked the instructional assistant in the room to let Student out of the restraints for the purpose of performing an evaluation. I was told Student needed to be restrained because the staff were concerned Student might elope or experience balance issues. I proceeded to take the restraints off Student, and once he was free, I noticed that he did not try to elope nor did he experience any balance issues. In fact, Student seemed pleased to be free from the restraints and was able to walk and stand on one foot independently.

I came into the special education teacher's classroom to perform occupational therapy services from February to June 2019 proximately three times a month. Each time I entered the special education teacher's classroom, the Student was restrained to the chair in the same manner. The consistency of his restraints led me to believe Student was being restrained every day for multiple hours at a time. Additionally I never saw Student outside of the self-contained classroom even when there were school-wide activities going on such as recess, lunch, or the end of school picnic.

I never observed the eloping behaviors the staff were concerned about. Each time I worked with Student, we would walk from his classroom in the building to the occupational therapy portable outside. Student would always walk beside me or behind me, and not once did he attempt to run away.

I first reported the issue to the school psychologist February 25, 2019. Under my obligation as a mandated reporter, I felt I had a legal duty to report the use of excessive restraints on Student. I believed the school psychologist would address the issue with the special education teacher, and that same morning I observed a conversation between the two of them discussing the need to document the use of restraints.

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<sup>7</sup> Generally speaking, a notarized statement is one that is made "under oath." In Washington State, intentionally making a material, false representation on a notarized statement can potentially result in criminal liability. *See generally* RCW 9A.72.010 through RCW 9A.72.085; *see also* the preface to occupational therapist 2's Declaration: "I...swear and declare the following under penalty of perjury pursuant to the laws of the State of Washington."

...

During this period of time February to June 2019, the special education teacher became increasingly hostile towards me. On five separate occasions the special education teacher unilaterally reduced minutes for Student's occupational therapy. Each time I noticed that the occupational therapy minutes had been changed, I would go see the administrative assistant for student services, who would unlock the IEP to change the occupational therapy minutes back to what they were originally set.

Eventually, the special education teacher banned me from the classroom and I was only allowed to pick students up for occupational therapy services at the front desk. The special education teacher informed me that the reason why I was not permitted to pick students up at her class was that it was too disruptive for me to come in her class.<sup>8</sup>

29. On February 24, 2019, occupational therapist 2 emailed school psychologist 1, the special education director, the administrative assistant for special services, and occupational therapist 1, stating, in part:

I don't know if you will see this for Student's evaluation. Due to the snow holidays, I only learned about it late Thursday afternoon. I will provide what input I can, however, I need record review time, observations across settings, sensory profile for home and school, and standardized testing. I am requesting time to do this through Friday, March 1. I will be at the meeting on Monday morning. I did do an informal observation and talked to the paraeducator.

The special education situation is very concerning with Student. The times I have been in the life skills class he has been in chair restraints which is clearly against the law... Informal discussion with the paraeducator as the teacher was unavailable, she said that they do not have the staff watch student 'in case he runs.' She tries to take the restraints off when she can. Student is supposed to have gross motor activities, but she says hasn't time to do them. Student does not attend physical education, library, lunchroom, or recess or play outside. How it appears [*sic*] that he is confined to the chair, unable to stand up, hours daily.

When he was taken out of the chair, Student engaged with activities with me very happily, smiling and complying with all that I ask. We did some motor planning activities, and bilateral games, and he had great eye contact and full attention.

The para said this has been going on for at least a month. So this is clearly not acceptable. He is six years old and needs a lot of movement to be happy and regulated. This situation could cause permanent trauma and damage to his nervous system to say the least. What about in case of fire, earthquake, or a shooter? We had school closures last year due to shooter alerts. The risks to having him in restraints and confined to his chair are not acceptable.

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<sup>8</sup> In a phone interview that OSPI's investigator conducted on November 1, 2019, occupational therapist 2 clarified a couple portions of her declaration: it was roughly the first of May when the special education teacher banned occupational therapist 2 from the classroom; starting around the first of May, occupational therapist 2 says she had to "pick students up for occupational therapy services at the front desk" (quote from Declaration); from mid-to-late February to roughly the first of May, she was in the Student's classroom 1 day a week, or 4 times a month.

In order to do a proper sensory profile, student needs to be able to be observed in a normal classroom situation. Children become quite aggressive when restrained. Any evaluations or behavior that were done in the last month while he has been restrained are in my opinion null and invalid...OSPI should be notified if changes are not made. If a better school situation is available that has autism consultants that teach positive behaviors [that] would be my recommendation. Student could benefit from ABA training, and a program that meets for learning. Student does not know why he is confined.

Life skills classes are full of 'runners,' there has to be staff manage this behavior. If Student cannot be taken outside, he needs a school with a contained outdoor play area. Just a quick look at his gross motor skills, I would say, [they are] at least average.

This situation appears dire, and I don't know how this could happen. I have seen paras deal with runners and it is just what you have do with the new law. Someone has to sit at each door if it leads outside. Fortunately [the Student's school is in] a quiet neighborhood with little traffic.

I don't think it is my place to bring this up at the meeting on Monday, unless Student is under a doctor's orders to be restrained...A proper assessment of Student's current behavior [needs] to be done and whoever gave out restraints needs to be informed of the law.

Later that same day, the special education director responded, stating: "Please make time this week to see me and have a conversation about the concerns expressed in your email."

OSPI's investigator conducted a phone interview of the special education director on October 29, 2019. In that phone interview, the special education director stated:

- Special education director and occupational therapist 2 spoke sometime soon after February 28, 2019. Before their meeting, special education director made a couple unannounced visits to the Student's classroom. During those visits, she never saw the Student restrained.
- As of late February 2019, director had not spoken with the special education teacher about occupational therapist 2's concerns.
- Between February and June 2019, director spoke with the school psychologist and the special education teacher. They both denied ever having seen the Student restrained, as described in occupational therapist 2's February 24, 2019 email. From later February through the beginning on OSPI's instant investigation, she had not spoken with the Student's paraeducators.

OSPI's investigator conducted a phone interview of school psychologist 1 on October 31, 2019. In that phone interview, school psychologist 1 stated: in February 2019, she talked to the special education teacher about occupational therapist 2's concerns; she never saw what occupational therapist 2 described in her February 2019 email; the special education teacher denied having seen anything similar as well; when occupational therapist 2 came to her with said allegations, it was 'completely outside the realm' (paraphrase) of anything she had seen concerning the Student.

30. On February 25, 2019, the District completed a reevaluation of the Student. The February 2019 reevaluation read, in part:

Student's behaviors have affected his social integration times. He began the school year integrating into music and PE. He consistently runs away, screams, or is aggressive if he leaves our classroom. He has been given PE activities within our classroom by using our OT equipment (exercise ball, trampoline, swing, balance board)...Outside: he is now able to play outside with support...A gross motor screen was completed...Student does not appear to have gross motor delays below age/grade level. Student has adequate balance, coordination, and mobility.

In regard to the Student's hearing capability, the February 2019 evaluation read, in part: Student has a...hearing impairment. Student has bilateral hearing aids, but he struggles with consistently wearing them and frequently they are broken...[In] January 2018, consultants came from The Center for Childhood Deafness and Hearing Loss to observe and consult on Student...They encouraged staff to increase sign along with verbal which is happening...Student's hearing...impacts his receptive language. He does not always turn toward noise or respond when his name is called...Student has bilateral hearing aids that he wears inconsistently. He tends to pull them off and break them. His right ear has better hearing and we try to sit on his right side when presenting auditory information.

In regard to the Student's communication skills, the February 2019 evaluation read, in part: Student currently does not have functional communication. He is emerging using the following phrases 'I want \_\_\_' sign paired with voice...Student's score [on the Pervasive Developmental Disorder Behavior Inventory] reflects his inability to display meaningful communication...His expressive language domain score of 24 is in the low range. Given the hearing problem coupled with the autism diagnosis, it is understandable that vowel production, consonant production, diphthong production, expressive language competence, and pragmatic conversational skills are in the low range...During the evaluation Student attempted to make sounds in words at times to communicate. He used gestures skillfully at times...Student appeared very limited in his ability to use verbal communication but he used nonverbal communication skillfully with support from the teacher aide who signed...At times he attempted to communicate using single words which he struggled to articulate...He is learning sign language and can put simple sentences together ('I want \_\_\_'). He does this simultaneously with verbally saying this. His intelligibility is not always clear. We have used Proloquo2go but Student becomes fixated on how he wants to manipulate the iPad so this is not always helpful for a communication tool. We have also used Picture Exchange. This works a little better for communication although Student can rip, crumple, [or] tear the pictures.

...

Receptive Language: Student can find objects in the room when signed 'where's the ball?' although he does not always attend to the task the teacher has given. Student can sign say yes and no but Student is quick to say no frequently. It is unclear if student can differentiate the six ling sounds. He can point to body parts but this is more of an imitation because presentation is done with sign language which points to the body parts. He is unable to do this just with a verbal presentation.

Expressive Language: Student can sign say several words. He can put structured sentences together. 'I want \_\_\_.' He can request frequently this is at single word level (sign and verbal). Student's articulation skills are poor but due to diagnosis and behavior, it is hard to get Student to work on this skill. Although recently he is beginning to work on initial sound with a 1:1 reinforcement schedule. Student is primarily working on total communication

using every avenue of communication: sign, gesture, verbal, pictures, augmentative technology. We are also using Edmark reading system to help him learn to read and this increases his vocabulary (signs/verbal).

...

Play: Student enjoyed iPad apps like light box and kaleidoscope. He would get frustrated if he was not in control of the iPad...We are using a total communication method to help Student learn to communicate. We are incorporating augmentative communication Proloquo2go, pictures, sign, verbal, gestures, and writing. Student does not really like Proloquo2go. He grabs the iPad trying to get on apps that he wants. If the iPad is locked on proloquo2go he may throw it...Student seems to need sign to understand information, but he does not like to use sign to communicate. He prefers to be verbal. He has limited vocabulary. He is learning to imitate oral motor positioning and produce sounds. He can say his colors and animal names.

In regard to the Student's need for sensory activities, the February 2019 evaluation read, in part: "OT may consult with staff for sensory accommodations, such as movement breaks, identifying and communicating sensory needs, and fidgets."

31. On February 25, 2019, the Student's IEP team developed a new IEP for the Student. The February 2019 IEP included annual goals in the following areas: adaptive; math; reading; written language; social/emotional; oral language-sound pairing; oral language-identify picture; oral language-total communication.

The February 2019 IEP provided the Student with the following specially designed instruction in a *special education setting* from February 25, 2019 through February 24, 2020:

- Math: 60 minutes 5 times a week (to be provided by a paraeducator)
- Adaptive: 93 minutes 5 times a week (to be provided by a paraeducator)
- Social/emotional: 60 minutes 5 times a week (to be provided by a paraeducator)
- Reading: 60 minutes 5 times a week (to be provided by a resource room teacher)
- Written Language: 60 minutes 5 times a week (to be provided by a resource room teacher)
- Speech Therapy: 30 minutes 3 times a month (to be provided by a speech language therapist)

The February 2019 IEP provided the Student with the following related service in a *special education setting* from February 25, 2019 through February 24, 2020:

- Occupational Therapy: 30 minutes 3 times a month (to be provided by an occupational therapist)

The February 2019 IEP provided the Student with the following supplementary aids and services in a *special education setting* from February 25, 2019 through February 24, 2020:

- Instructional Assistant: 345 minutes 5 times a week (to be provided by a paraeducator)

The 'Team Considerations' portion of the February 2019 IEP read, in part: "This student is hard of hearing...A sensory belt helps him feel secure and supports assistant[s] in guiding him when needed." The 'Special Education and Related Services' portion of the February 2019 IEP read, in part: "This student will participate with non-disabl[ed] peers for recess."

