

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 21-003

PROCEDURAL HISTORY

On January 5, 2021, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Kent 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 January 6, 2021, 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 January 21, 2021, OSPI requested that the Parent provide additional information, and the Parent provided the requested information on January 25, 2021. OSPI forwarded the information to the District on the same day.

On January 26 and 27, 2021, OSPI received the District's response to the complaint and forwarded it to the Parent on January 28, 2021. OSPI invited the Parent to reply.

On February 2, 2021, OSPI received additional information from the District. OSPI forwarded the information to the Parent on February 3, 2021.

On February 3, 2021, OSPI requested additional information from the Parent. On the same day, the Parent responded, and OSPI forwarded the information to the District on the same day.

On February 12, 2021, OSPI received the Parent's reply. OSPI forwarded that reply to the District February 12, 2021.

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

ISSUES

1. Did the District implement the Student's individualized education program (IEP) during the March 2020 through June 2020 school facility closures, specifically the services of a 1:1 paraeducator and consultation by a board-certified behavior analyst (BCBA)?
2. Did the District implement the services of a 1:1 paraeducator and consultation by a BCBA from September 2020 to December 2020, according to the Student's IEP?
3. Did the IEP team consider the Parent's input that included the results of the independent educational evaluation in determining the Student no longer needed BCBA services?

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 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).72A-03105(1).

IEP Implementation during Spring 2020 School Facility Closures for COVID-19: During the Spring 2020 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") (Emphasis added). 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).

IEP Development: When developing each child's IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child. 34 CFR §300.324(a). WAC 392-172A-03110.

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

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, (9th 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 (9th Cir. 1994). 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 (9th Cir. 2006).

FINDINGS OF FACT

Background

1. OSPI received this complaint from the Parent on January 5, 2021. The Parent, in her complaint, alleged that from March to December 2020, the District failed to provide the Student with services of a 1:1 paraeducator and consultation from a board-certified behavior analyst (BCBA) as specified in the Student's individualized education program (IEP). In December 2020, the Parent alleged the District later removed BCBA consultation from the Student's IEP, despite the recommendation from an independent educational evaluation (IEE). The Parent later clarified that she did not request 1:1 paraeducator services or BCBA consultation in spring

2020, but in July 2020, she requested paraeducator services be provided to the Student. The Parent stated the District told her no in-person services were being offered. Meanwhile, from August to December 2020, the Parent paid for private behavioral in-person services at home.

2. During fall 2017, the Student was evaluated by a private psychologist. The results of the evaluation showed significant delays in adaptive functioning and behavior. The Student displayed limited oral language. The diagnoses included in the report were mild to moderate intellectual disability, an autism spectrum disorder, and attention deficit hyperactivity disorder. The report provided numerous recommendations. The most pertinent was for a quiet environment with intensive behavior interventions provided on a daily basis, including a registered behavior technician using applied behavioral analysis (ABA) and supervised by a BCBA.

2019-2020 School Year

3. During the 2019-2020 school year, the Student attended a District middle school and was eligible for special education services under the category of autism.
4. The District's 2019-2020 school year began on August 29, 2019.
5. The Student's December 2, 2019 IEP was in effect prior to the COVID-19 school facility closures. The Student's December IEP (effective from December 13, 2019 to July 31, 2020) included annual goals in the areas of social/emotional, adaptive skills, behavioral intervention, reading comprehension, writing, math, and communication. The Student's IEP provided the Student with the following specially designed instruction and related services, all in a special education setting:
 - Speech/Language: 30 minutes, 3 times per month (provided by a speech/language pathologist (SLP))
 - Math calculation: 25 minutes, 4 times per week (provided by a special education teacher)
 - Written expression: 30 minutes, 4 times per month (provided by a special education teacher)
 - Social/Emotional: 25 minutes, 4 times per month (provided by a special education teacher)
 - Behavioral instruction: 100 minutes, 5 times per week (provided by a special education teacher)
 - Math problem solving: 30 minutes, 4 times per month (provided by a special education teacher)
 - Reading comprehension: 80 minutes, 4 times per month (provided by a special education teacher)
 - Adaptive skills: 30 minutes, 4 times per month (provided by a special education teacher)
 - Social/Emotional: 75 minutes, 1 time per week (provided by a special education teacher)
 - Adaptive skills: 75 minutes, 1 time per week (provided by a special education teacher)
 - Classified Staff – concurrent: 1,950 minutes, 1 time per week (provided by a 1:1 paraeducator)
 - Occupational therapy: 30 minutes, 2 times monthly (provided by an occupational therapist and/or certified occupational therapist assistant (OT/OTA))

