

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-64

PROCEDURAL HISTORY

On June 11, 2020, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Blaine School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On June 17, 2020, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District Superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On June 25, 2020, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on the same day.

On June 30, 2020, the District requested an extension to respond to the complaint. OSPI granted the extension and asked the District to respond by July 14, 2020.

On July 14, 2020, OSPI received the District's response to the complaint and forwarded it to the Parent on July 15, 2020. OSPI invited the Parent to reply. The Parent did not reply.

On July 28, 2020, OSPI requested that the District provide additional information, and the District provided the requested information on July 29, 2020. OSPI forwarded the information to the Parent on the same day.

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

ISSUE

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

LEGAL STANDARDS

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

other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105.

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

During the COVID-19 school facility closures, as students received general education instruction and student support services, districts must provide students with disabilities with the special education services—related services and specially designed instruction—supporting a free appropriate public education (FAPE). The U.S. Department of Education Office for Civil Rights (OCR) and Office for Special Education and Rehabilitative Services (OSERS) indicated the “exceptional circumstances” presented during the school facility closures caused by COVID-19 “may affect how all educational and related services and supports are provided” to students with disabilities. There is not an expectation that IEP services would be delivered exactly as the IEP states. *Questions and Answers: Provision of Services to Students with Disabilities During School Facility Closures for COVID-19* (OSPI March 24, 2020); *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (OCR/OSERS March 21, 2020) (“It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities...during this national emergency, schools may not be able to provide all services in the same manner they are typically provided...The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency...FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students.”)

While there was not an expectation that districts implemented a student’s IEP as written during school closures caused by COVID-19 in spring 2020, districts must have had a plan for how students with disabilities were to receive a FAPE, including the provision of special education. *Questions and Answers* (OSPI, March 24, 2020); *Questions and Answers* (OSPI, May 5, 2020). See also, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (U.S. Department of Education, March 13, 2020) (“SEAs, LEAs, and schools must ensure that to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under the IDEA”). All schools were expected to have begun providing educational services for all students by March 30, 2020, which OSPI termed “Continuous Learning 2020.” OSPI Bulletin 024-20 (March 23, 2020).

The individualized special education services being provided to a student during the school facility closures as part of continuous learning, were to be documented in writing using a student’s annual IEP, IEP amendment (particularly if services to be provided during the closure were significantly different from what the IEP indicated), prior written notice, or optional “Continuous Learning Plan” (CLP) or similar document. Districts had flexibility in how they chose to document decisions made in real-time. *Questions and Answers* (OSPI, April 13, 2020). Districts were encouraged to prioritize

parent communication, including discussions of how special education services were to be provided during the closures. *Questions and Answers* (OSPI, May 5, 2020).

Progress Reporting: The purpose of progress reporting is to ensure that, through whatever method chosen by a school district, the reporting provides sufficient information to enable parents to be informed of their child's progress toward the annual IEP goals and the extent to which that progress is sufficient to enable the child to achieve those goals. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir, 2001) (parents must be able to examine records and information about their child in order to "guarantee [their] ability to make informed decisions" and participate in the IEP process). IEPs must include a statement indicating how the student's progress toward the annual goals will be measured and when the district will provide periodic reports to the parents on the student's progress toward meeting those annual goals, such as through the use of quarterly or other periodic reports concurrent with the issuance of report cards. 34 CFR §300.320(a)(3); WAC 392-172A-03090(1)(c).

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on June 12, 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 period.

FINDINGS OF FACT

Background

1. OSPI received a special education citizen complaint from the Parent on June 11, 2020. The Parent, in his complaint, alleged the District failed to implement the Student's individualized education program (IEP): The District failed to provide special education reading services to the Student during the school closure due to COVID-19.
2. The Student's April 24, 2019 IEP was in effect prior to the COVID-19 school facility closures. The Student's April 2019 IEP included annual goals in the area of reading. The Student's IEP provided the Student with the specially designed instruction in the area of reading for 25 minutes, four times per week provided by the special education teacher and staff in a special education setting. The annual goal for reading fluency was to be measured by curriculum-based measures and data collection and reported each trimester. The reading comprehension goal was to be measured by teacher assessment and observation and reported each trimester. The Student's April 2019 IEP additionally provided the Student with 27 accommodations.

The Student's IEP indicated the Student would spend 94% of her time in the general education setting.