The February 2019 IEP says the Student was to receive "Special Transportation."

The Parent signed the Student's February 2019 IEP. Occupational therapist 2 also signed the Student's February 2019 IEP.

32. According to speech language pathology records, the Student received 2 half-hour speech language therapy sessions in March 2019. According to the speech language pathologist, in March 2019, the speech language pathologist was absent on one of the days a therapy session was scheduled for and on another day that a therapy session was scheduled for, the Student was present at school "but sick [and] unable to work."
33. According to occupational therapist 2's declaration, in mid-March 2019, she reported her concerns regarding the Student being improperly restrained to the special education director "for a second time. However, no action was taken and the practice of excessively restraining Student continued."
34. According to speech language pathology records, the Student received 1 half-hour speech language therapy session in April 2019. According to the speech language pathologist, she was absent on one of the days that a session was scheduled for.
35. On April 25, 2019, the Parent and paraeducator 1 exchanged the following text messages:
  - Paraeducator 1:** Do you have the white [sensory] belts we send [Student] home with? If so, could you possibly drop them off?
  - Parent:** Yes sorry I'll be right over.
  - Paraeducator 1:** Thanks so much. You can just drop them off at the office.

According to the Parent:

Around the time of the text message when I forgot to send Student back with [the sensory belt], [the District] asked me to put the belt on at home before he arrived at school. I assumed this was because they were having a hard time getting him to put it on because he struggled and didn't want it. He hated that belt and fought me when I tried to put it on him. He didn't not want to go to school with the belt. He would sign 'ouch.'

The Parent's reply included similar language:

Over time, the instructional assistant in class asked me to put Student in the belt before he came to school. I tried to comply with the school's request, but Student would get extremely upset with the belt on and sometimes would not get out of the car when [it] pulled up to school on mornings I put the belt on him.

In the investigation of this complaint, OSPI's investigator asked paraeducator 1: "Why did you want to make sure the Parent/Student brought the sensory belt back to school?" Paraeducator 1 responded: "The Student liked the sensory belt and we wanted to have it available for him."

36. According to occupational therapist 2's declaration, during the week of April 30, 2019:
  - I approached the special education director again and pleaded with her to do something to end the use of excessive restraints on Student. I felt the use of restraints was harming Student and put him in serious danger. The special education director became irate, and she firmly informed me [that] she was 'handling it.'

37. According to speech language pathology records, the Student received 4 half-hour speech language therapy sessions in May 2019.

38. According to occupational therapist 2's declaration: "In the first week of May 2019...I reported [the restraint issue] to the office of Child Protective Services (CPS). The CPS worker informed me that this was a school matter and [that] they did not have the authority to investigate complaints related to abuse in schools."

39. As of June 2019, the Student had made the following progress on the goals included in his February 2019 IEP:

- **Adaptive:** Emerging Skill
- **Math:** Emerging Skill
- **Reading:** Sufficient Progress
- **Written Language:** Emerging Skill
- **Social/Emotional:** Emerging Skill
- **Oral Language-Sound Pairing:** Emerging Skill
- **Oral Language-Identify Picture:** Insufficient Progress
- **Oral Language-Total Communication:** Emerging Skill

OSPI's investigator conducted a phone interview of school psychologist 1 on October 31, 2019. In that phone interview, school psychologist 1 stated: in spring of 2019, she saw fairly significant progress: Student was using humor in his sign language, Student was playful, Student had "beautiful" interactions with paraeducator 1, and Student actually had fun during testing; she witnessed Student working in small groups doing Edmark reading group activities; she believed Edmark was really successful with the Student; she believed it helped the Student develop 'inner language.'

40. According to the Parent, "towards the end of the [2018-2019] school year...occupational therapist 2...told me that Student was being restrained to a chair every day for multiple hours at a time."

According to occupational therapist 2's declaration, the Parent subsequently:  
...reported to me that she had [had] a conversation with the special education teacher about what I had told Parent regarding [the use of] excessive restraints. The special education teacher did not address the restraint issue and reported to Parent that I was crazy, I was lying, and I was fired.

41. Occupational therapist 2's employment with the District ended in June 2019.

42. On June 13, 2019, occupational therapist 2 emailed the special education teacher, the school principal, and the school nurse, stating:

In my consultation with OSPI in regards to the use of restraints and isolation, it appears that the WACs have not been followed properly. I [am] writing to suggest that staff have an updated professional development training in the new laws regarding use of restraints and isolation. I strongly recommend this course for you and your staff.

43. The District's last day of school for the 2018-2019 school year was June 13, 2019.

## 2019-2020 School Year

44. At the start of the 2019-2020 school year, the Student was eligible for special education under the category of autism and was in the second grade. The Student's February 2019 IEP continued to be in place.
45. The District's first day of school for the 2019-2020 school year was August 28, 2019.
46. The Student's schedule for the 2019-2020 school year it attached to this complaint decision and labeled **Exhibit B**.
47. During the 2019-2020 school year, there were eleven students in the Student's special education classroom.
48. According to the District, the Student received no speech language therapy sessions in the 2019-2020 school year—"the first scheduled speech language therapy session for the Student was September 19, 2019 [but] the Parent did not return the Student to school after September 9, 2019."
49. In the fall of 2019, occupational therapist 3 was assigned to provide occupational therapy services to the Student. However, according to the District:  
Occupational therapist 3's first day of employment with the District was August 28, 2019. Occupational therapist 3 spent the first two weeks of school (August 28, 2019 through September 6, 2019), observing students in classrooms and reviewing files in preparation for beginning therapy sessions the week of September 9, 2019. As the Student's last day attending school was September 9, 2019, occupational therapist 3 was not able to provide [Student with] any direct services.
50. According to the District, at the start of the 2019-2020 school year, "the sensory belt was offered to Student but he was not interested. Student did not use the sensory belt from August 28, 2019 to September 9, 2019."
51. According to the District:  
[The following] strategies and structures [were in place] to help support Student's safety, security, and sensory needs and [his] ability to self-regulate during the periods when he is unregulated and having behavior difficulties: switching tasks; picture cards for choice; seating options; close monitoring when Student left the classroom; verbal cuing and redirects; use of sensory room and sensory tools and reinforcement for appropriate choices.
52. According to the special education director:  
The special education teacher and principal reported that on **September 4, 5, and 6, [2019]**, the special education teacher called [Parent] and requested that, due to [Student's] behaviors [Parent] pick him up prior to dismissal to the bus as it was determined that it was unsafe for [Student] to ride the bus home. As [Parent] must meet the bus at home for [Student's] sibling, [Parent] arrived to pick [Student] up from the school at approximately 2:45 on [these] three days. Students prepare for dismissal and loading the bus at 3:00 for a 3:15 departure.



(emphasis added).

In the investigation of this complaint, OSPI's investigator asked the District's special education director questions concerning the events of September 4- 6, 2019. OSPI received the following answers:

**Question:** What was different about Student's behavior on September 4-6? I.e., why, on those days, did the District ask that the Parent come get the Student prior to dismissal to the bus?

**Answer:** The Student's behavior became more unregulated through-out the afternoon on those days and staff was concerned that he could not safely ride the bus with other students.

**Question:** Was the Student provided with a 1:1 paraeducator on September 4, 5, and 6, 2019?

**Answer:** Yes.

**Question:** Besides having the Parent pick the Student up early on September 4, 5, and 6, 2019, how else did the District respond to any changes in the Student's needs resulting from his disability on or about this time period? Did the District ever consider an FBA and/or BIP? If not, why not?

**Answer:** The special education teacher and para educators made adjustments in student's schedule<sup>9</sup>, adjusted his academic tasks<sup>10</sup>, and increased his choice of activities. In addition, the special education teacher that the school psychologist observe the Student to provide input regarding what additional steps should be taken to address the behavior. The observation took place on 9/9/19. However, the Parent then pulled the Student out of school and refused to further engage with the Student's IEP team.

**Question:** Are there any emails and/or letters related to the incidences on September 4, 5, and 6, 2019?

**Answer:** There are no emails or letters related to Sept 4,5, or 6 incidents. Staff spoke with the Parent on the phone and in person when she picked up the Student at dismissal time on those days.

53. On September 9, 2019, school psychologist 2 conducted an observation of the Student.<sup>11</sup>

54. According to the Parent's complaint, on September 9, 2019, the special education teacher informed her by phone that the Student had been "hanging out" in the sensory room "since

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<sup>9</sup> The special education teacher provided the following clarification: "[We] offered Student more opportunities to make picture choices for work or play."

<sup>10</sup> The special education teacher provided the following clarification: "[We] adjusted [his] academic tasks to be less demanding."

<sup>11</sup> According to a phone interview of school psychologist 2 that OSPI's investigator conducted on October 31, 2019: her involvement with the Student was really limited to the observation of the Student she conducted on September 9, 2019; and she does not believe that the Student was wearing the sensory belt on the day she conducted her observation.

after lunch [and Student] was still there when I arrived [at] 2:30 pm...so [Student] was in the isolation room for two hours [with] no games or toys that I could see.”

In the investigation of this complaint, OSPI’s investigator asked the District’s special education director questions concerning what transpired on September 9, 2019. In response, the District submitted the following statements:

- On this date, “the Student was experiencing dysregulation and spent some time throughout the day in the sensory room.”
- The Student’s 2019-2020 elementary school contained only one sensory room. The District provided OSPI with a picture of this sensory room during the course of this investigation.
- The sensory room was ventilated, lighted, and temperature controlled.
- “The sensory room has a window in the door that allows someone to look into the room.<sup>12</sup> A paraeducator or the special education teacher was with the Student at all times he was in the sensory room [on September 9, 2019].”
- “The sensory room has the same door as all classrooms at [that] elementary [school]. The lock on the door can only restrict entry to the room, not exiting. The teacher confirmed the Student is able to exit on [his] own.”
- “The Student was in the sensory room 2 x after lunch for a maximum of 20 minutes.” (The special education teacher provided the following clarification: “This Student was in and out throughout the day, never staying in the room very long. The total minutes would be less than 40 minutes for the entire day.”)

The Parent’s reply read, in part:

When I arrived at the school [on September 9, 2019], I believe the aide was outside the door and then opened the door to let Student out. I did not see any adult in the room. Someone else walked quickly up the hallway when they saw me coming. Student came out and looked sad.

The District’s response included the following, general information on sensory rooms:

The room is supplied with sensory items such as Kinetic sand, play dough, trapeze swing, sensory pea pod, tent, stability balls and ball pit. Sensory rooms may also be used for OT sessions. Student is always accompanied by a paraeducator or teacher [and] the Student may choose to leave at anytime. The room has not been used for isolation for Student.

55. According to the District, “beginning on September 10, 2019, [Parent] withheld [Student] from attending school.”

56. According to the District, on September 11, 2019, both the District social worker and the principal called the Parent to encourage her to allow the Student to attend school.