The Student's IEP also provided the following supplemental aids and services:

- From December 13, 2019 to July 31, 2020 – Board-certified behavior analyst (BCBA) consultation: 8 hours, 1 time per month (provided by a contracted applied behavior analysis (ABA) behavior specialist)

- From August 1, 2020 to December 12, 2020– Board-certified behavior analyst (BCBA) consultation: 8 hours, 1 time per month (provided by a contracted applied behavior analysis (ABA) behavior specialist)

The “Description of Services” in the IEP stated, in part: “BCBA consultation is support for classroom staff in reference to behavior support team as a whole, including observation, data collection, coaching.”

The Student’s December 2019 IEP additionally provided the Student with the following accommodations and modifications:

- Calculator for state testing
- Read aloud for state testing
- 1:1 assistance when working on academics
- 1:1 bathroom assistance to prompt timely use of bathroom
- Adult proximity to monitor interactions/behaviors with people
- Allow extra time to respond
- Augmentative communication
- Break material into manageable parts
- Calculator
- Check work frequently to ensure understanding
- Cue to stay on task during tests
- Cues to stay on task for class work
- Errorless teaching
- Give short, concise directions
- Increased time on tests
- Individual or small group testing space
- Post visual or picture/schedule
- Present information auditorily
- Present information visually
- Provide individual assistance
- Repeat directions verbatim during testing
- Safety Monitoring – prevent or removal of items from mouth
- Scribe verbal directions from teacher for task completion
- Sensory strategies and tools
- Use concrete manipulatives
- Word processor/computer
- Grading: Pass/Fail or SE grading option

The Student’s IEP indicated the Student would spend 43% of her time in the general education setting.

6. The prior written notice, dated December 11, 2019, proposed to initiate a new IEP for the Student.¹ The notice contained the following relevant information, summarized:
 - The team discussed the “merit of an outside evaluation” and the need of BCBA support and training for ABA and error-less learning.
 - The team determined the student required 1:1 paraeducator support during most of her academic programming and in general education settings and BCBA support.
7. 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.

¹ The notice stated a second meeting followed the December 2, 2019 meeting, but no date was provided.

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 April 6, 2020, the Governor extended the March 13, 2020 school facility closure directive through the remainder of the 2019-2020 school year.
10. Also, on April 6, 2020, OSPI issued guidance on Continuous Learning 2020, which included recommended guidelines for maximum student commitment each day, as follows:
 - Grades 6-8: 20 minutes per class (2.5 hours maximum)
 - Grades 9-12: 30 minutes per class (3 hours maximum)
11. The District was on spring break from April 13 to April 17, 2020.
12. According to the undated "[District] Special Education Continuous Learning Plan (CLP)" form, the Parent, special education teacher, general education teacher, occupational therapist, and SLP developed the CLP. The CLP goals were in the areas of reading comprehension, math calculations, and social/emotional. The Parent input on the form stated:

Mom is supplying outside ABA and nanny services weekly. Mom would like some guidance on activities for [Student] to follow directions (recipes) to assist with reading comprehension. She would also like to see [Student] have some video social time with current classroom peers.

The CLP provided for the following specially designed instruction and related services:

Service	Initiation Date	Frequency	Modality (e.g., worksheet, platform, program, etc.)	Duration	Staff
Specially Designed Instruction					
Reading Comprehension	05/04/2020	1x weekly	worksheets	15 min	Special Education (SE) Teacher
Math Calculation	05/04/2020	1x weekly	worksheets	15 min	SE Teacher
Social Emotional	05/04/2020	1x weekly	Video conference call	30 min	SE Teacher or Para
Communication	05/04/2020	1x weekly	SE Teacher and SLP collaboration	10 min	SE Teacher, SLP
Related Services					
OT	05/04/2020	1x weekly	Posted activities, staff support. Upon family request: email, phone/video conference	15 min	OT

13. Regarding the 1:1 paraeducator services and BCBA consultation, the Parent stated in her reply that she did not request these behavioral support services during spring 2020. The Parent

stated, "I figured it was a pandemic, and that the district should be given some time to adjust to new learning protocols."

