

## **SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 21-29**

### **PROCEDURAL HISTORY**

On March 29, 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 Clover Park School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On March 29, 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 March 31, 2021, the District requested an extension of time to respond to the complaint. OSPI granted the extension and requested the District respond by April 23, 2021.

On April 23, 2021, OSPI received the District's response to the complaint and forwarded it to the Parent the same day. OSPI invited the Parent to reply.

On May 11, 2021, the Parent requested an extension of time to reply to the District's response to her complaint. OSPI granted the extension and requested the Parent reply by May 21, 2021.

On May 20, 2021, OSPI received the Parent's reply. OSPI forwarded that reply to the District on May 24, 2021.

OSPI considered all 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?
2. Did the District implement the Student's IEP during the 2020-2021 school year, including appropriately considering the Student's ability to access remote instruction and potential need for in-person instruction?

### **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. 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).

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”). 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).

## FINDINGS OF FACT

### 2019-2020 School Year

1. During the 2019-2020 school year, the Student attended a District elementary school and was eligible for special education services under the category multiple disabilities.
2. The Student's February 2020 individualized education program (IEP) was in effect prior to the COVID-19 school facility closures. The IEP noted the Student's visual impairment, significant medical needs, and need for a nurse care plan. The Student's IEP included annual goals in the areas of adaptive (indicating preference by facial expression or eye gaze), cognitive (reach and object manipulation), communication (expressive language, social and expressive language), fine motor, gross motor (head control), and vision (visual attention). Progress toward the annual goals was to be measured at the trimester. The Student's IEP provided the Student with the following specially designed instruction and related services, all in the special education setting:
  - Occupational Therapy: 30 minutes weekly (provided by an occupational therapist (OT))
  - Speech Language Therapy: 30 minutes weekly (provided by a speech language pathologist (SLP))
  - Physical Therapy: 100 minutes monthly (provided by a physical therapist (PT))
  - Vision: 240 minutes monthly (provided by a vision specialist)
  - Vision: 150 minutes weekly (provided by special educations staff)
  - Adaptive Skills: 275 minutes weekly (provided by special educations staff)
  - Cognitive Development: 350 minutes weekly (provided by special educations staff)
  - Communication: 350 minutes weekly (provided by special educations staff)
  - Fine Motor: 240 minutes weekly (provided by special educations staff)
  - Gross Motor: 230 minutes weekly (provided by special educations staff)

The Student's February 2020 IEP additionally provided the Student with several accommodations, right response training as a support for school personnel, and a 1:1 paraeducator (for educational and medical needs) for 1,740 minutes weekly as a supplementary aid and service. The Student's IEP indicated the Student would spend 100% of his time in the special education setting (1,740 minutes per week). The Student attended a physical education (PE) class with his life skills class and received special transportation.

3. 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. The District closed on March 16, 2020, pursuant to the Governor's proclamation. The school facility closures were subsequently extended for the remainder of the 2019-2020 school year.
4. 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.

5. The District was on spring break from March 30 to April 3, 2020. Following spring break, remote continuous learning began in the District.
6. On April 26, 2020, according to a communication log provided by the District and emails, the vision specialist emailed the Student's case manager, asking whether the case manager had contact with the Parent and whether the Parent wanted "direct services" for vision.
7. On May 1, 2020, the Student's IEP team met and developed a continuous learning plan (CLP) for the Student. According to the District's response, it attempted to include the Parent in this meeting; however, the Parent did not respond to the District's communications. The team determined that all service areas remained a priority for the Student and that "service minutes would be adjusted based on the Student's ability to participate." The CLP included:
  - Communication: 15 minutes weekly
  - Vision: 20 minutes weekly
  - Cognitive: 45 minutes weekly
  - Fine motor: 10 minutes weekly
  - Gross motor: 5 minutes monthly

The CLP included the following information about how services would be provided:

Specially designed instruction for reading and math will occur through district online format using MS Classroom. Delivery of instruction will occur in MS Classroom in small groups, pre-recorded lessons or learning videos...weekly learning packet, Learning A-Z site, and emails between teacher and parent.

Specially designed instruction in communication will be provided through the following, which can include but is not limited to: individualized materials, consultation with teachers and parents, asynchronous learning opportunities (e.g., packet work, parent coaching, videos, etc.), and weekly check-ins in the form of SLP office hours by appointment (1:30-2:15 PM by phone, MS Teams and/or email).

[PT] will be available during the office hours of 1:30 to 3:00 pm. Please contact your PT for appointment times for consultation with staff and family for gross motor home activities provided by the district.

