

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-65

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 Edmonds 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 July 7, 2020, OSPI received the District's response to the complaint and forwarded it to the Parent on July 8, 2020. OSPI invited the Parent to reply. The Parent did not reply.

On July 24, 2020, OSPI requested clarifying information from the District. On July 29, 2020, OSPI received the requested information and forwarded it to the Parent the same day.

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

ISSUE

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

LEGAL STANDARDS

IEP Implementation during School Facility Closures for COVID-19: At the beginning of each school year, each district must have in effect an individualized education program (IEP) for every student within its jurisdiction served through enrollment who is eligible to receive special education services. 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).

Specially Designed Instruction: The purpose of the IDEA is to ensure that all students eligible for special education have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 CFR §300.1; WAC 392-172A-01005. Special education includes specially designed instruction, which means adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction: to address the unique needs of the student that result from the student’s disability; and to ensure access of the student to the

general curriculum, so that the student can meet the educational standards within the jurisdiction of the public agency that apply to all students. 34 CFR §300.39(b)(3); WAC 392-172A-01175(3)(c).

Continuous Learning Plan (CLP): A CLP (or similar document) is used to document the temporary services that will be made available and provided during school facility closures for COVID-19. *Questions and Answers* (OSPI, April 13, 2020). A CLP is a temporary plan that outlines the extent to which IEP services and accommodations must be delivered differently or suspended due to emergency health and safety restrictions in spring of 2020, and documents decisions regarding services, timelines, and other student specific considerations during school facility closures. While the information recorded in an individual student CLP may come from a student's IEP, such documentation is not intended to serve as, or to replace, the most recent IEP. Districts must have a method for documenting decisions made for individual students during the spring 2020 school facility closures. *Questions and Answers* (OSPI, May 5, 2020).

FINDINGS OF FACT

1. During the 2019-2020 school year, the Student attended a District middle school, was in the sixth grade, and was eligible for special education services under the category autism.
2. The District's 2019-2020 school year began on September 14, 2019.
3. The Student's January 2020 individualized education program (IEP) was in effect prior to the COVID-19 school facility closures. The Student's January 2020 IEP included eight goals in the area of social skills (asking for a break), adaptive (check schedule), behavior (safe body), reading (letter recognition), math (number recognition), writing (tracing), and communication (directions, expressive language). The Student's IEP provided the Student with the following specially designed instruction and related services, all to be provided in the special education setting:
 - Functional academics - reading: 45 minutes/ 5 times weekly (to be provided by a paraeducator);
 - Language skills: 30 minutes/ 3 times monthly (to be provided by a speech language pathologist (SLP));
 - Functional academics – math: 45 minutes/ 5 times weekly (to be provided by a paraeducator);
 - Functional academics – writing: 45 minutes/ 5 times weekly (to be provided by a paraeducator);
 - Adaptive behavior – 70 minutes/ 5 times weekly (to be provided by a special education teacher);
 - Social skills: 70 minutes/ 5 times weekly (to be provided by a paraeducator);
 - Behavior: 70 minutes/ 5 times weekly (to be provided by a special education teacher); and,
 - SLP Consultation: 10 minutes monthly (to be provided by a SLP).

The Student's January 2020 IEP additionally provided the Student with the following accommodations and modifications:

- Visual aids/PECS¹ (classroom, school grounds, community); and,
- One-on-one support for safety (classroom, school grounds, community).

The Student's IEP included the following supports for school personnel:

¹ PECS standards for: Picture Exchange Communication System.

- CPR/seizure training;
- Right response training; and,
- Collaboration with occupational therapist (OT) for sensory strategies (as needed).

The Student's IEP indicated the Student would spend 2.92% of his time in the general education setting.