2019-2020 School Year

3. During the 2019-2020 school year, the Student attended a District elementary school, was in the fifth grade, and was eligible for special education services under the category of specific learning disability.
4. The District's 2019-2020 school year began on August 28, 2019.
5. On March 13, 2020, the Washington Governor issued a proclamation, announcing the closures of all public and private K-12 school facilities in the state through April 24, 2020, due to the COVID-19 pandemic and resulting public health crisis.
6. From March 16 to April 10, 2020, according to the District, all District schools were closed, and no services were provided to any students.
7. On March 23, 2020, OSPI issued guidance, instructing districts that while school facilities are closed and not providing traditional in-person instruction, education must continue. OSPI's guidance outlined the expectation that "continuous learning" would begin for all students by Monday, March 30, 2020.
8. On March 24, 2020, the District's executive director of special education and federal programs (executive director) sent an email to all District staff, stating, in relevant part: "...All sped teachers and service providers need to be planning for delivery of [specially designed instruction (SDI)] (start by March 30) related to each student's IEP..."
9. On March 25, 2020, the Student's general education teacher emailed the Parents the following questions:
 - Do you have internet access?
 - Is there a computer in the home?
 - Do you have any specific needs that the district can help you with at the moment?

The Parent replied: yes, yes, and no, respectively.

10. On April 3, 2020, according to the District, the case manager, general education teacher, and the Parent developed a continuous learning plan (CLP) for the Student. The CLP consisted of modified instructional packets, video conferencing and telephone calls, printed and mailed materials, and online materials. They determined the focus of instruction should be on reading, including the following areas:
 - Sight word and vocabulary practice
 - Fluency practice using close read articles
 - Comprehension in response to a close read text

The CLP stated progress in these areas was to be measured according to the following: "Provided weekly; offered to review materials with families and give feedback." The CLP stated continuous learning was to begin on April 13, 2020 and specially designed instruction was to

begin on April 20, 2020. The specially designed instruction was to be provided by "modified instructional packets, parent instruction, teacher availability through phone, video, email."

11. Also, on April 3, 2020, according to the parent contact record form, the Student's case manager emailed the Parent about the "instruction plan for the first week (4/13)." The contact entry stated:

How classroom work for literacy and math will be mailed home; role of Case Manager will be to support classroom teacher, [Student], and you with making sure she feels successful with this work through modifications, adjustments, or talking through a specific task with her. Parent responded that this sounded good.
12. On April 6, 2020, the Governor extended the March 13, 2020 school facility closure directive through the remainder of the 2019-2020 school year.
13. Also, on April 6, 2020, OSPI issued guidance on Continuous Learning 2020, which included recommending a guideline for maximum student commitment each day to be 90 minutes for grades 4-5, including both general education instruction and specially designed instruction.
14. The District was on spring break from April 6 to April 10, 2020.
15. On April 15, 2020, the Parent contact record stated:

Case Manager called to check-in and schedule IEP meeting. Mom said they are taking it day-by-day. Mom is accommodating classwork by scribing writing tasks, then having student type up. Student has had anxiety around peers seeing her work submissions. Case Manager clarified a separate packet will be sent next week that is only to her so other students shouldn't see it, and that will be at her literacy level.
16. On April 20, 2020, the District began to provide specially designed instruction to the Student. The Parent contact record from April 20 to June 17, 2020 showed the District continually provided materials and communicated with the Parent, who was working with the Student. At times, the record indicated there were technical issues or formatting problems, which the contact record also indicated were resolved. The documentation noted there was an issue with adapting the materials to the Student's level and that was also resolved. The record also indicated the Parent stated that while everyone made a "valiant effort," it would have easier just to send weekly packets.
17. On April 21, 2020, the Student's IEP team met virtually to conduct an annual review of the IEP (effective April 21, 2020 to April 21, 2021). The school psychologist, special education teacher, general education teacher, and the Parent participated in the meeting. The Student's IEP provided revised goals in reading and specially designed instruction in the area of reading for 25 minutes, five times a week provided by a special education teacher and staff in a special education setting. The IEP provided for 30 accommodations to be provided on behalf of the Student. The reading fluency goal continued to be measured by curriculum-based measures and data collection reported and each trimester. The reading comprehension goal was to be measured by teacher assessment and observation and reported each trimester.

The prior written notice, dated April 21, 2020, stated the recent work samples were used to update the Student's annual goals. No other proposals or refused actions were noted.

18. When OSPI asked the Parent when the District first contacted the Parent about the special education services the Student would be receiving, the Parent stated, "...Around the first week of May, we were notified via email with a resource room packet." OSPI asked the Parent if the District requested the Parent assist in the Student's instruction and whether the Parent needed training in implementing the services. The Parent stated the District offered "support" but "no dyslexia intervention training options were discussed."
19. On June 11, 2020, OSPI received the Parent's complaint and opened this investigation.
20. The special education progress report, dated June 12, 2020, stated, "new goal," meaning no progress could be reported because the two reading goals were new as of the April 2020 IEP. The report further stated: "Due to school closure related to COVID-19, [Student] was provided individualized work focusing on reading fluency practice, vocabulary connected to the text, comprehension of the text, and summarizing the text. – [special education teacher]."
21. Sometime after the complaint was filed, according to the District, the District requested an IEP meeting with the Parent. The Parent declined.
22. June 19, 2020 was the last day of the 2019-2020 school year for the District.