57. On September 12, 2019, a representative from CPS emailed the special education director and the principal, stating, in part:

I work for CPS. I am the assigned worker for Student’s family. I have been in contact with the mother and am a bit concerned as to what is being reported...It was reported to me that Student was being restrained last year by being strapped to a chair. I am concerned as

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<sup>12</sup> The Parent’s reply also stated the sensory room had “a tiny window on the door with blinds.”

the child is trying to communicate that he is not feeling safe at school and Parent has not been able to get him on the bus. I am not sure as to whole story of the restraints, but we did receive a report at the end of the year and I am concerned if this is true.

Parent has expressed that since this occurred last year, his behaviors got worse and now going to school, he is clearly fearful. She has not been able to get him on the bus the last two days. I'm reaching out as I received a call from someone at Student's school the other day and I believe [it was] the special education teacher.<sup>13</sup> I'm a little concerned about my conversation with her and some comments she made...she shared that they have not been able to manage him and are sending him home every day after lunch...I am hoping we can get a meeting in the next day or so we can address the child's needs and issues and how we can get him to go to school and feel safe.

58. On September 13, 2019, the principal responded to the CPS representative's email, stating, in part:

There is a meeting set up next Tuesday...you are welcome to attend this meeting to support mom and listen to the supports in place for Student. I appreciate you encouraging Parent to call as we have also been calling encouraging her to send Student to school. Student is in a very nurturing classroom with an expert teacher and paraeducators that tailor a program to meet his unique needs...Student had a difficult transition back to school. When prompted to do learning activities he has been physical with staff, spitting, running, screaming, and kicking. This is his way of telling us the work is challenging. He ended the year with us last spring being able to do this same work. We have invited our school psychologist into Student's classroom to do observations.

59. According to the District:

The principal invited Parent to a meeting on September 17, 2019 in effort to reengage her and resolve her concerns. The meeting included the student's IEP team, social worker, special education director and [a] parent advocate. The Parent declined the invitation by phone and said she would not attend. The principal still held the meeting in hopes the Parent would change her mind and attend. She did not.

Following this attempt on September 17, 2019 to engage the Parent, the Parent did not answer or return phone calls from school staff.

60. OSPI's investigator asked the special education director the following question: "During or after September 4, 2019 through September 6, 2019, did the District ever consider a functional behavior assessment (FBA) and/or a behavioral intervention plan (BIP)? If not, why not?"

The special education director responded:

The District started with [a classroom] observation [of the Student] on September 9, 2019. A meeting was held on September 17, 2019 to discuss next steps, however, the Parent did not attend the meeting and the Parent refused to return Student to school. Without the

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<sup>13</sup> In a phone interview with OSPI's investigator on October 30, 2019, the CPS representative said she later learned that it was not the special education teacher that she spoke with that day, but rather that it was the speech language pathologist.

Parent's participation, the IEP team was not able to move forward with considering an FBA or BIP.

61. According to the District, "on or about September 30, 2019, the Parent expressed an interest in enrolling the Student at [another District] elementary school [(school 2)]." Specifically: "The Parent filled out a request for an intradistrict transfer to [school 2]. The special education director...spoke by phone to the Parent on October 1, 2019 and agreed to set up an opportunity to meet with [school 2] staff and discuss a potential transfer to [school 2]."
62. According to emails, as of October 7, 2019, the Parent, the Parent's attorneys, and the District agreed to meet on October 9, 2019 to discuss the Student potentially transferring to school 2.
63. According to the District, "On October 9, 2019, the Parent visited and toured [school 2] and an IEP meeting was set to discuss possible programming at [school 2] on October 11<sup>th</sup>."
64. The District's response included a 'Review IEP Invitation' dated October 9, 2019, invited the Parent to attend a meeting scheduled for October 11, 2019 to "discuss prospective programming at [school 2]." According to this document, the following individuals were invited to attend and participate in this meeting: Parent, special education director, general education teacher, principal, and "sped program staff—TBD."
65. According to the Parent's attorney, "On October 11, 2019, we requested [an] independent educational evaluation for Student to be provided by [a specific] deaf psychologist and facilitated by the Washington Center for Deaf and Hard of Hearing Youth."
66. According to the District:

At the October 11, 2019 meeting, the Parent's attorneys stated she was no longer willing to enroll the Student as [school 2].

At the October 11, 2019 IEP meeting, the Parent's lawyers indicated the Parent was refusing to return the Student to school due to "broken trust" and a belief that his IEP was inappropriate. When the IEP team attempted to explore how the IEP was inappropriate, her lawyers stated that their concerns could not be addressed until an independent educational evaluation was completed.

The purpose of the October 11, 2019 meeting was for the IEP team to discuss the Parent's interest in enrolling the Student at [another elementary school in the District].

According to the Parent's attorney:

We provided occupational therapist 2's declaration [to the District during the] October 11, 2019 meeting to show the District our concerns and to ask them to describe the therapeutic value of the belt, but they refused to engage. It was really shocking that even in light of these horrible allegations they would not explain to the Parent (who was crying) what had been going on...We also asked the District to show us the rifton chair...and they refused.
67. An October 21, 2019 prior written notice, proposing to continue the Student's IEP read, in part:

The IEP team [previously met and] was composed of [school 2] staff, [as well as the special education director, occupational therapist 3, the Parent, and Parent's attorneys, and the IEP team] met at [school 2] because the Parent had expressed an interest in enrolling the Student there. The IEP team expressed a desire to review the Student's IEP and address any concerns the Parent had regarding the IEP. The Parent, through her attorneys, indicated that she was not interested in discussing the IEP because she believed it was necessary to have an independent educational evaluation conducted to identify what, if any, changes needed to be made to the IEP. Because the Parent was unwilling to discuss the IEP, the IEP team meeting was adjourned.

68. According to the Parent's attorney, on November 4, 2019, the Student "started [his] unilateral placement at a [school for the deaf]."
69. According to the District: "There are no reports or documentation of isolation or restraint for Student as none were initiated. While at times Student's behaviors of running, hitting, screaming, throwing items and spitting were challenging, they did not rise to the level of imminent likelihood of serious harm as defined in the WACs/RCWs."
70. The District's response included several of the Student's "work samples." According to the District, these "work samples" are some evidence of the provision of specially designed instruction. The submitted "work samples" included: a 'Kid Writing K-2 Writing Developmental Scale;' handwriting and composition exercises; math worksheets; personal routine checklists.

#### **OSPI Investigation: Issue 1<sup>14</sup>**

71. OSPI's investigator emailed paraeducators 1-3 the following question and received answers concerning the use of the Student's sensory belt:

The Student's February 2019 IEP states the sensory belt "supports assistant in guiding Student when needed." When you worked with the Student, did you ever use the sensory belt to guide the student? If so, how often did this occur? And in what circumstances was it used as a guide—e.g., was it only used during particular transitions? When the Student was displaying dysregulation, etc?

- **Paraeducator 1:** No, he would often walk with me, and hold my arm or hand.
- **Paraeducator 2:** I picked up the student from lunch and walked to a table. We did not need the sensory belt during this time. It was a 30 minute period.
- **Paraeducator 3:** No this student held my hand at the time I had him.

According to the special education director, despite the fact that the Student's February 2019 IEP stated the sensory belt "supports assistant in guiding Student when needed:" "Staff do not recall using [the] belt in this way...the sensory belt was not used as a restraint device by any staff."

72. According to the special education director, the Student's elementary school does not have cameras in the following locations: the hallway outside the Student's 2018-2019

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<sup>14</sup> The OSPI investigator conducted interviews via phone and through written questions to obtain additional information as part of the investigation.

and/or 2019-2020 classroom; inside the sensory room used by the Student during the relevant time period; outside the sensory room used by the Student during the relevant time period; the recess and/or playground area that the Student used during the relevant time period.

73. During the course of this investigation, the following individuals submitted written statements asserting they did not see the Student restrained in any manner similar to that as described in occupational 2's declaration: K-5 special education specialist; occupational therapist 3; administrative assistant to the principal; K-5 title teacher.
74. During the course of this investigation, the following individuals submitted written statements asserting that they did not see District staff holding onto the Student's sensory belt while the Student ambulated, either in the classroom or in the hallways: K-5 special education specialist; occupational therapist 3; administrative assistant to the principal.
75. The K-5 title teacher submitted an email that read, in part: "I did witness District staff holding the sensory belt occasionally as the Student walked in the hallway."
76. OSPI's investigator conducted a phone interview of the principal on October 30, 2019. In that phone interview, the principal stated: she was in the Student's classroom multiple times a day; she saw Student wear the sensory belt a lot; she saw him put it on and off; she hypothesized that it signified school time to Student; she never saw the sensory belt used in conjunction with another belt; she never saw Student restrained in the manner described in occupational therapist 2's Declaration.
77. OSPI's investigator conducted a phone interview of the special education director on October 29, 2019. In that phone interview, the special education director stated that she never saw the Student restrained in a manner similar to that as described in occupational therapist 2's declaration.
78. OSPI's investigator conducted a phone interview of the special education teacher on October 31, 2019. In that phone interview, the special education teacher stated: she never saw Student restrained in manner described in occupational therapist 2's Declaration; student could take it on and off; she does not recall how long Student would keep it on after he put in on; she does not have a specific recollection of how often he did not have the sensory belt with him or how he did when he did not have it with him, but there were times when he did not have the belt.
79. OSPI's investigator conducted a phone interview of paraeducator 1 on October 31, 2019. In that phone interview, paraeducator 1 stated: the sensory belt had a Velcro connector; Student would sometimes sign 'help' for assistance in putting the sensory belt on, and, in those instances, staff would assist him in putting it on; other times, though, Student put it on entirely himself; Student could sit and stand while wearing the belt; she never saw it being used in conjunction with another belt; she never witnessed what occupational therapist 2 described seeing in her Declaration; there was a rifton chair that had a belt that Student could take on and off.

80. OSPI's investigator conducted a phone interview of paraeducator 2 on October 31, 2019. In that phone interview, paraeducator 2 stated: she never saw anything similar to what is described in occupational therapist 2's Declaration; Student could get out of the sensory belt at any time; her guess is that the Student found the sensory belt comfortable; at the start of the 2019-2020 school year, Student was no longer wearing the sensory belt; Student wore the belt while both walking and sitting; she never saw the sensory belt used in conjunction with another belt; she never saw anybody pull on the belt while he was wearing it.
81. OSPI's investigator conducted a phone interview of paraeducator 3 on October 31, 2019. In that phone interview, paraeducator 3 stated: she never saw anything similar to what was described in occupational therapist 2's Declaration; she worked in the classroom all day; Student liked to feel like he was being 'hugged'; Student could put the sensory belt on and off at will; she does not know how long Student would keep it on after he put it on; she never saw it used in conjunction with another belt.
82. OSPI's investigator conducted a phone interview of paraeducator 4 on October 31, 2010. In that phone interview, paraeducator 4 stated: she never saw anything similar to what was described in occupational therapist 2's Declaration; she never saw District staff using the sensory belt to guide the Student.
83. OSPI's investigator conducted a phone interview of paraeducator 5 on October 31, 2010. In that phone interview, paraeducator 5 stated: she never saw anything similar to what was described in occupational therapist 2's Declaration; since in a while/occasionally, in the hallways, she would see District staff hold onto the sensory belt's handle while walking with the Student down the hallway—though she does not recall this ever happening in the classroom itself.
84. OSPI's investigator conducted a phone interview of the speech language pathologist on October 30, 2010. In that phone interview, the speech language pathologist stated: she never saw anything similar to what was described in occupational therapist 2's Declaration; she was 'in the classroom frequently—multiples times per week for consultation and to pick up students for direct consultation elsewhere' (paraphrased).
85. OSPI's investigator conducted a phone interview of occupational therapist 1 on October 31, 2010. In that phone interview, occupational therapist 1 stated: she never saw anything similar to what was described in occupational therapist 2's Declaration; she never saw District staff using the sensory belt to guide the Student.
86. OSPI's investigator conducted a phone interview of school psychologist 1 on October 31, 2019. In that phone interview, school psychologist 1 stated:
- She never saw anything similar to what was described in occupational therapist 2's Declaration.
  - Student would stand up and sit down while wearing the sensory belt.
  - The sensory belt was never attached to an object so as to prevent Student from moving.
  - She did see staff members occasionally hold onto the sensory belt as they walked together. Paraphrase: "Student has lots of challenges—more than most students who have autism." She

only saw the Student, and District staff holding the sensory belt, working in a “cooperative manner.” She never saw the belt being used to guide the Student when the Student was yelling or fighting or wanting to travel in another direction.