14. On April 27, 2020, according to the Student's IEP case manager, the Student began receiving special education services.
15. During spring 2020, the Student received applied behavioral analysis (ABA) five days a week, two to three hours a day, and respite/day habilitation services five days a week, four hours a day, from a private service provider paid through the Parent's insurance.
16. On June 19, 2020, the 2019-2020 school year ended.
17. On July 21, 2020, the Parent emailed the assistant director of inclusive education (assistant director), asking about the availability of an ABA provider from the District to assist the Student at home while receiving instruction. The assistant director replied on the same day, stating: "...We have not provided in home services during the closure and it is uncertain we will be able to do so it is unsafe for our students and staff to engage in in-person learning at their school."

2020-2021 School Year

18. According to the Parent, the Student continued to receive private services from August to December 2020 that was paid by the Parent's private insurance company.
19. According to the District "2020-21 Back to School Reopening Plan," dated August 10, 2020, the plan provided information about students with IEPs:
Students with IEPs
 - Students receiving Special Education services will be provided services aligned to their IEP.
 - The IEP Team will make recommendations regarding the instructional setting to serve each student best.
 - Evaluation protocols are in development and may require an additional discussion with labor partners.
 - Special Education Guidance from OSPI was released on July 30, [District] will continue working to serve all students, including those with an IEP, and more information will be provided as we work with labor partners to unpack the new guidance.
20. According to the District's "Flowchart for IEP Services," if a student with an IEP was not able to make meaningful progress on their goals, the IEP team, including the program specialist and school nurse, would determine the need for in-person services for specific areas of specially designed instruction. The District also had the "IEP In-Person Services Rubric" that rated a student's ability regarding safe distancing/personal protective equipment usage, access to distance learning, and benefit from distance learning.²

² The form stated that a score of 6-9 may be appropriate for the IEP Team to consider in-person services.

21. On September 3, 2020, the 2020-2021 school year began.
22. According to the District, the Student's CLP continued to be implemented and a paraeducator was assigned to the Student's remote classes to assist with instruction and data collection.
23. On September 4, 2020, the Parent and District staff exchanged numerous emails about the Student's need for in-person services. The District arranged a time to meet to discuss the Parent's concern.
24. On September 18, 2020, the IEP team met and determined the Student needed in-person services. However, the District determined in-person services could not be provided safely to the Student according to the District's decision matrix for in-person service.
25. A prior written notice, dated September 18, 2020, addressed the Student's need for in-person services, as follows:

Description of the proposed or refused action:

IEP team met to discuss distance learning and challenges in the distance learning setting for [Student].

The reason we are proposing or refusing to take action is:

The family and team had concerns about [Student's] ability to access distance learning opportunities and make progress on IEP goals last Spring and this Fall.

Description of any other options considered and rejected:

Team considered implementing IEP within the distance learning framework without augmentation of in person learning.

Team considered that distance learning may not be safely implemented due to need for adult proximity during instruction and the potential of aerosols being spread from behavior of screaming noted in the IEP.

Team considered reviewing IEP progress from this Fall.

The reasons we rejected those options were:

Team rejected due to [Student's] inability to access distance learning opportunities and benefit from synchronous and asynchronous learning activities.

Team determined that the safety concerns could be mitigated because [Student] is able to wear a mask for an extended duration of time. Additionally, she has historically screamed only when interacting with one particular student.

Team decided that it's too early in the school year to include this data in the meeting; team will meet again to determine the services and goals that [Student] can access and benefit from. This information will inform the [specially designed instruction] planning for in person learning when it begins.

A description of each procedure, test, record, or report we used or plan to use as the basis for taking this action is as follows:

Reviewed [Student's] needs, progress on IEP goals from last year, discussed services and progress on IEP goals this year, reviewed [District] Decision Matrix guide for considering in person supports during distance learning.