The Student's IEP included a behavioral intervention plan (BIP) to address the behaviors of pinching and biting.² The BIP noted the Student had previously used a helmet with a faceguard as an intervention to keep students and staff safe from the Student's biting, but noted it had been phased out as the Student's biting had become less frequent. The Student continued to grab/scratch/pinch/kick when upset, but would usually vocalize loudly right before he would begin and would continue until calm and safe. Data showed the Student often exhibited behaviors during loud noises, transitions in setting, when told "no," or during undesired or unexpected events or activities. It was also noted that the Student preferred a consistent and predictable schedule and would act with aggression when presented with change. The BIP identified the Student's behavior often functioned to remove the Student from the aversive stimuli and provided strategies to help promote functional communication to help the Student notify others of his needs.³ The BIP also included a crisis intervention plan, which included verbalizing "safe body," touching the "break" switch, and presenting the Student with an iPad with "Children's Break Time" app on it—a visual count down timer the Student could use to focus on to deescalate.

4. 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.
5. Also, on March 13, 2020, the Student's special education teacher emailed the families of all his students to notify them that the Intensive Support (IS) team would continue to update a list of optional online resources to the District's website to help parents access materials their students may be able to use. He noted that because the students in his class each had individual needs, he would be putting together learning packets for each student, which parents could pick up at school to use with their student. He noted the materials would be available on March 16, 2020. He also stressed that he would recommend parents try to "create some structure and schedule at home" and to be "as consistent as possible," and to do the best they could. He indicated they could reach out to him or the District if they needed any additional support.

² Data collected during December 2019, the time the BIP was developed, indicated incidents of pinching occurred 0-20 times per day and biting others occurred 0-5 times per day.

³ For example, the BIP recommended before aversive stimuli is presented or anticipated to ask the Student to "exhibit 'safe body,'" and to use visual cues. It also provided recommendations for functional communication training and tolerance training of the wearing of headphones.

6. The Parent, in his complaint, stated that following the school facility closures, the Student was not providing the following services as outlined in the Student's January 2020 IEP:
 - Occupational therapy
 - Adaptive tech
 - Communication ("language skills")
 - Adaptive behavior
 - 1:1 in-person services
7. On March 16, 2020, the District sent home learning materials for the Student that had been created by his special education teacher. On Monday, March 16, 2020, in addition to the individualized packets, the special education teacher also began sending home weekly suggested schedules for his class with ideas for differentiated instruction ("mild," "medium," and "high,") for each day in the areas of reading, writing, math, "get active," and music/art. Each activity contained a recommended time for the activity. Each week's schedule also contained recommended activities and materials from the occupational therapy department. The District provided documentation to show the Parents received a schedule for the Student every Monday for the remainder of the 2019-2020 school year.
8. 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.
9. On March 24, 2020, the SLP emailed the parents of students she served a list of enrichment activities they could do with students. The list was not individualized to the Student. She stated she was available if they had questions.
10. On March 25, 2020, the special education teacher emailed the families of students in his class to provide resources, to check in on what barriers parents were facing with students, to find out if parents were engaging with any of the resources and supports the District had been offering, what tools families were using or if there were any tools they wish they had, if they thought having a Chromebook or other technology would benefit the student, and to ask if the families were getting their basic needs (food, health care, work, etc.) met. The special education teacher also provided the families instructions on how to set up a Zoom account so he could connect with them while at home.
11. On March 30, 2020, continuous learning began in the District.
12. On March 31, 2020, the special education teacher emailed the parents of students in his class to notify them that they would officially be beginning "remote learning," and that it would "not only look different from other classes in the district," but "it will look different for each student in our class." The special education teacher added:

Our students all have Individual Education Plans [sic] because they do need individualized instruction and accommodations, so I don't think it would be fair of me to send a blanket weekly checklist or packet for your students. I would like to do my best to meet you where you are with home learning and what I can do to provide you with work for you [sic]

students or the tools to help instruct them in the home environment. I understand that everyone is at different places of need (some have technology at home and some are still trying to get internet access) and I want to remind you that this is not required and I don't want to add any further stress. Simply, let me help you with where you are at, whether it be working on a new skill or just helping make sure your students are getting fed...I will be reaching out to each of you individually throughout this week...I will have 'office hours' Tuesday-Thursday from 2-3 pm.