87. OSPI’s investigator conducted a phone interview of the District social worker on October 31, 2019. In that phone interview, the District social worker stated: she is not often in the classroom—she is a social worker for the whole District; on the few, short visits she did make to the classroom during the relevant time period, she never saw the Student restrained to a chair.
88. OSPI’s investigator conducted a phone interview of occupational therapist 2 on November 1, 2019. In that phone interview, occupational therapist 2 stated: a week before February 24, 2019 (see her email of this same date), paraeducator 1 had to undo the Student from his restraint so that an evaluation could be administered to him; it was not a Rifton chair that he was tied to—she says those are only for small kids and that a Rifton chair would have been inappropriate for someone of Student’s size; to her recollection, the Student was restrained to a regular chair; she is not sure what actions, if any, District staff took in response to the concerns she articulated in her February 24, 2019 email; whenever she saw the Student restrained, he would often be banging his head and the table because he was frustrated at being restrained.
89. According to the special education director: a) the District’s current policy on the use of restraint and isolation was approved by the school board on August 18, 2016; b) that same year, “the District reviewed the new policy and procedure with certificated special education providers. The review included a discussion of changes including: advanced planning using the Emergency Response Protocol;” c) current staff that received that training include: special education director; special education teacher; speech language pathologist; school psychologist 1; and school principal; and d) the District did not provide a training on this policy for paraeducators and it proposes to do so as part of the corrective actions for this complaint.

### **OSPI Investigation: Issue 2**

90. In the investigation of this complaint, OSPI’s investigator asked the District’s special education director questions concerning the Parent’s participation in IEP meetings. OSPI received the following answers:

**Question:** Since September 14, 2018, were any IEP meetings rescheduled—i.e., a date and/or time was set and then, for one reason or another, the date and/or time was changed? If so, can you please provide a detailed explanation of the same?

**Answer:** No IEP meetings were rescheduled during the time period at issue.

**Question:** Before IEP meetings were scheduled, did the District ask the Parent what date and times worked best for you?

**Answer:** The District engaged with the Parent to determine mutually agreeable times for IEP meetings. The Parent communicated with staff she preferred meetings during school hours and the district accommodated this request.



### OSPI Investigation: Issue 3

91. In the investigation of this complaint, OSPI's investigator asked the special education director questions concerning IEP implementation since September 14, 2018. OSPI received the following answers:

**Question:** The Parent states that the Student's hearing aids were not always used. Is this an accurate statement? Why or why not?

**Answer:** The District does not have data on the frequency with which the Student used his hearing aids. Staff report that that the Student did object to wearing them or remove[d] them at times.

**Question:** The Parent states that, on numerous occasions, the Student was kept on an iPad all day without instruction. What is the District's response to this? What did the Student use the iPad for? Were there certain days where the Student was on the iPad more than usual?

**Answer:** The district denies the parent's allegation. The Student used the iPad for "Signing Time", an ASL Teaching Video series. He was scheduled to use the iPad two times each day for a maximum total of 45 minutes.<sup>15</sup>

**Question:** Were there ever incidences where the Student was not permitted to participate in recess? If so, how frequently did this occur? And, on those occasions, what was the reason for not permitting the Student to participate in recess? (The Parent alleges that the Student "is rarely taken outside as [the District] says he may run away.") Were there any accommodations made for the Student to enable him to participate in recess? If Student was not permitted to participate in recess, what did Student do during those time periods?

**Answer:** The Student participated in recesses daily with other students. Indoor recess was held in inclement weather. On indoor recess days the Student and other students participated in games and other activities in the gym or classroom.

**Question:** How did the District provide the Student with his 1:1 paraeducator on those days when his normal 1:1 paraeducator was absent—for example, for either vacation or illness?

**Answer:** In the event the Student's paraeducator was absent the District would reassign another paraeducator to serve the student.

**Question:** Since September 14, 2018, were there ever periods of time where the Student was not provided with a 1:1 paraeducator—for example, if Student's paraeducator quit or was fired and it then took the District some time to find a replacement? If so, when were these time periods and how long did they last?

**Answer:** There were no time periods when a 1:1 para educator was not available to the Student.

**Question:** According to both the March 2018 IEP and the February 2019 IEP, paraeducators were to provide SDI in certain areas. Can you provide me with an explanation of which special education teacher designed and supervised the various paraeducators' provision of specially designed instruction? And how this was accomplished?

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<sup>15</sup> The special education teacher provided the following information on this matter: "Thirty minutes included sign [a] sign language tutorial video to help him learn sign language; the other fifteen minutes was a speech app to improve language concepts or [one of the following:] starfall literacy; [a] math app; proloquoto."

**Answer:** [The] special education teacher...designed SDI and trained and supervised the para educators who delivered it.

**Question:** Concerning: Implementation of 3/18 IEP from start of 18-19 school year through 2/24/19: When in the Student's daily schedule for the 18-19 school year did he receive his respective SDIs, related service, and paraeducator support? (For example, the 3/2018 IEP has oral language, adaptive, etc, but no time in the class that has an obviously similar title or name.)

**Answer:** Paraeducator support is provided from arrival to dismissal through the entire day, adaptive is provided concurrently throughout the Students daily schedule, not as a separate class period (e.g., handwashing, preparing for and eating breakfast and lunch, use of restrooms, getting ready for recess, physical education class etc.) Oral language was scheduled with an SLP on Fridays 12:00-12:30, and OT (fine and gross motor) was scheduled for Mondays from 11:00-11:30.

**Question:** Concerning: Implementation of 2/19 IEP from February 25, 2019 through end of 18-19 school year: When in the Student's daily schedule for the 18-19 school year did he receive his respective SDIs, related service, and paraeducator support?

**Answer:** See the answer above.

**Question:** Concerning: Implementation of 2/19 IEP from start of 19-20 school year through the present: When in the Student's daily schedule for the 19-20 school year did he receive his respective SDIs, related service, and paraeducator support?

**Answer:** Same as answer above, except oral language was scheduled with an SLP on Thursdays from 12:45-1:15, OT (fine and gross motor) was scheduled for Wednesdays from 9:30-10:00.

92. In the investigation of this complaint, OSPI's investigator asked the Parent questions concerning IEP implementation since September 14, 2018. OSPI received the following answers:

**Question:** What makes you believe that the Student's hearing aids were not always used?

**Answer:** Student's hearing aids would get lost on the bus a few times, so I started putting them in his backpack, but when Student came home they were exactly the same. I would send it with the batteries outside the device and it would come home the same way. When I asked how often they were using them, the aides would say that sometimes Student was upset and took the hearing aids out after five or 10 minutes just "had a rough time."

**Question:** What makes you believe that the Student was sometimes kept on an iPad all day without instruction?

**Answer:** The few times I was allowed to go back into the room, I only ever saw him sitting at the corner of the table by himself on the iPad with the aide immediately next to him with big headphones over his head. She'd say "let's show mom this" and then Student would change it back to games that he was playing instead.

In regard to implementation, the Parent's reply also included the following allegation: District staff generally did not have the training required to effectively utilize the Picture Exchange Communication System (PECS) and sign language to communicate with the Student.

93. OSPI's investigator emailed paraeducators 1-3 several questions concerning the Student's access to recess with nondisabled peers. OSPI received the following answers:

- When you worked with the Student at recess, what, if any, accommodations were made for the Student to enable him to participate in recess?
  - **Paraeducator 1:** Paras supervised at recess.
  - **Paraeducator 2:** There were two paraeducators to help the Student during transition from recess to class time.
  - **Paraeducator 3:** During recess there was additional staffing.
- Can you provide a general description of how the student participated with his nondisabled peers during recess?
  - **Paraeducator 1:** He played independently and had use of all of the equipment, he didn't interact with other students.
  - **Paraeducator 2:** The Student would play independently around other students. He did not interact with them.
  - **Paraeducator 3:** At recess the Student would play among his nondisabled peers and watch them but normally just followed his own playing agenda.
- How often did the Student attend recess with his nondisabled peers?
  - **Paraeducator 1:** Twice a day.
  - **Paraeducator 2:** All students had two recesses a day. He joined them in both recess times the same as the other students.
  - **Paraeducator 3:** There were two recesses per day at which he would attend.
- If Student did not attend recess on particular days, why was this?
  - **Paraeducator 1 and 3:** He was sick or absent.
  - **Paraeducator 2:** To my knowledge the Student was never denied recess.

The special education teacher asserted the following accommodation was made so as to enable Student to participate in recess with his nondisabled peers: "Additional staff during recess periods to supervise [him] for safety."

94. The special education teacher provided the following written statement on the Student's access to physical education with nondisabled peers:

The Student was permitted to have PE with non-disabling peers as scheduled weekly for Student throughout the school year. If his behaviors were not safe or he left the PE location, he continued motor movements with a walk in the hallway, sensory activities or playground. He had PE with non-disabling peers more than not.

Recess is not teacher structured, so Student had more success with recess as he did what he wanted. PE is teacher structured so he had more difficulty.

95. OSPI's investigator emailed the special education teacher and paraeducators 1-3 several questions concerning the Student's use of hearing aids. OSPI received the following answers:

- From your observation of, and work with, the Student, how often did the Student remove his hearing aids?
  - **Special education teacher:** If he had the aid on when arriving at school, [he] would take them off at some point throughout the day.
  - **Paraeducator 1:** If he came to school with them, he would take them off by [the] middle of the day.