Any other factors that are relevant to the action:

Mom's concerns: Would like it to be noted that she is currently providing a 1:1 for [Student] to access her education. [Student] is not able to independently access the distance learning framework.

Mom requested compensation for staffing support in the home because [Student] needs supports during distance learning. [District] is not providing staffing support in the home at this time due to the distance learning framework in place.

The team decided that [Student] does qualify for in person learning according to the [District] Decision Making Matrix. The team members present were: [case manager], [special education teacher 1], [special education 2], [last year's case manager], [District representative], [program specialist], [District staff person], [nurse]. We also need to have a contingency plan needed for possible behavior of screaming (spreading aerosols).

26. On November 13, 2020, the District issued a report on the Student's progress towards her December 2019 annual goals. The report stated the following progress was made:

- Social/Emotional: Self Regulation – Emerging skill demonstrated but may not achieve annual goal within duration of IEP
- Social Emotional: Social norms – Emerging skill demonstrated but may not achieve annual goal within duration of IEP
- Adaptive Skills: Following a schedule – Emerging skill demonstrated but may not achieve annual goal within duration of IEP
- Behavioral: Asking for help – Emerging skill demonstrated but may not achieve annual goal within duration of IEP
- Behavioral: Completing tasks without screaming – Emerging skill demonstrated but may not achieve annual goal within duration of IEP
- Speech/Language: Identify past tense verbs – Emerging skill demonstrated but may not achieve annual goal within duration of IEP (Comments: Based on observation-no direct instruction provided)
- Speech/Language: Conversation – Not been provided instruction on this goal
- Reading Comprehension: Detail information – Sufficient progress being made to achieve annual goal within duration of IEP
- Reading Comprehension: Identifying details – Not been provided instruction on this goal
- Written Expression: Descriptive sentences – Sufficient progress being made to achieve annual goal within duration of IEP
- Math Calculation: Equations with decimals – Sufficient progress being made to achieve annual goal within duration of IEP
- Math Calculation: Money – Emerging skill demonstrated but may not achieve annual goal within duration of IEP

27. In November and December 2020, the District conducted the Student's three-year reevaluation. The reevaluation provided the following information, in part:

Adaptive

- In three observations, the Student was able to turn on her microphone but only intermittently turned on the camera.
- The Student responded to teacher questions including counting by 5s and referring to a worksheet.
- It was difficult to determine if the Student was engaged in the learning activity when the camera was off.

Social/Emotional

- She has someone sitting right with her assisting her with the work. If she doesn't have someone with her she will not do the work – she is not able to access the tech independently. It is really hard to get a grasp of what she can and cannot do. Like she is getting 100% on everything, but I'm not sure how much she is doing independently. I did send over some math problems specific to her math goals and asked her helper [paraeducator] to have her do them completely independently. She is able to use a calculator perfectly. She struggles with knowing the amount of different denominations of money (IE she doesn't know a quarter = 25 cents). The data I have from class says she can add, subtract, and do word problems with addition and subtraction with no troubles (again, 100%!) but like I said I don't think that is a good measure of what she can actually do.

Her teachers reported that she was more active at the beginning of the year when she was attending class from her own room and had a bouncy ball. They say area and attended while seated on the couch that she has become less active.

- Observations in the classroom suggest difficulties maintaining focus and attending to tasks, as well as previous IEP, previous evaluation, and current BCBA data indicate concerns with maintaining attention and social skills. Due to her not meeting her last IEP goals in identifying feelings and determining unacceptable social situations, those goals should likely remain in place under Social/Emotional skills. Focus and attending to instruction should be considered for specially designed instruction under behavioral goals.

Behavior

- ABA therapy data from the privately contracted BCBA shows a wide variety of behaviors and goals that are being worked on in the home which include Behavior and Compliance, Communication, Independent Living Skills, Learning Readiness, Play and Social skills. The majority of the goals appear to be meant to have cross-over effectiveness toward other skills, and those that did not show progress were indicated as to be continued. Some of the goals are for very specific safety concerns, the majority are related to Adaptive skills, and there are recommendations from the current evaluation included for adaptive skill specially designed instruction under the Adaptive area of the report. In regard to behavior, specially designed instruction is recommended for stamina for classroom work with a focus on readiness for learning, reducing off-task behavior, self-advocacy, and online engagement.