Related services in vision will include synchronous and asynchronous learning opportunities. Vision lessons will include providing activities that will increase visual behaviors including: recognizing objects within visual complexity, attending to 2-d materials, and reaching for an object while looking at it. Parent coaching will also be included. Asynchronous activities will include viewing CVI friendly videos, books, iPad apps, and vision packet activities. Materials to enhance vision have been sent home for [Student] to use when learning on [his] own and during direct services.

Occupational Therapy services will be provided through the means of consultation/collaboration services to support your student and their access to remote learning curriculum. Consultation/collaboration services may include but are not limited to: weekly fine motor packets, supplemental activities, daily OT office hours on Microsoft Teams, check-ins with teachers, accommodation recommendations, phone calls/emails to families, provision of resources/materials and pushing into Microsoft Teams sessions as needed to support the student and team.

The CLP also included the following accommodations and additional supports for remote learning:

- Shortened assignments
- Small group instruction
- Frequent breaks
- Written instructions
- "Access to recorded content for instruction"
- "Provide student with self-monitoring and time management tools (schedules, check lists, rubrics, or planning guides)"
- "Parent and/or child weekly group check in's and preview and/or review of in-home learning activities"

The District stated the Parent "accept[ed] the proposed small group instruction with other students in an online format."

8. On May 4, 2020, the vision specialist emailed the case manager, stating, "I dropped off stuff at [Student's] on Friday and mom said she was still confused how to log into Teams. Do you have his email and password and I can help her out?"
9. On May 5, 2020, according to the District's communication log, the Student's CLP was initiated.
10. On May 11 and 12, 2020, the vision specialist and case manager emailed regarding whether the Parent was accessing services.
11. On May 13, 2020, the vision specialist text messaged the Parent regarding scheduling vision services. The Parent requested services the next day and the vision specialist asked if after 1:00 pm worked, to which the Parent responded yes.
12. On May 14, 2020, the case manager and District "engagement team" emailed regarding whether the Student had participated in online learning that week. The case manager noted the Student had "not participated in the online classroom or Learning A-Z this week." The case manager noted the Student's family was having technical difficulties, but that the vision specialist made contact with the Student/Parent.
13. On May 19, 2020, the SLP emailed the PT, OT, and vision specialist regarding the Student's CLP. The OT responded that "the last 3 weeks I have not had the parent contact me during office hours." The SLP replied that the case manager was having difficulty getting ahold of the Parent, and that the SLP had tried and had not heard back. The vision specialist responded that she talked to the Parent several times a couple weeks before and scheduled a time to meet, but that now she was not getting a response from the Parent.
14. On May 19 and 20, 2020, the vision specialist texted the Parent to check in and encourage the Parent and Student to join online learning. There was no response from the Parent recorded in the District's communication log.
15. Between June 2 and 10, 2020, the District completed progress reporting for the Student. For each of the Student's goals, the progress report listed the following codes: "CV5" or "CV4." The progress report does not define the codes. For the Student's cognitive development and

adaptive goals, the progress report included the following: "June 2020: Due to COVID-19, the governor closed schools March 17 – June 17 when learning was moved online. [Student] has had little or no engagement in distance learning activities."

16. On June 5, 2020, the vision specialist emailed the case manager, OT, PT, and SLP, to see if they had received a response from the Parent. The vision specialist stated, "I've left either a text or voicemail each week, but have had no response. Are you having better luck?"
17. On June 8, 2020, the vision specialist texted the Parent: "Just wondering if you and [Student] need anything. New tactile books? Toys for the active learning space? Hope you are doing well!" The Parent responded that they were doing well and had "been working on stuff with the things that you gave us and some things that I have planned at home since we couldn't figure out the iPad with school. If you have some new ideas I'd love to hear them."
18. June 10, 2020 was the last day of the 2019-2020 school year for the District, according to the District's 2019-2020 calendar.
19. The District stated in its response that it offered the Student extended school year (ESY) services and recovery services<sup>1</sup> for summer 2020. The District stated the Parent declined these services.

The Parent stated in her reply that she declined ESY during summer 2020 because remote learning did not work for the Student.

20. The District addressed services offered during the school facility closures in its response. The District stated that, for example, "physical therapy services were severely limited due to the inability to actually work on services due to the nature of the goals, the PT was available from 1:30-3:00 pm daily to consult with the Parent or other staff members to identify gross motor activities to be performed at home."

The District further stated that, "despite the multiple formats offered, the Student did not access remote instruction and did not engage in any educational services between March 2020 through June 2020." The District stated it communicated with the Parent to "ensure access, answer questions, check in, and offer whatever support the Parent required to best access educational instruction." The documentation included communication and service logs, indicating the Student's related services providers attempted to contact the Parent with no response and provided a variety of activities online that were not accessed or viewed.