- **Paraeducator 2:** I was not trained to put the Student's hearing aid in or out. During our work period it was not an issue.
- **Paraeducator 3:** By the time of day he would come to me his hearing aids would be off.
- **Speech language pathologist:** Student did not consistently wear his hearing aids. Student would push staff's hands away, turn head, and yell 'no' when they tried to place his hearing aids on. This has occurred since preschool. Student generally did not come to school with hearing aids on.
- Why would he remove them?
  - **Special education teacher:** I am not sure, maybe they were not working.
  - **Paraeducator 1:** I believe they bothered him.
  - **Paraeducator 2:** I am guessing it was uncomfortable or loud.
  - **Paraeducator 3:** I can only guess that they were irritating him.
  - **Speech language pathologist:** It is unclear as to why he did not like his hearing aids. It may have been sensory issues or issues related to his autism.
- Could the Student hear anything if he didn't have his hearing aids?
  - **Special education teacher:** It seemed as though he could as he would turn his head to sound, but we used total communication (sign, verbal, visual cues) to help him understand his learning at school.
  - **Paraeducator 1:** I believe so and I signed with him.
  - **Paraeducator 2:** Yes, we talked to the Student and also signed.
  - **Paraeducator 3:** I believe he could hear some. There were times when he had them off that it seemed he could understand what we wanted him to do.
  - **Speech language pathologist:** Student sustains a mild to moderately-severe sensorineural hearing loss in his right ear and a severe sensorineural hearing loss in his left ear. He responded to words and sounds. When his name was called he could turn and look. Instruction was primarily presented with verbal, visual supports, and sign to help him increase his comprehension. Staff would sit on his right side to ensure the best comprehension with 1:1 instruction. His autism and his behavior were an impact on his comprehension.
- Did District staff assist the Student in putting the hearing aids back in after he took them out? Or did the District allow the Student to put them back in when he felt like it? If the latter scenario, generally speaking, how often would the Student's hearing aids be out?
  - **Special education teacher:** Staff assisted Student with putting in the hearing aids after they were taken out if he was wanting them in and maybe occurred one time a day.
  - **Paraeducator 1:** Yes, if he allowed, [and] yes, if he wanted to put them in—approximately once a day.
  - **Paraeducator 2:** Generally, other staff supported the Student with his hearing aids.
  - **Paraeducator 3:** If he allowed me to put them in for him which didn't happen but a few times. He would usually have them out by the time he came to me.
  - **Speech language pathologist:** I am unsure how often they would attempt. I do know there were times that I tried to assist, and Student would clearly tell me 'no' by pushing my hand away, turning his head, and yelling 'no.'

96. The speech language pathologist provided the following description of the specially designed instruction in oral language and speech therapy that she provided the Student:

Student's overall goal was total communication to break through his autism with his hearing loss. Total communication means the use of multi-modal communication techniques using every avenue of communication: sign, gesture, verbal, pictures, and augmentative technology. Some of his goals included: Being able to answer concrete yes / no concrete questions. Increasing his sound awareness – locating noises / music. Imitating and identifying ling sounds (isolated phonemes to target low, middle and high frequency sounds).

97. The special education teacher provided the following description of how she designed and supervised the provision of specially designed instruction in cognitive, math, adaptive, and social/emotional that paraeducators 1-3 provided to the Student:

Data generated from Benchmark assessments; formative and summative assessment; classroom observations. Student was taught within my classroom groups, so I was able to observe and assist with daily lessons. Data, observation data or work samples were collected weekly.

After evaluating students learning strengths and areas of need during IEP development/weekly staff meetings to review data, my team will choose available curriculum or make curriculum to meet the students learning.

Reading Edmark was chosen as it has elements of Total Communication (Print, Pictures, Sign language, verbal). There are built in assessments. DRA assessment/ReadWell Developmental stories: verbal and sign with high interest pictures for comprehension.

We used words from Edmark for written language also as the words were familiar and we could use total communication within written language. Handwriting without tears and Brain Gym was used for fine motor letter writing.

Math: We used total communication to instruct base ten instruction (Math manipulative tools-base ten blocks supported Joe's math understanding, sign language of all numbers, written numbers, verbal) Saxon math cycles math skills, use of total communication, built in assessments.

Adaptive Curriculum: Social thinking books, videos, and turn taking games with classmates and typical peers. /STARS curriculum also supported data collection, goal setting, and implementation of Functional routines using total communication.

98. OSPI's investigator asked several District staff members what their training and experience was in the following areas: picture exchange communication system (PECS); sign language; proloquo. OSPI's investigator received the following answers:

- PECS
  - **Paraeducator 1:** "[I was] trained by the speech language pathologist and the special education teacher [on PECS]."
  - **Paraeducator 2 and 3:** "[I was] educated by the special education teacher and the speech language therapist [on PECS]."
- Sign Language

- **Paraeducator 1:** "I took a course at Whatcom Community College and did an online course."
- **Paraeducator 2:** "[I was] educated by the special education teacher and the speech language therapist [on sign language], including Edmark, signing time, and life print."
- **Paraeducator 3:** "[I] took an online course."
- Proloquo
  - **Paraeducator 1 and 3:** "[I] never used [proloquo] with the Student."
  - **Paraeducator 2:** "[I was] educated by the speech therapist [on proloquo] but I did not use this with the Student."

The speech language pathologist provided the below answer to the aforementioned question:

I have a master's degree in Speech Language Pathology. I have been practicing for 26 years (7 years in the medical field – home health, hospitals and 19 years in the schools). I take continuing education classes every year. I have had classes pertaining to all of these areas. Some of the relevant classes are: Functional AAC Assessment and Interventions Strategies for Individuals with Severe Disabilities in Schools and Other Settings; Working Memory and Language of Children Who are Deaf and Hard of Hearing; Two Day Conference For School Based Speech – Language Pathologists; High Functioning Autism: Proven and Practical Interventions for Challenging Behaviors in Children, Adolescents and Young Adults; Two Day Conference STAR Program – Strategies for Teaching Based on Autism Research; American Sign Language – Whatcom Community College; Addressing Challenging Behaviors in School Age Children with Autism; Structured Teaching: Creating systems that Work for Students with Autism; Early Intervention for Young Children with Autism; iPad Innovations for SLPs; Autism Summit; and Proloquo2go training videos – I have used Proloquo2go for a variety of students for approximately 10 years.

The special education teacher provided the below answer to the aforementioned question:

I have a Master's Degree in Curriculum and Instruction, BA in Special Education, Early Childhood Education, 1 full college year of Sign Language (level1,2,3). Over a year with volunteer and personal friendships with deaf individuals which made my skills fluent, Continuing education classes in STARS (Strategies for teaching based on Autism Research); PEC training (Picture Exchange Communication System); PROLOQUO usage and training for a min. of 7 years with...SLP training and development.

I have worked with severe disabled students who have had Autism, Hearing Impairments, Physical Disabilities and other disabilities for over 20 years.

99. According to multiple District staff members: the iPad could only be accessed if a District staff member first entered a 4 digit password<sup>16</sup>; when not in use, the iPad was stored at a "recharge station;" the iPad was used by multiple students in the classroom; the Student only used the

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<sup>16</sup> The special education teacher stated that, at some point, a "guided access teacher-only password was added to student programs, so that the Student was unable to change programs." Paraeducator 1 also said: "When the Student used the iPad with me, I entered a code for guided access so he would stay on the app I wanted him to be on."

iPad for a total of 45 minutes; and the Student never used the iPad to play games and/or use apps that were not related to sign language and/or speech skills.

100. OSPI's investigator conducted a phone interview of the principal on October 30, 2019. In that phone interview, the principal stated: PE takes place in an auxiliary room; recess takes place on a large playground close to the Student's classroom; she often goes to recess and, as best she recalls, Student was always there and playing with his nondisabled peers; recess was only canceled on rainy days.
101. OSPI's investigator conducted a phone interview of paraeducator 1 on October 31, 2019. In that phone interview, paraeducator 1 stated: she used 'starfall' on the iPad, a program for reading and math; she and Student eventually moved from the iPad to the chrome book because, as the Student progressed, the chrome book had more appropriate applications for his increased abilities; PE was 2 or 3 times a week; PE class had a warm-up activity and then a sitting period while the students got instruction; Student sometimes could not make it through this sitting period; Paraeducator 1 and Student would either walk the hallway or go back to the classroom to work on a ball activity or balance for roughly 15 minutes, then they would go back to PE after the instruction portion of the class was finished; sometimes Student went to PE, sometimes he did not.
102. OSPI's investigator conducted a phone interview of paraeducator 2 on October 31, 2019. In that phone interview, paraeducator 2 stated: she served as extra personnel support for the Student for recess; she cannot speak to how long and/or when and/or under what circumstances the Student did not receive PE.
103. OSPI's investigator conducted a phone interview of paraeducator 3 on October 31, 2019. In that phone interview, paraeducator 3 stated: it depended on the day whether he went or not he went to PE; some days Student enjoyed going, but other days he did not enjoy going to PE; she cannot say how often he did not go to PE.
104. OSPI's investigator conducted a phone interview of occupational therapist 2 on November 1, 2019. In that phone interview, occupational therapist 2 stated: the couple times she went to the Student's PE class, Student was never in attendance; she only ever saw the Student leave his classroom to attend occupational therapy sessions and speech language pathology sessions.

#### **OSPI Investigation: Issue 4**

105. In the investigation of this complaint, OSPI's investigator asked the special education director questions concerning shortening the Student's school day. OSPI received the following answers:
  - Question:** Did District staff and/or the Student's IEP team ever consider the need for specialized transportation as a result of the occurrences on September 4-6, 2019?
  - Answer:** The student is provided specialized transportation. See page 17 of his February 25, 2019 IEP.

**Question:** Did District staff ever tell the Parent something akin to, "from here on out," she needs to come get the Student prior to dismissal to the bus at or around 3 pm?

**Answer:** Staff did not tell the parent something akin to "from here on out" she needs to come get the student prior to the bus at or around 3 pm.

**Question:** Was the District aware that the Parent believed she was being told that, "from here on out," the Student needed to be picked up early? And, if so, what steps, if any, did the District take to correct the Parent's misunderstanding?

**Answer:** Staff was not aware the Parent held this belief.

**Question:** What did specialized transportation for this Student look like?

**Answer:** The Student is provided transportation on a small passenger bus, which has six bench-style seats and includes a wheel chair lift. A paraeducator rides the bus to aide in monitoring students. There are ten students in the small passenger bus.

**Question:** Why was this specialized transportation not sufficient on September 4, 2019 through September 6, 2019?

**Answer:** Due to the Student's atypical behaviors on September 4, 2019 through September 6, 2019, staff were concerned Student would not be safe on the bus with other students.

## CONCLUSIONS

**Issue 1(a): Use of a Proper Isolation Enclosure** – Any isolation enclosure must be ventilated, lighted, and temperature controlled from inside or outside for purposes of human occupancy. Furthermore, the isolation enclosure shall permit continuous visual monitoring of the student from outside the enclosure.

Here, the Student's evaluation and IEP teams determined the Student would benefit from sensory exercises.<sup>17</sup> As a result, Student's 2018-2019 and 2019-2020 schedules both included time for the Student to engage in sensory exercises. On occasion, the Student would engage with these scheduled sensory exercises in a "sensory room." For example, the District stated that "sensory rooms may...be used for OT sessions."<sup>18</sup>

According to the District, the single sensory room at the Student's school was "supplied with sensory items such as Kinetic sand, play dough, trapeze swing, sensory pea pod, tent, stability balls and ball pit." In the course of this investigation, OSPI obtained the following information on the sensory room at the Student's school:

- Special education director: The sensory room was ventilated, lighted, and temperature controlled.
- Special education director: "The sensory room has a window in the door that allows someone to look into the room."

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<sup>17</sup> See, in particular, Student's March 2018 IEP and February 2019 evaluation.

<sup>18</sup> The record also suggests, though, that if the Student became dysregulated, the Student would sometimes be moved to the sensory room, in an effort to allow the Student to calm down. For example, the District says this is what happened on September 9, 2019.



- Parent's reply: The sensory room had "a tiny window on the door with blinds."