13. The District was on spring break from April 6-10, 2020.
14. On April 6, 2020, the Governor extended the March 13, 2020 school facility closure directive through the remainder of the 2019-2020 school year.
15. On April 30, 2020, the special education teacher texted the Parent to say that he was going to go into school the next day to retrieve an iPad for the Student to configure. The Parent responded, "great!" and said he would come pick it up the next day. Later that same day on April 30, 2020, the special education teacher texted the Parent that he had some difficulties getting the iPads, but hoped to have them the following week.
16. On May 4, 2020, the special education teacher emailed the families of students in his class to let them know that he was attaching a weekly activity schedule for students with differentiated instruction and that he would continue to connect with families individually to offer other ideas or plans for each student. He added:

There are some teaching strategies and ways to support their learning that I will continue to offer, but if you'd like help on a specific idea or strategy, please reach out and between myself, our Speech and Language Pathologist, and our Board Certified Behavior Analyst we can definitely do our best to support from a distance. I will work on checking in with all families individually every week to see how it is going.

He also stated he and his para staff would be in the classroom occasionally to work on preparing materials for parents to pick up the next week, including "some printed worksheets, file folder activities, and other items that I want to make simple and easy for you to support your child's learning at home."
17. On May 8, 2020, the Parent thanked the special education teacher for the update on the iPad. The special education teacher responded, asking if the Parent was able to engage the Student in learning that week.
18. On May 11, 2020, the special education teacher emailed the families of students in his class, noting that he had been hearing from several parents that there was a need for tasks that students could engage in independently that did not involve technology. The special education teacher said he would work on putting together additional file folders and other materials for each student and would make them available for parents to pick up. The special education teacher also attached activities from the school's occupational therapy/physical therapy department.

19. On May 13, 2020, the Parents picked up an iPad from the school for the Student to use. The Parent also picked up a packet of learning materials that had been created for the Student by the special education teacher to accompany the weekly lesson plans he sent out on Mondays.
20. On May 19, 2020, the special education teacher texted the Parent to follow up on the Student's use of the iPad to see if the Student had been able to engage in the iPad and whether other materials provided had been helpful. The special education teacher also asked the Parent if he had time to talk on the phone at some point. The Parent responded to the special education teacher's text that the Student had mostly been engaging in play on the iPad, but that he had hoped to start working with the Student on matching games and other materials in the folder that week. He indicated he was free to speak with the special education teacher the following morning.
21. During the last few weeks of the school year,⁴ the special education teacher created a CLP to document the special education services offered and provided to the Student during the school facility closures. According to the District's response, the Parent was not provided a copy of the plan, but rather it was kept as an internal document with the District.
- The CLP indicated that when the Parents were initially offered services, they stated "via phone that they were doing their best but not trying to engage [Student] in too much work, as it would be a challenge at home." It further stated the Parents had decided to prioritize well-being at home during the school facility closures. It noted the Parents did, however, request an iPad for communication and work tasks, which the special education teacher agreed to work with the District to arrange. The CLP stated that progress would be reported in June.
 - The following services were included on the Student's CLP:
 - **Reading:** "Weekly learning plans were sent on Mondays; Materials (worksheets, file folders, etc., sent home on March 16th and May 13th; suggested iPad apps with loaner iPad);"
 - **Written Language:** "Weekly Learning Plans sent on Mondays; Materials (worksheets, file folders, etc.) sent home on March 16th and May 13th, suggested iPad apps with loaner iPad);"
 - **Math:** "Weekly Learning Plans sent on Mondays; Materials (worksheets, file folders, etc., sent home on March 16th and May 13th; suggested iPad apps with loaner iPad);"
 - **Social/Emotional:** "Asking for a break when given undesired task; have [Student] request break and have a consistent routine;"
 - **Adaptive Behavior:** "Check daily schedule, making a simple daily schedule at home;" and,
 - **Behavior:** "No pinching or biting when frustrated; have [Student] show safe hands when getting frustrated."
22. On June 11, 2020, OSPI received the Parent's complaint and opened this investigation.

⁴ The District was unable to provide an exact date for the creation of the CLP, but noted in an email, dated July 29, 2020, to the complaint investigator, that the special education teacher created the CLP on a District provided form during the last few weeks of school. While the phone call was not memorialized in writing elsewhere, the email communications reviewed supported what was documented in the CLP in that the Parent did not respond to offers in emails to develop an individualized plan for the Student. The special education teacher did, however, continue to make individualized packets available for the Student, which the Parent could pick up.