Summary of Qualifications and Functioning

- [Student] requires a 1:1 to engage in academics online, and parents are currently providing their own 1:1 during online instruction due to COVID-19 restrictions. IEP goal performance in academics show progress in reading comprehension, written expression and math calculation skills. Math problem solving skills did not indicate progress. [Student] continues to have difficulties with counting money, is writing 5-6 word sentences, and is able to be mostly successful after reading a passage, choosing a correct response regarding details from a group of 4 items. The team discussed the findings and felt that her recommendations should be more functional to help her develop skills to be more independent after she transitions from public school and into other programming or adulthood. Behavior concerns continue to be demonstrated with off-task behavior, stamina for classroom work, self-advocacy, and online engagement. Social emotional functioning shows average concerns with internalizing and externalizing behaviors and more concerns with behavioral symptoms, such as attention, atypicality, and withdrawal. Recommendations continue to be made in social/emotional skills in interpersonal communication and social skills with a focus on building and maintaining friendships and understanding relationships; identifying emotions in self and others, and self-

advocacy with a focus on communicating needs effectively. BCBA data and performance on adaptive skills continue to show concerns with safety, daily living skills, community engagement, communication, and social skills with recommendations to continue specially designed instruction in these areas. Communication assessment continues to show needs in communication as she did not meet previous IEP goals.

28. On December 2, 2020, the IEP team that included the Parent reviewed the Student's IEP. The IEP (effective from December 2, 2020 to December 2, 2021) listed the following Parent concerns:

1. IEP goals that aren't being met are being abandoned. This doesn't allow me to accurately track progress or the lack thereof from year to year to determine if [Student] is receiving adequate education supports needed to be successful.
2. No protocol for flat or decreasing data.
3. No data shared that I can track her educational gains – no graphs, weekly averages, etc.
4. Use of prompt hierarchy amongst staff that works with [Student] is inconsistent, creating a prompt dependency.
5. Service Matrix minutes not being met by district – specifically 1:1 para and BCBA portions.
6. I have not heard anything regarding data/training being overseen by the BCBA as stated in the service matrix of [Student's] IEP.
7. [Student] is only able to access remote education with a physical 1:1 present, which is being supplied by my private insurance company. I understand that we're in a pandemic, but I will be notifying my insurance company that the IEP violations are at their expense as well as mine, since the request for [District] to fund this individual has been denied by upper district administration.

The IEP provided annual goals in the areas of social/emotional, behavioral instruction, adaptive (including math, reading, and writing), speech/language, and occupational therapy. The IEP provided the following specially designed instruction and related services to the Student in a special education setting:

- Speech/Language: 30 minutes, 3 times per month (provided by an SLP)
- Social/Emotional: 25 minutes, 4 times per week (provided by a special education teacher)
- Behavioral instruction (concurrent): 100 minutes, 5 times per week (provided by a special education teacher)
- Adaptive skills: 200 minutes, 5 times per week (provided by a special education teacher)
- Adaptive skills (concurrent): 200 minutes, 5 times per week (provided by a special education teacher)
- Classified Staff (concurrent): 1,950 minutes, 1 time per week (provided by a 1:1 paraeducator)
- Occupational therapy: 30 minutes, 2 times monthly (provided by an occupational therapist and/or certified occupational therapist assistant)

The proposed IEP also included "behavioral consultation" for errorless learning, using data collection to inform instruction, prompt fading hierarchy, and rapport building strategies as supports for school personnel who were "new members to the team that need training."

29. The prior written notice, issued on December 15, 2020, contained proposals, including conducting a functional behavioral assessment (FBA), developing a behavioral intervention plan (BIP), and "keeping BCBA consult under the category of Supplemental Aids and Services."