On the basis of the foregoing, the sensory room at the Student's school met the requirements of WAC 392-172A-02110(1)(b)-(c).

**Issue 1(b): Discontinuing Isolation and Restraint as soon as Likelihood of Serious Harm Dissipates** – Isolation and restraint shall be used only when a student's behavior poses an imminent likelihood of serious harm.

Before determining whether an isolation or restraint event was ended at the appropriate time, it is first necessary to determine that an isolation or restraint event, as defined in state statutes and regulations, actually took place.

**Isolation: Sensory Room** – Isolation as defined in RCW 28A.600.485 means: Restricting the student alone within a room or any other form of enclosure, from which the student may not leave. It does not include a student's voluntary use of a quiet space for self-calming, or temporary removal of a student from his or her regular instructional area to an unlocked area for purposes of carrying out an appropriate positive behavioral intervention plan. Positive behavioral interventions are strategies and instruction that can be implemented in a systematic manner in order to provide alternatives to challenging behaviors, reinforce desired behaviors, and reduce or eliminate the frequency and severity of challenging behaviors. Positive behavioral interventions include the consideration of environmental factors that may trigger challenging behaviors and teaching a student the skills to manage his or her own behavior.

In the course of this investigation, OSPI obtained the following information on the Student's use of the sensory room at the Student's school:

- District's response: "Student is always accompanied by a paraeducator or teacher [when in the sensory room and] the Student may choose to leave at any time. The room has not been used for isolation for Student."
- Special education director stated: "The sensory room has the same door as all classrooms at [Student's] elementary [school]. The lock on the door can only restrict entry to the room, not exiting. The [special education] teacher confirmed the Student is able to exit on [his] own."
- Special education director: "The Student was in the sensory room 2 x after lunch for a maximum of 20 minutes." (The special education teacher provided the following clarification: "This Student was in and out throughout the day, never staying in the room very long. The total minutes would be less than 40 minutes for the entire day.")

Because the Student could leave the sensory room of his own accord, and because he was always accompanied by a teacher or paraeducator, the Student was not "isolated," as defined by RCW 28A.600.485 and WAC 392-172A-01107, when he was in the sensory room. Furthermore, when the Student was temporarily relocated to the sensory room in an attempt to allow him to calm down after becoming dysregulated, this would have represented a permissible positive behavioral intervention under WAC 392-172A-01107 and WAC 392-172A-01142.

Restraint: Sensory Belt and Regular Chair – Restraint as defined in RCW 28A.600.485 means: Physical intervention or force used to control a student, including the use of a restraint device to restrict a student’s freedom of movement.

Here, occupational therapist 2 stated that, on several occasions from mid-February 2019 through roughly May 1, 2019, she saw the Student restrained in the following manner: “The restraint consisted of a belt approximately 5 inches wide secured around Student’s waist, which was attached to another substantial strap secured to [a regular classroom] chair. Student was unable to stand or move freely while restrained.” This, if true, would definitely meet the definition of restraint under RCW 28A.600.485 and WAC 392-172A-01162. Occupational therapist 2’s allegations appear credible. For example, she submitted a notarized declaration and there is a contemporaneous email, see her email dated February 24, 2019, documenting her concerns.

However, OSPI uses a preponderance of the evidence standard in making independent determinations as to whether a district violated a requirement of Part B of the IDEA. Merriam-Webster’s Dictionary of Law defines the phrase preponderance of the evidence as “the standard of proof...in which [a] party [wishing to establish a factual premise] must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not.”

Here, then, occupational therapist 2’s notarized declaration and February 24, 2019 email need to be examined in conjunction with the assertions (both verbal and written) from 16 different staff members that were in and out of the Student’s classroom on a regular or irregular basis during the time period relevant to this investigation, that they never saw what is described in occupational therapist 2’s declaration—or even something similar to what is described in occupational therapist 2’s declaration.

On the basis of the foregoing, OSPI cannot conclude that the Student was restrained in a manner as described in occupational therapist 2’s declaration.

Restraint: District Staff Holding Sensory Belt while Student Walked in Hall – Restraint device as defined in RCW 28A.600.485 means: A device used to assist in controlling a student (emphasis added). A restraint device does not include a seat harness used to transport a student safely or other safety devices, including safety belts for wheelchairs, changing tables, booster seats, and other ambulatory or therapeutic devices when used for the purpose intended for the safety of a student. A restraint device shall be used only when a student’s behavior poses an imminent likelihood of serious harm. The use of a restraint device is subject to each of the following conditions: a) the restraint device must be discontinued as soon as the likelihood of serious harm has dissipated; b) the restraint device shall not interfere with the student’s breathing; c) either the student shall be capable of releasing himself or herself from the restraint device or the student shall continuously remain within view of an adult responsible for supervising the student; d) any staff member or other adults using a restraint device must be trained and certified by a qualified provider in the use of such restraint devices, or otherwise available in the case of an emergency when trained personnel are not immediately available due to the unforeseeable nature of the emergency.

Here, the Student's February 2019 IEP stated the Student's sensory belt, in part, "support[ed] assistant[s] in guiding Student when needed." According to the special education director, despite the fact that the Student's February 2019 IEP included this language, "staff do not recall using [the] belt in this way...the sensory belt was not used as a restraint device by any staff." However, in the course of this investigation, the following three District staff members stated that, on occasion, they saw District staff members holding onto the Student's sensory belt as he walked in the hallways: K-5 title teacher; paraeducator 5; and school psychologist 1. School psychologist 1 says she only ever saw District staff holding onto the Student's sensory belt in a "cooperative manner"—in other words, she never saw District staff use the belt to guide the Student when the Student was emotionally dysregulated and/or wanted to travel in a direction other than where Student was supposed to.

Still, given: a) the numerous references in the record to the Student's elopement and aggression challenges<sup>19</sup>; and b) the fact that the District does not deny that the Student possessed normal coordination and balance and was independently ambulatory<sup>20</sup>, it is clear that District staff, in placing their hand(s) on the Student's sensory belt while he was walking in the hallways, were only doing so because it **assisted** them in controlling the Student. Therefore, the use of the sensory belt, in this specific manner, constituted the use of a restraint device. And, given the fact that there is nothing in the record to indicate that the use of the belt to guide the Student was undertaken because the Student's behavior posed an imminent likelihood of serious harm, the use of the belt in this manner constituted an impermissible use of a restraint device. OSPI finds the District in violation when the sensory belt was used in this manner and the District will be required to provide training.

Restraint: Rifton Chair – According to the District, during the 2018-2019 school year:

The Student also had seating preferences, a child's wood rifton chair with a front buckling strap. This chair is designed to support positioning and providing security and stability for children with sensory and strength needs. Staff reported Student used the chair at his work place, seating himself and buckling the front buckle of the strap. Student was able to buckle and unbuckle and leave the chair at any time...The Student used the rifton chair during academic/instructional work times in the classroom at his...table...the Student was [first able] to buckle and unbuckle himself during his first grade year—2018-2019.

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<sup>19</sup> See February 2019 evaluation ("Student consistently runs away, screams, or is aggressive if he leaves our classroom"); see also occupational therapist 2's February 24, 2019 email (Wherein she states that one of the Student's paraeducators told her that "they do not have the staff [to] watch Student 'in case he runs'"); occupational therapist 2's Declaration (Wherein she says she "never observed the eloping behaviors [that other] staff were concerned about [with Student]"); principal's September 13, 2019 email to the CPS representative ("Student had a difficult transition back to school. When prompted to do learning activities he has been physical with staff—spitting, running, screaming, and kicking"); District's response generally; Parent's reply generally.

<sup>20</sup> See February 2019 evaluation ("Student does not appear to have gross motor delays below age/grade level. Student has adequate balance, coordination, and mobility"); see also statement by special education director ("The district is not aware of any staff member who believed the Student has poor coordination").

As the Student was able to buckle and unbuckle the strap on the rifton chair, and to “leave the chair at any time” he desired, this did not constitute either a restraint or the use of a restraint device.<sup>21</sup>

**Issue 1(c): Proper Documentation of Isolation and Restraint** – School districts must follow the documentation and reporting requirements for any use of isolation, restraint, or restraint device consistent with RCW 28A.600.485.

Here, the District did not follow these reporting requirements following the occasional use of the sensory belt as a restraint device when Student walked the hallways because the District did not acknowledge that this was a restraint. The District stated that “there are no reports or documentation of isolation or restraint for Student as [it did not believe that any had been] initiated.” This represents a violation of the IDEA.

**Issue 2: Parent Participation in IEP Meetings** – In the course of this investigation, the Parent’s complaint on this score was clarified. Specifically, the Parent stated: “IEP meetings were actually moved to exclude occupational therapist 2 which thus inhibited my participation and the flow of information about what was actually happening in the classroom.”

Parents of a child with a disability will participate with school personnel, in developing, reviewing, and revising the student’s IEP. This is an active role in which the parents: provide critical information regarding the strengths of their child, and express their concerns for enhancing their child’s educational program; participate in discussions about their child’s need for special education, related services, and supplementary aids and services; and join with 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. An IEP team is composed of, in part, any individuals who have knowledge or special expertise regarding the student, including related services personnel. An IEP meeting

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<sup>21</sup> A separate issue, though, is whether the rifton chair was an appropriate support for the Student based on the Student’s needs resulting from his disability. According to the Parent’s reply, “the [rifton] chair is never mentioned in Student’s IEP and...he has never shown a preference for being strapped into chairs.” According to the Parent’s attorneys: “Parent had not heard of the use of a rifton chair until [she received] information...from the District’s response to [this complaint]. Parent responded that she had not seen one and that such a chair would not have been appropriate.” The Student’s IEP documents mention that he has certain sensory needs. To the extent the rifton chair fulfills Student’s sensory needs, it might be an appropriate support for the Student. However, OSPI makes three observations: a) rifton chairs usually serve as “positioning chairs [that] enable users to learn functional sitting skills...[permitting] a client [to] actively use and develop his or her core muscles and improve their postural motor skill” (<https://www.rifton.com/resources/articles/2012/april/guidelines-for-the-rifton-activity-chair>); b) the record in this complaint does not support the notion that the Student needed assistance with sitting and/or seated posture; and c) the rifton chair does not appear to be mentioned in the March 2018 IEP, the February 2019 evaluation, or the February 2019 IEP. Therefore, OSPI recommends that the Student’s IEP team discuss (this would, by definition, include the Parent), whether and why the Student’s needs resulting from the Student’s disability requires that he be given the option of using a rifton chair.

invitation informs the parents of the provisions relating to participation by other individuals on the IEP team who have knowledge or special expertise about the student.

Here, there is an email from occupational therapist 2 dated February 24, 2019, wherein she says that she only learned about the Student's evaluation and IEP meeting scheduled for the next day (February 25, 2019) late in the afternoon on February 21, 2019. In that same email, occupational therapist 2 says she will need "through Friday, March 1, 2019 [to] review [Student's file], [conduct] observations across settings, [complete a] sensory profile for home and school, and [sic] standardized testing." A 'Review IEP Invitation' document, however, states that occupational therapist 2 was invited to the February 25, 2019 meeting on January 31, 2019. Even accounting for several days for mailing and any snow-related school closures, this still represents roughly 3 ½ weeks of notice of the February 25, 2019 meeting. Finally, occupational therapist 2 participated in the February 25, 2019 meeting—she signed the February 2019 IEP and the February 2019 evaluation includes detailed fine motor and gross motor sections that were completed by occupational therapist 2. On the basis of the foregoing, the Parent's participation in the February 25, 2019 meeting was not hindered by a failure to properly include occupational therapist 2.