CONCLUSIONS

Issue One: IEP Implementation – The Parent alleged the District failed to implement the reading services provided in the Student's individualized education program (IEP) during the school closure due to COVID-19.

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

Here, both the Student's April 2019 and April 2020 IEPs provided specially designed instruction in the area of reading: the April 2019 IEP provided for reading services 25 minutes, four times per week; the April 2020 IEP provided reading services 25 minutes, five times per week. After the District closed school facilities on March 16, 2020, the Student's IEP was not implemented as written, which during this time does not represent a violation of the IDEA by itself. However, that does not end the analysis as the District still had an obligation to provide students with special education services (i.e., specially designed instruction) during the school facility closures according to their IEP to the extent possible beginning March 30, 2020.

On April 3, 2020, the District and the Parent developed a continuous learning plan (CLP), which noted instruction was to begin on April 13, 2020, and that provided for 25 minutes "weekly" of specially designed instruction in reading. The District was on spring break from April 6 through 10, 2020. On April 20, 2020, the documentation indicated the District actually began providing the specially designed instruction in reading to the Student.

The documentation showed the District proposed reading services for the Student based on the Student's unique needs and informed the Parent about the reading services. The District continually communicated with the Parent about the implementation of the reading services through the CLP and attempted to resolve any issues with implementation that arose. The documentation showed that once the reading services began on April 20, 2020, the District substantially implemented the reading services according to the CLP. However, the District was required to begin continuous learning, including specially designed instruction, by March 30, 2020. The delay in the implementation amounts to a violation.

The District was also required to continue monitoring the Student's progress towards her annual goals and provide the Parent with special education progress reports. The Student's CLP focused on reading goals. Regarding progress, the District's description of when and how progress toward the CLP reading goal was to be measured stated: "Provided weekly; offered to review materials and give feedback." The documentation indicated the District provided weekly feedback to the Parent, although it was not clear what specific feedback or progress was reported to the Parent.

The District provided a progress report, dated June 12, 2020, stating the Student's progress was: "new goal" (the Student had a new IEP goal as of April 21, 2020). The District did not include any data on progress in the progress report and instead reiterated the services being provided: "Due to school closure related to COVID-19, [Student] was provided individualized work focusing on reading fluency practice, vocabulary connected to the text, comprehension of the text, and summarizing the text." From April 21, the date of the April 2020 IEP meeting, to June 19, 2020, there were approximately eight weeks of instruction, during which the District maintained it reviewed materials with the family weekly and provided feedback about the Student's progress toward the reading goals in the CLP. If the District was reviewing the Student's progress weekly, the District should have had more definitive data to report about how the Student was performing other than "new goal." Therefore, OSPI finds that the District's progress report is insufficient, and a violation is found.

Although the District did not start special education services until April 20, 2020 that resulted in the Student missing 50 minutes of instruction when spring break is taken into account the District substantially provided the special education reading services according to the CLP. Therefore, no compensatory services are required. However, given the delay in beginning services and the lack of progress reporting, the District will be required to hold an IEP meeting to discuss the impact of the closures on the Student. The District is also required to develop a plan and conduct training to ensure that students' progress towards their goals are monitored, data is collected, and progress reported.

CORRECTIVE ACTIONS

By or before **August 28, 2020, October 2, 2020, and November 6, 2020**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

IEP Meeting

By or before **October 30, 2020**, the Student's IEP team will meet to discuss the Student's progress and the impact of the school facility closures. Prior to the meeting, the District will need to monitor and measure the Student's progress. This could include a review of existing data, Parent input regarding progress at home during the closures, and new assessments to reestablish the Student's baseline on her goals.

At the meeting, the Student's IEP team should discuss her progress and the impact of the school facility closures on that progress. The team should also discuss what additional special education services are necessary to help lessen the impact of the closures.

By **November 6, 2020**, the District will provide OSPI with the following documentation from the IEP meeting: 1) Invitation or scheduling documentation; 2) Agenda or meeting notes; 3) IEP or amended IEP, if applicable; 4) Plan for additional special education services, if applicable; 5) prior written notice; and, 6) any other relevant documentation.

DISTRICT SPECIFIC:

Training

By **September 25, 2020**, the District will develop and conduct training for District special education administrators and special education certificated staff, which focuses on conducting progress monitoring during non-traditional instruction. The training may be conducted remotely.

By **August 28, 2020**, the District will submit a draft of the training materials to OSPI for review. The training materials will include examples. OSPI will approve the materials or provide comments by September 4, 2020 and additional dates for review, if needed.

By **October 2, 2020**, the District will submit documentation that staff participated in the training. This will include: 1) a sign-in sheet; and, 2) a roster of who should have attended so OSPI can verify that staff participated.

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

Dated this ___ day of August, 2020

Glenna Gallo, M.S., M.B.A.
Assistant Superintendent
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THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

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