The District provided the following reasons for rejecting the proposals:

1. An FBA/BIP is not going to be written for the virtual environment because we are not seeing the behaviors in the virtual environment that we would see in school/at home (eloping and meltdowns). We will reconvene the IEP team when in person instruction starts again to discuss writing an FBA/BIP if the need arises.
 2. The team discussed the need behind the BCBA consultation that was in the service matrix from the previous IEP and defined the current need as: [Student's] team (including the 1:1 para-educator) needs to have instruction and training on a. errorless learning; b. using data collection to inform instruction; c. the prompt fading hierarchy; d. rapport building strategies between adult and student. While the team agreed on this need in the IEP, there was not an agreement on the cadence of consultation or number of minutes for consultation that would be required to meet this need. There was discussion about where this should be documented in the IEP (Supplementary Aids and Services, or Supports for School Personnel).
30. On December 15, 2020, the Parent emailed the program specialist, stating she disagreed with the decision about the behavioral consultation. The Parent insisted that the IEP was not specific enough; the IEP should state the consultation would be provided by a BCBA and have specified times when the consultation would be provided.
31. In its response to the complaint, the District stated the information from the 2017 private evaluation was considered along with Parent input into the decision about the need for BCBA consultation:
- On December 2, 2019, the IEP team considered an outside evaluation provided by the Parent and the Parent's request for BCBA services. On February 26, 2020, the evaluation team met to review the outside evaluation, determining that no change in eligibility or [specially designed instruction] was warranted. On December 2, 2020, the IEP team again considered the Parent's request for BCBA consultation for school staff supporting data collection. On December 2, 2020, the IEP team changed BCBA consultation from Supplementary Aids Service to Support for School Personal as it was determined the need for adult-to-adult training is best captured as Support for School Personal rather than Supplementary Aids and Services.
32. When asked by OSPI why the Student continued to need the BCBA-specific consultation, the Parent stated:
- The student has intense, frequent meltdowns that disrupt everyone in the classroom (and surrounding classrooms). Her meltdowns include high pitched very loud screaming. These are documented with previous IEPs, as the remote learning IEP doesn't indicate meltdowns because the teachers were not aware of them (we would turn the camera / mic off). She has limited expressive communication, and should receive BCBA services to monitor that progress, along with the data on her IEP goals and the way the goals are being taught. A BCBA is also required to ensure the staff assisting/working with the student is effective, and not unintentionally creating situations where her behavior becomes an effective way to avoid school work.
33. The District's response to the complaint acknowledged the District did not implement the 1:1 paraeducator services.

34. On December 15, 2020, the Parent withdrew the Student from the District.
35. On December 18, 2020, the District issued a prior written notice, stating the District refused to initiate the IEP because the Student was residing out of state.
36. On January 5, 2021, OSPI received the Parent's complaint and opened this investigation.
37. Regarding the Student's progress towards her goals, the District's response and the documentation confirmed the Student made progress on three out of the twelve goals from September to December 2020. Regarding the Student's progress towards her annual goals, the Parent stated: "Any progress made on IEP goals during the 2020/2021 school year would not have been made without the parent supplied 1:1 para. Without the parent provided 1:1, the student would not have been able to access any form of the virtual model offered by the district."

CONCLUSIONS

Issue One: IEP Implementation from March to June 2020 – The Parent alleged the District failed to provide the services of a 1:1 paraeducator and board-certified behavior analyst (BCBA) to the Student according to her individualized education program (IEP) from March to June 2020.

A district must provide special education services in conformity with a student's 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 in spring 2020. 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.

Here, the Student's December 2019 IEP provided for a full-time (1,950 minutes, per week) 1:1 paraeducator and BCBA consultation eight hours a month. The IEP stated the BCBA consultation was for "support for classroom staff in reference to behavior support team as a whole, including observation, data collection, coaching."

In April 2020, the District and the Parent developed a continuous learning plan (CLP) that did not include the services of a 1:1 paraeducator or BCBA consultation. The Parent provided input into the creation of the CLP and the parent input section noted the Parent was "supplying outside ABA and nanny services weekly." Despite being involved in creating the CLP—and thus being presented with an opportunity to request more than the District was offering—the Parent did not request additional behavior supports in Spring 2020. Thus, while the District did not provide these special education services during the spring 2020 school facility closures, because the Parent, when presented the opportunity, declined the additional supports, OSPI finds no violation.