**Issue 3: IEP Implementation** – The Parent alleged the District did not implement the Student's March 2018 and February 2019 IEPs. At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction who is eligible to receive special education services. A school district must 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. 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 child with a disability and those required by the IEP.

Speech – Here, the Student did not always receive the speech language therapy sessions that were required by this March 2018 and February 2019 IEPs. In the situation "where the student is absent from school because of the family's or physician's decision that the student not attend school...the general rule is that, if the school district makes IEP services available to the student at the normally scheduled time, the school district is not obligated to make other arrangements to provide services." In the situation "where the student cannot receive the services in his or her IEP due to reasons associated with participation in school-sponsored activities or the unavailability of needed personnel...the school district generally will be responsible for making alternative arrangements for providing IEP services." *Letter to Balkman*.

The Student's March 2018 IEP provided the Student with three 30 minute speech therapy sessions a month. From the latter half of September 2018 through February 2019, the Student missed 9 speech therapy sessions because either the provider was absent, school was not in session on the scheduled day, or a school-wide event took place on a day a session was scheduled for.

The Student's February 2019 IEP provided the Student with three 30 minute speech therapy sessions a month. From March 2019 through September 10, 2019 (the last day Student attended school in the 2019-2020 school year), the Student missed 6 speech therapy sessions because

either the provider was absent, school was not in session on the scheduled day, a school-wide event took place on a day a session was scheduled for, or the service provider was not prepared to deliver services. Under *Balkman*, the District should have also provided makeup sessions for these speech sessions.

A state educational agency is authorized to order compensatory education through the special education citizen complaint process. Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. Therefore, the District will be required to provide the Student with 7 ½ hours (or 450 minutes) of compensatory education in speech language therapy (15 half hour sessions multiplied by 30 minutes, divided by 60 minutes).

Fine Motor – The Student's March 2018 IEP provided the Student with two 10 minute fine motor sessions a month. From the latter half of September 2018 through February 2019 the Student missed 6 fine motor sessions because either the provider was absent, a required session was not scheduled, or no documentation of the provision of services was provided to OSPI. Under *Balkman*, the District should have also provided makeup sessions for these fine motor consultations. Therefore, the District will be required to provide the Student with 1 hour of compensatory education in fine motor (6 sessions multiplied by 10 minutes).

Gross Motor – The Student's March 2018 IEP provided the Student with two 10 minute gross motor sessions a month. From the latter half of September 2018 through February 2019 the Student missed 6 gross motor sessions because either the provider was absent, a required session was not scheduled, or no documentation of the provision of services was provided to OSPI. Under *Balkman*, the District should have also provided makeup sessions for these gross motor consultations. Therefore, the District will be required to provide the Student with 1 hour of compensatory education in gross motor (6 sessions multiplied by 10 minutes).

Sensory – The Student's March 2018 IEP provided the Student with one 10 minute sensory session a month, to be provided by an occupational therapist. From the latter half of September 2018 through February 2019 the Student missed 3 sensory sessions because either the provider was absent, a required session was not scheduled, or no documentation of the provision of services was provided to OSPI. Under *Balkman*, the District should have also provided makeup sessions for these gross motor consultations. Therefore, the District will be required to provide the Student with 30 minutes of compensatory education in sensory (3 sessions multiplied by 10 minutes).

Occupational Therapy – The Student's February 2019 IEP provided the Student with three 30-minute occupational therapy sessions a month, to be provided by an occupational therapist. Neither the District nor occupational therapist 2, though, was able to provide OSPI with documentation of what OT-related services were provided to the Student in the spring of 2019, though the record does establish that occupational therapist 2 worked with the Student for some unknown number of sessions—for example, in her declaration, occupational therapist 2 states she worked with the Student.

However, absent any documentation of services, OSPI will assume that at least half of the required therapy sessions were provided to the Student from March 2019 through June 13, 2019 (the last day of school in 2018-2019).

March 2019 through June 13, 2019 represents approximately three and a half months. Therefore, 315 minutes of occupational therapy should have been provided to the Student during this time (90 minutes a month multiplied by 3.5 months). Half of that figure is approximately 2.5 hours (157.5 minutes) of occupational therapy. Therefore, the District will be required to provide the Student with 2.5 hours of compensatory education in occupational therapy to cover the period of March 2019 through June 13, 2019.

Student also attended approximately one week of school at the beginning of the 2019-2020 school year; however, due to administrative challenges related to occupational therapist 3's onboarding, Student received no occupational therapy sessions during that time. Student should have received one 30 minute speech therapy session during that same time period. Therefore, this figure will be added to the above figure, and the district will be required to provide the Student with a total of 3 hours of compensatory education in the area of occupational therapy.

#### Other Service Areas

*September 14, 2018 through February 24, 2019*

The March 2018 IEP provided the Student with the following specially designed instruction in a *special education setting* from April 10, 2018 through March 8, 2019:

- Cognitive: 180 minutes 5 times a week (to be provided by a paraeducator)
- Adaptive: 95 minutes 5 times a week (to be provided by a paraeducator)
- Social/emotional: 63 minutes 5 times a week (to be provided by a paraeducator)

According to the District, the Student's special education teacher and paraeducators provided him with his specially designed instruction in adaptive and social/emotional throughout the school day. In 2018-2019, the Student attended school for approximately six hours, so, even accounting for the 180 minutes in cognitive the Student was supposed to receive each day during this time period, this would have left the Student with enough time to receive the required SDI in adaptive and social/emotional. In the investigation of this complaint, the special education teacher included a detailed description of how she designed and supervised the paraeducators' provision of SDI to the Student.

The Student's March 2018 IEP included a cognitive goal that appears to pertain to both math and communication. The Student's schedule from September 14, 2018 through February 24, 2019 provided him with the following: approximately 230 minutes in cognitive SDI (60 minutes for literacy; 60 minutes for literacy; 30 minutes for sign language; 60 minutes for math; 20 minutes for reading). This is more than the 180 minutes in cognitive SDI required by the March 2018 IEP.

On the basis of the foregoing, OSPI concludes that the Student was provided with the amount of SDI in cognitive, adaptive, and social/emotional, as specified by his March 2018 IEP, from September 14, 2018 through February 24, 2019. OSPI finds no violation.

*February 25, 2019 through June 13, 2019*

The February 2019 IEP provided the Student with the following specially designed instruction in a *special education setting* from February 25, 2019 through February 24, 2020:

- Math: 60 minutes 5 times a week (to be provided by a paraeducator)
- Adaptive: 93 minutes 5 times a week (to be provided by a paraeducator)
- Social/emotional: 60 minutes 5 times a week (to be provided by a paraeducator)
- Reading: 60 minutes 5 times a week (to be provided by a resource room teacher)
- Written Language: 60 minutes 5 times a week (to be provided by a resource room teacher)

According to the District, the Student's special education teacher and paraeducators provided him with his specially designed instruction in adaptive and social/emotional throughout the school day. In 2018-2019, the Student attended school for approximately six hours, so, even accounting for the 120 minutes in math, reading, and written language that the Student was supposed to receive each day during this time period, this would have left the Student with enough time to receive the required SDI in adaptive and social/emotional. In the investigation of this complaint, the special education teacher included a detailed description of how she designed and supervised the paraeducators' provision of SDI to the Student.

The Student's schedule from February 25, 2019 through June 13, 2019 provided him with the following: 60 minutes of SDI in math; 60 minutes of SDI in reading; and 60 minutes of SDI in written language. This matches the services in these areas that the Student was supposed to be receiving during this time period.

On the basis of the foregoing, OSPI concludes that the Student was provided with the appropriate amount of SDI in math, adaptive, social/emotional, reading, and written language from February 25, 2019 through June 13, 2019. OSPI finds no violation.

*August 28, 2019 through September 10, 2019*

For this week and a half period, there appears to have been some slight mismatches in the services the Student was supposed to receive according to his February 2019 IEP and what he actually received. For example: a) he was supposed to receive 60 minutes of SDI in math each day, but it appears he actually received 70 minutes of SDI in math each day (math workshop from 11:30-12:10 and calendar math from 1:00-1:30); b) he was supposed to receive 60 minutes of SDI in reading each day, but it appears he actually received 45 minutes of SDI in reading each day (reader's workshop from 10:00-10:15 and another reader's workshop from 10:45-11:15); c) he was supposed to receive 60 minutes of SDI in written language each day, but it appears he actually received 30 minutes of SDI in written language each day (writer's workshop from 9:15-9:45).

On the basis of the foregoing, OSPI reminds the District that, were the Student to reenroll in the District, that the District set up the Student's schedule so as to ensure that the Student is receiving the SDI required by his most recent IEP. However, despite the violation, given the brief period of time and the fact the Student no longer attends, OSPI finds no violation.



PE – The Parent alleged the Student rarely received PE with his nondisabled peers. Each student eligible for special education services must be afforded the opportunity to participate in the general physical education program available to students who are not disabled, unless the student is enrolled full time in a separate facility or the student needs specially designed physical education, as described in the student's IEP. If the student requires specially designed physical education, the district will ensure that the school either provides the services directly or makes arrangements with a private program.

Here, both the Student's March 2018 IEP and February 2019 IEP said that the Student was to participate in a general education PE class. The record, though, shows that, on a regular basis, the Student would not fully participate in the general education PE class. Rather, the Student often participated in the PE warm-up activity with his peers, but then, during a sitting period where the Students received instruction immediately following the PE warm-up activity, Student would either walk the hallway or go back to the classroom to work on a ball or balance activity.<sup>22</sup> The record also suggests that, on certain days, the Student did not go to the general education PE class at all.<sup>23</sup>

On the basis of the foregoing, the Student's IEP team should have met to determine: a) the maximum extent to which the Student's needs resulting from his disability permitted him to participate in the general education PE class; b) the reasons for this determination; c) what additional specially designed instruction, related services, accommodations, and/or modifications the Student needed in order to increase the amount of time he could spend in the general education PE class; and d) amended the Student's IEP to reflect the aforementioned decisions. The fact that this did not occur represents a violation of the IDEA.

Recess – The Parent alleged the Student rarely attended recess with his nondisabled peers.

Here, the Student's March 2018 and February 2019 IEP both stated that the Student would "participate with non-disabl[ed] peers for recess." And the record shows that this generally occurred. For example, the special education teacher and paraeducators 1-3 said that additional staffing, in the form of an additional paraeducator, were provided to the Student during the general education recess period. Paraeducators 1-3 said that the only time Student missed general education recess was if he was absent or sick. The principal stated she went to recess on most day

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<sup>22</sup> See February 2019 reevaluation ("Student's behaviors have affected his social integration times. He began the school year integrating into music and PE. He consistently runs away, screams, or is aggressive if he leaves our classroom. He has been given PE activities within our classroom by using our OT equipment (exercise ball, trampoline, swing, balance board"); see also Statement by special education teacher ("If his behaviors were not safe or he left the PE location, he continued motor movements with a walk in the hallway, sensory activities or playground. He had PE with non-disabling peers more than not"); paraeducator 1 interview notes; paraeducator 3 interview notes; occupational therapist 2 interview notes.