23. On June 18, 2020, the District completed progress reporting for the Student. In each IEP goal area, the District indicated the Student made “limited progress due to COVID-19 school closures (LP).” Under each goal area, the Student’s special education teacher and service providers included data collected and narrative information on the Student’s progress, which had been collected prior to the school facility closures and noted that the Student’s goal baseline would be revisited upon the resumption of normal school operation or the Student’s annual IEP review—whichever came sooner.
24. June 19, 2020 was the last day of the 2019-2020 school year for the District.
25. On July 31, 2020, the District informed OSPI that it had contacted the family and scheduled an IEP meeting for August 11, 2020, to discuss the Parent’s concerns and the impact of the school facility closures on the Student.

CONCLUSIONS

Issue One: IEP Implementation – The Parent alleged the District failed to implement the Student’s individualized education program (IEP) from March 13, 2020 through June 19, 2020, during the school facility closures caused by the novel Coronavirus (COVID-19). Specifically, the Parent alleged the Student did not receive his occupational therapy, adaptive technology, communication, adaptive behavior, and one-on-one in person services as outlined in his IEP.

Given the exceptional circumstances of the COVID-19 global pandemic, the federal Department of Education and OSPI recognized that IEPs may not be implemented as written as school facilities shut down and districts transitioned to various distance learning formats. While there was not an expectation that districts implement a student’s IEP as written during school facility closures caused by COVID-19 in spring 2020, districts had to have a plan for how students with disabilities were to receive a free appropriate public education (FAPE), including the provision of specially designed instruction and related services. Accordingly, all schools were required to have begun continuous learning for all students by or around March 30, 2020, which was to include a written plan for providing special education services, including specially designed instruction, to students during the school facility closures. In addition, districts were required to document in writing, the individualized special education services it was providing to each student with an IEP. The District was encouraged to collaborate with families and prioritize communication with families during this time.

On March 16, 2020, the special education teacher emailed the Parent and informed him that to meet the special education needs of the Student during the temporary school facility closures, he would be putting together an individualized packet the Parent could pick up. When the school facility closures were extended through the end of the school year, the special education teacher informed the Parent that he would be sending out weekly schedules of suggested activities with differentiated instructions to accompany the individualized packets, and also that due to the individualized needs of the students in his class, he would be scheduling times with parents to develop an individualized program for each student if they were interested. Here, the CLP noted the Parent initially opted for the Student not to participate in additional learning opportunities,

but indicated they did feel it would be useful for the Student to have an iPad to assist with communication needs. The special education teacher accordingly worked with the District to acquire an iPad for the Student. Similarly, the Parent did not respond to offers by the special education teacher to collaborate with the SLP or OT. However, the special education teacher continued to make weekly schedules and individualized packets of work available to the Parent. OSPI accordingly finds the District followed procedures regarding the individualized special education services offered to the Student and the written documentation it provided of those services. OSPI finds no violation.

It is noted that the District was also required to have a process in place for measuring the Student's progress on IEP goals during the school facility closures. Here, the District indicated under each goal that the Student was able to make "limited progress due to COVID-19 school closures." The narrative statements offered under the June 2020 notes offered only data and information collected prior to the school closures. As the Parents chose to not have the Student participate in continuous learning during the school facility closures, and therefore, the District was not provided an opportunity to collect progress data during that time, OSPI finds no violation on the District's obligation to collect data on the Student's progress on IEP goals during this time. However, if the District utilizes remote or distance learning in the fall and should the Parent choose for the Student to participate, the District is reminded that it must have a process for measuring the Student's progress on IEP goals during any school facility closures, and its staff must be trained on how to monitor progress during non-traditional instruction.

However, as all students were impacted by the school facility closures, OSPI has recommended IEP teams meet to determine the impact of the closures on students with IEPs. OSPI notes the District has collaborated with the Parents to schedule an IEP meeting for August 2020 in accordance with these recommendations.

CORRECTIVE ACTIONS

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this ___ day of August, 2020

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

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