Issue Two: IEP Implementation from September to December 2020 – The Parent alleged the District failed to provide the services of a 1:1 paraeducator and BCBA to the Student according to her IEP from September to December 2020.

In fall 2020, districts were expected to implement the special education services a student needed in conformity with their IEP. If services were unable to be provided because of COVID-19, the district was expected to consider compensatory (or recovery) services to address lack of progress by the student toward the annual goals.

Here, the Student's December 2019 continued to be in effect at the start of the 2020-2021 school year and provided for a 1:1 paraeducator and BCBA consultation. In July 2020, the Parent inquired about the District providing 1:1 in-person services at home, rather than relying on just the private services. The District responded at the time, stating no in-person services were being provided for health and safety reason. In September 2020, the District followed up with the Parent's request for behavior support at home. On September 18, 2020, the Student's IEP team determined the Student needed in-person services to receive a free appropriate public education (FAPE). However, the District also determined that in-person services could not be provided safely to the Student because of her screaming behaviors. Although in-person services could not be provided safely to the Student, the District had an obligation to provide the Student a FAPE, and thus, to collaborate with the Parent to consider other options to implement the 1:1 paraeducator and BCBA consultation services remotely but effectively in order to implement the Student's IEP. The documentation provided that the Student could not access remote instruction without 1:1 support. These services may have been implemented differently than how they were implemented at school, but the documentation showed the Student continued to need behavioral support for her education. The addition of the remote classroom paraeducator may have provided some assistance to the Student, but there was no evidence that it met her needs during remote instruction.

The Student continued to receive private behavioral services at home. Although her behavior needs at home were being met through private services, which may have overlapped somewhat with her educational needs, the private services did not supplant the need for behavioral support to access her educational services. The District failed to provide the 1:1 paraeducator services and BCBA consultation from September to November 2020, either in-person or remotely. Thus, OSPI finds a violation.

In December 2020, the District reevaluated the Student and reviewed the Student's IEP. As part of the review, the District changed BCBA consultation to behavioral consultation for "errorless learning, using data collection to inform instruction, prompt fading hierarchy, and rapport building strategies...when there are new members to the team that need training." The 1:1 paraeducator services remained the same. The Parent disagreed with the change to the BCBA consultation and wanted a BCBA to implement the consultation at specific times. Despite the Parent's disagreement, the District had an obligation to provide training to new staff that were working with the Student. But there was no indication from either the District or the Parent that there were new staff working with the Student that required behavioral consultation per the December 2020 IEP during December 2020, until the Parent withdrew the Student on December

15, 2020; therefore, there was no failure to implement this portion of the December 2020 IEP. Regarding the 1:1 paraeducator services, the District failed to implement the services until the Student was withdrawn on December 15, 2020. Thus, OSPI finds a violation for the failure to implement the 1:1 paraeducator services in the Student's IEP.

The Student's December 2019 and 2020 IEPs called for the Student to receive approximately 32 hours of 1:1 paraeducator services per week. But 1:1 paraeducator services are not stand-alone services, in that the paraeducator support is designed to support the specially designed instruction the Student was receiving according to her IEP and to help ensure the Student could access that instruction. The November 2020 progress reports indicated the Student was making sufficient progress to meet the annual goals in the areas of written expression and math equations. However, the Student was at the emerging skill level in her other goal areas (money, past tense verbs, social/emotional regulation, social norms, following a schedule, asking for help, and completing tasks without screaming), which meant the Student was unlikely to meet the annual goals by the time the goals expired in December 2020. No instruction was provided to the Student towards the conversation and identifying details in reading goals. The lack of instruction in these areas and the lack of progress demonstrated by the Student was, at least in part, attributable to the lack of the 1:1 paraeducator. The Student was to receive approximately 75 hours of nonconcurrent specially designed instruction a month based on the December 2020 IEP. Taking into account the progress made by the Student in some areas, but also the lack of progress and no instruction provided in other areas, the District is required to provide 50 hours of compensatory services in the areas of specially designed instruction that were either not addressed or in which the Student failed to make adequate progress from September to December 2020. In addition, the District is required to provide the services of a 1:1 paraeducator to support the compensatory services for the Student.