<sup>23</sup> See paraeducator 1 interview notes (paraphrased: 'Sometimes Student went to PE, sometimes he did not'); see also paraeducator 3 interview notes (paraphrased: 'It depended on the day whether he went or not'); occupational therapist 2 interview notes (In the interview, she said that, on the couple times she went to the Student's PE class, he was never in attendance).

and that, as best she recalls, the Student was always there and playing with or near his nondisabled peers. The special education teacher offered an explanation for why the Student was able to participate in general education recess more than he was general education PE: "Recess is not teacher-structured, so Student had more success with recess as he did what he wanted. PE is teacher-structured, so he had more difficulty." On the basis of the foregoing, OSPI concludes that this portion of the Student's March 2018 and February 2019 IEPs was properly implemented.

Hearing Aids – OSPI has a concern as to whether the Student was actually able to benefit from the specially designed instruction he received since September 14, 2018. For example, the Student appears to have a significant hearing loss in both ears, and wears hearing aids for this purpose. However, the record also shows that, for significant portions of the Student's average school day, he did not wear his hearing aids. In order for the Student's service providers to have engaged with him via total communication (verbal, sign language, PECS, proloquo, print), it would have been imperative the Student be able to hear verbal commands and communication. Here, the Student appears to have made fair progress on the goals in his March 2018 IEP through late February of 2019. However, the Student appears to have made poor progress on the goals in his February 2019 IEP through September 10, 2019. For example, as of June 2019, Student's progress on 7 of 8 of his goals was either emerging skill or insufficient progress; by June 2019, Student had only made sufficient progress on 1 of his 8 goals. Given this fact, at some point in the spring of 2019, the Student's IEP team should have met to determine: a) the reason Student was failing to make progress on his goals; and b) whether the Student needed any additional SDI, related services, accommodations, or modifications so as to permit him to make progress on the goals.

**Issue 4: Whether Student's School Day Was Shortened** – Students eligible for special education services should attend school for the same amount of time as students without disabilities, unless the IEP team decides that a shortened school day is necessary to ensure access to FAPE.

Here, according to the special education director:

The special education teacher and principal reported that on *September 4, 5, and 6, [2019]*, the special education teacher called [Parent] and requested that, due to [Student's] behaviors [Parent] pick him up prior to dismissal to the bus as it was determined that it was unsafe for [Student] to ride the bus home. As [Parent] must meet the bus at home for [Student's] sibling, [Parent] arrived to pick [Student] up from the school at approximately 2:45 on [these] three days. Students prepare for dismissal and loading the bus at 3:00 for a 3:15 departure.

According to the District: a) the Student received the following specialized transportation: ten students, including the Student, ride a six bench bus with one paraeducator; and b) it did not believe that this specialized transportation was sufficient on September 4-6, 2019, because the District was concerned about the safety of the other students that rode the Student's bus.

As a preliminary matter, it is important to note there was not an IEP team decision in early September to permanently require the Parent to come get the Student before the end of the regular school day; rather, it appears that the act of requiring the Parent to get the Student before

the end of the regular school day on September 4-6, 2019, was merely a reaction to the events of those specific days.

Still, by September 6, 2019, the Student's IEP team should have likely been considering whether additional supports were needed to permit the Student to attend a full day of school—for example: the addition of another paraeducator to the Student's bus and/or whether a functional behavior assessment and behavioral intervention plan needed to be completed. In the course of this investigation, OSPI's investigator asked the special education director the following question: "During or after September 4, 2019 through September 6, 2019, did the District ever consider an FBA and/or a BIP? If not, why not?" The special education director responded:

The District started with [a classroom] observation [of the Student] on September 9, 2019. A meeting was held on September 17, 2019 to discuss next steps, however, the Parent did not attend the meeting and the Parent refused to return Student to school. Without the Parent's participation, the IEP team was not able to move forward with considering an FBA or BIP.

On the basis of the foregoing, OSPI recommends that, if the Student reenrolls in the District, the Student's IEP team determine what additional supports, if any, are needed to ensure the Student can participate in a full day of school.

### **CORRECTIVE ACTIONS**

By or before **December 6, 2019, December 13, 2019, January 6, 2020, January 22, 2020, and February 10, 2020**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

By or before **December 6, 2019**, the District and the Parent will develop a schedule for providing the following compensatory education to the Student: 7.5 hours of speech language therapy; 1 hour of fine motor; 1 hour of gross motor; 30 minutes of sensory; 3 hours of occupational therapy. Services will occur in a one-on-one setting and be provided by a certificated special education teacher. The instruction will occur outside of the District's school day and may occur on weekends or during District breaks. If the District's provider is unable to attend a scheduled session, the session must be rescheduled. If the Student is absent, or otherwise does not attend a session without providing the District with at least 24 hours' notice of the absence, the District does not need to reschedule. The services must be completed no later than **February 7, 2020, including those needing to be rescheduled**. The District will provide OSPI with documentation of the schedule for services by or before **December 6, 2019**.

No later than **February 10, 2020**, the District shall provide OSPI with documentation that all of the compensatory services have been completed. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled by the District or missed by the Student.

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

reimburses Parent for transportation, the District must provide reimbursement for round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **February 10, 2020**.

#### **DISTRICT SPECIFIC:**

##### **One**

By **February 7, 2020**, the following District staff will receive training: special education administrators, the principal, the assistant principal, and special education-certified staff, including educational staff associates (ESAs), at the school that the Student was enrolled in during the 2018-2019 and 2019-2020 school years, as well as the paraeducators in the Student's classrooms during those two years. The training will cover the following topics:

- Restraint (WAC 392-172A-01162)
- Restraint Devices (WAC 392-172A-01163)
- Limitations to Using Restraint and Restraint Devices (WAC 392-172A-02110(2)-(3))
- Reporting Requirements for the Use of Restraint and Restraint Devices (WAC 392-172A-02110(4); RCW 28A.600.485)

The training will include examples. **The training will be presented by Lee Collyer, Program Supervisor (OSPI).**

By or before **December 13, 2019**, the District and Lee Collyer will establish a date on which the training will take place. By or before **December 13, 2019**, the District will inform OSPI of the scheduled date for the training.

By **February 10, 2020**, the District will submit documentation that required staff participated in the training. This will include 1) a sign-in sheet from the training, and 2) a separate official human resources roster of all staff required to attend the training, so OSPI can verify that all required staff participated in the training.

##### **Two**

By **January 17, 2020**, the District will ensure that the following individuals receive written guidance on WAC 392-172A-02030 (physical education requirements for students with IEPs): special education administrators, the principal, the assistant principal, and special education-certified staff, including educational staff associates (ESAs)<sup>24</sup>, at the school that the Student was enrolled in during the 2018-2019 and 2019-2020 school years, as well as the paraeducators in the Student's classrooms during those two years. The guidance will include examples.

By **January 6, 2020**, the District will submit a draft of the written guidance to OSPI for review. OSPI will approve the guidance or provide comments by January 10, 2020.

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<sup>24</sup> ESAs include school psychologists, physical therapists, occupational therapists, speech language pathologists, school counselors, school nurses, and other service providers.

By **January 22, 2020**, the District will submit documentation that all required staff received the guidance. This will include a roster of the required personnel. This roster will allow OSPI to verify that all required staff members received the guidance.

**Three**

By **January 22, 2020**, the District will provide OSPI with the following information on each student with an IEP that attends the school the Student attended during the 2019-2020 school year, as of November 11, 2019:

**Student's Name (Grade)**

Does this student's most recent IEP state that this student will receive specially designed physical education? Or does this student's most recent IEP state that this Student will receive general physical education?	
If the student is to receive specially designed physical education, why is this?	
If the student is to receive specially designed physical education, is the student actually receiving this?	
If the student is to receive specially designed physical education, what does this look like? In other words: who provides it, who designs and supervises it, when is it provided, and where is it provided?	
If the student is to receive specially designed physical education, what plans are in place so as to enable the student to eventually participate in general physical education?	
If the student is to receive general physical education, are accommodations, modifications, and/or supplementary aids and services necessary to enable the student to participate in general physical education? If so, what are these, why are they necessary, and are they being provided?	
If the student is to receive general physical education, is the student actually receiving this? For example, is the student able to regularly participate in the full class period for general physical education? Or is the student only able to regularly participate for a portion of the full class period for general physical education?	

Does the District believe that WAC 392-172A-02030 is being followed for this student? And, if not, what corrective actions does the District propose?	
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**Upon review of the foregoing documents and information, OSPI will order additional corrective actions as necessary.**

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**

#### **One**

OSPI recommends that, if the Student reenrolls in the District, the Student’s IEP team meet to determine what additional supports (specially designed instruction, related services, accommodations, modifications), if any, are needed to ensure the Student can participate in a full day of school.

#### **Two**

OSPI recommends that, if the Student reenrolls in the District, the Student’s IEP team discuss (this would, by definition, include the Parent), whether and why the Student’s needs resulting from the Student’s disability requires that he be given the option of using a rifton chair.

#### **Three**

OSPI also reminds the District that, were the Student to reenroll in the District, the District must set up the Student’s schedule so as to ensure that the Student is receiving the SDI required by his most recent IEP.

#### **Four**

OSPI further recommends that the following individuals review the Tip portion of OSPI’s September 2019 monthly update, titled, “When Do Students Start Receiving Special Education Services”: special education administrators, the principal, the assistant principal, and special education-certified staff, including educational staff associates (ESAs), at the school that the Student was enrolled in during the 2018-2019 and 2019-2020 school years, as well as the paraeducators in the Student’s classrooms during those two years. A copy of that Tip can be found on pages 9 through 10 of this link: <https://www.k12.wa.us/sites/default/files/public/specialed/monthlyupdates/Sept2019Updates.pdf>. For convenience, though, that portion of the September 2019 monthly update is reproduced here:

#### **Tips from the Special Education Division: Reminders to the Field**

##### **When Do Students Start Receiving Special Education Services?**

Each school district must have in effect an individualized education program (IEP) for every student within its jurisdiction who is eligible to receive special education services at the beginning of the

school year (WAC 392-172A-03105). The beginning of a new school year, however, often brings questions about when students eligible for special education will start receiving services.

School districts are reminded that they cannot arbitrarily determine when special education and related services will begin or schedule them to begin after the start of the school year for some providers (SECC 16-29 (2016)). Furthermore, a school district policy mandating that services for all students eligible for special education will begin at a specific time after the beginning of the school year (e.g., the third week of the school year) would not be consistent with the IDEA and its implementing regulations (Letter to Ackerhalt). 60 IDELR 21 (OSEP 2012).

The IEP team, which includes the parent(s) and school district officials, determines the projected date for the start of a service based on the individual needs of the student. The IEP team, on a case-by-case basis, may determine that the individual needs of the student require that the start date of a service should occur the first week of school or some other time after the beginning of the school year. Any decision by an IEP team regarding the anticipated start date for services must be documented within the IEP (WAC 392-172A-03090). The expectation, however, absent any other documented decision from an IEP team, is that students eligible for special education start receiving services at the beginning of each school year. School districts may want to remind school leaders and providers of these requirements, and encourage them to proactively address questions and concerns prior to the start of school to ensure each student accesses an appropriate education.

Dated this \_\_\_ day of November, 2019

Glenna Gallo, M.S., M.B.A.  
Assistant Superintendent  
Special Education  
PO BOX 47200  
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**THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT**

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