As a note, the Parent requested reimbursement for the private ABA services the Student was receiving at home. Although there is some overlap between the needs that are addressed through private ABA services and educational services, the two are not necessarily interchangeable. The District was responsible for addressing the Student's behavior that interfered with her learning, which were addressed by the BCBA and behavioral consultation. The behaviors that ABA addressed at home extend beyond educational needs.

As noted above, the District was in violation for not implementing the BCBA consultation from September to December 2020, but the IEP team later determined the Student no longer required BCBA consultation. As a result, no compensatory services for BCBA consultation will be required.

Issue Three: Considering Parent Input – The complaint alleged the District failed to take the Parent's input and the results of the 2017 private evaluation into account when changing the December 2020 IEP from BCBA consultation to behavioral consultation.

A district is required to consider parent input and information provided by the parent into a student's IEP decisions.

Here, at the December 2020 IEP meeting, the District proposed to change the BCBA consultation to behavioral consultation based on the training needs of new staff working with the Student. The Parent disagreed, stating that based on the 2017 private evaluation that recommended BCBA-specific consultation, the Student required a BCBA consultation. In addition, the Parent requested the IEP specify the number of hours for consultation. In the Student's December 2019 IEP, the District accepted the private evaluation recommendations for a BCBA consultation. Nevertheless, there is enough evidence that the Student's circumstances have changed, including the shift to remote instruction, and that the Student no longer required a BCBA to oversee the Student's program. The District stated the Student was not exhibiting the same behaviors at home, such as eloping. While a BCBA consultant overseeing the program might be ideal and preferred by the Parent, there was no indication that the Student's needs could not be served by a "behavioral consultant." There was no documentation that the District completely disregarded the Parent's input or private evaluation's recommendations. The District further properly documented the change in a prior written notice. No violation is found.

CORRECTIVE ACTIONS

By or before **March 19, 2021, March 26, 2021, April 1, 2021,** and **February 11, 2022,** the District will provide documentation to OSPI that it has completed the following corrective action.

STUDENT SPECIFIC:

By **March 19, 2021,** the District will contact the Student's present school district to inquire whether the present district will agree to contract with the District to provide the 50 hours of compensatory services to the Student, along with the 1:1 paraeducator. If the school district agrees, the school district, Parent, and District will develop a schedule to provide the compensatory services.

If the new school does not agree to contract with the District, the District, with agreement from the Parent, will contract with a private education service to provide the compensatory services.

The District will notify OSPI by **March 26, 2021,** who will be providing the compensatory services to the Student and provide a copy of the service schedule, and a copy of the contract.

The compensatory services must be provided as follows:

- The services are to be scheduled in accordance with the district's or agency's re-opening plan and are to include, but not be limited to, the health and safety requirements at the time the services start;
- A contingency plan is to be offered if services cannot be provided in-person;
- The services are to be provided outside of the Student's school day;
- Services can be provided during breaks in the school year;
- Progress monitoring is to be used for the IEP goals addressed;
- Transportation, if necessary, is to be provided;
- Specially designed instruction must be provided by a certified special education teacher;
- Service logs are to be maintained, including attendance, dates, times, teacher's name, and services provided;

- The specially designed instruction must be based on peer-reviewed research to the extent practicable; and,
- If the 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.

All services must be provided by **January 25, 2022**.

By or sooner than **February 11, 2022**, the District will provide OSPI with the service log and progress monitoring for the compensatory services.

DISTRICT SPECIFIC:

By **April 2, 2021**, the District, in collaboration with the Puget Sound Educational Service District 121, must provide training to the Student's former 2020-2021 IEP team regarding the obligation to provide a free appropriate public education (FAPE) during distance learning, including behavioral supports.

By **March 19, 2021**, the District will provide OSPI with a copy of the proposed training that includes examples of how to implement behavioral supports during distance learning. By March 26, 2021, OSPI will review the proposed training materials and provide feedback.

By **April 9, 2021**, the District will provide OSPI with a final copy of the training materials and documentation of the list of participants.

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 March, 2021

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

THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

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