Further, in its response, the District asserted that it provided the Student with "appropriate services" and "acted in accordance with guidelines given at both the state and national levels." The District acknowledged that the Student's services did look different than in-person instruction, but that "such differences themselves do not warrant compensatory education."

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<sup>1</sup> Recovery services are additional services for students with disabilities designed to address lack of appropriate progress on IEP goals due to missed or limited services or for other reasons as a result of the COVID-19 pandemic.

The District also noted that at the start of the school facility closures, the District, "had no way of knowing what mode of instruction would be beneficial for the Student" and provided the Student with an "electronic device...printed work, email communications, websites, and other modes of instruction." The District stated it took into consideration the Student's needs and abilities and identified priorities for services. The District stated that staff and service providers "maintained contact with the Parents to facilitate engagement and modify the provision of services if necessary." The District noted it offered instruction in multiple modalities and "offered to modify and change instruction to accommodate the Student," including changing instructional times to address the Student's conflicts due to appointments. The District stated it "reached out to the Parent to advise of missed sessions or to inquire about status, [and] the Parent rarely responded."

21. In her reply to the District's response, the Parent provided some background information. The Parent noted she is a single parent, raising the Student and his sibling, both of whom have disabilities. The Parent noted the Student has "profound disabilities...has cortical blindness, cannot move or use his limbs, spends all his time in a wheelchair, and cannot speak." The Parent noted the Student is entirely dependent on her.

The Parent noted the Student and his sibling attend private physical and speech therapy twice a week. The Parent also stated that she attempted to,

Be diligent in responding to the district and meeting their timetable for CLPs, IEPs, and evaluations. I do my very best to stay in communication with teachers, paras, and therapist, but the demands of my children have undoubtedly caused me to miss responding to some emails or needing to reschedule some meetings.

The Parent further stated she was seeking compensatory education services for the Student because he did not receive or access services starting in March 2020, regardless of the reason for the lost services.

The Parent stated she did not reject offers of remote learning without a cause and stated she repeatedly told the District, and she believes the District knows, "that [the Student] cannot take advantage of remote learning." The Parent noted:

Because of [the Student's] profound disabilities, [Student] is unable to engage with online learning. He cannot see what is on the laptop and cannot keep his focus. His gaze would constantly wander. His degree of comprehension is unknown, but we do know that he requires stimulation and focused attention to get the benefit of any education...Without a professional physically present in the room with him during remote learning, I could not get [Student] to pay attention and engage with the material. It is unfair and unreasonable of the district to expect me to function as [Student's] teacher...

### **Summer 2020**

22. According to the District, it began offering recovery services during summer 2020, in addition to ESY services. The District stated that recovery services were offered for any student who had "69% or less engagement with remote instruction" and that only remote services were available due to health and safety restrictions.

23. On July 24, 2020, according to the District's response, the local county health department "explicitly stated that schools could not open for traditional classroom learning in September as hoped." This was reiterated in an August 11, 2020 letter from the local health department.

### **2020-2021 School Year**

24. During the 2020-2021 school year, the Student attended a District elementary school and continued to be eligible for special education services under the category multiple disabilities.

25. The District's 2020-2021 school year began on September 2, 2020.

26. According to the District's response, the "Student's participation in fall 2020 was sporadic." The District stated it, "attempted to reschedule, work around conflicts, and otherwise ensure the Student's access to education services." For example, the District stated, "when the Parent advised that existing times did not work for physical therapy, the physical therapist attempted to reschedule and identify a workable day and time." The District stated that when the Student did participate, the District team "worked collaboratively with the Parent to ensure access." For example, the "speech language pathologist worked with the Parent to adjust an activity to help with requests."

27. The District's communication log contained the following entries for September 2020, summarized in part:

- September 14: Weekly OT schedule established in Teams and posted to the classroom page. "Assignment not viewed in Team."
- September 15: PT sent Student a message in Teams regarding that day's meeting. Student did not attend physical therapy/vision therapy. PT called and left message with Parent.
- September 17: Student did not attend vision therapy.
- September 18: Student attended. Vision specialist texted the Parent: "...I am watching [Student] in class this morning. It's so good to see him! Did I get the wrong time yesterday? I thought we were meeting Tuesdays with [PT] and Thursdays at just vision at 12:15? Also, I have that paper that makes raised lines. Is there a good time to drop it off?" The vision specialist noted: "Classroom team-observation sent test [sic] to [Parent] asking for clarification for meeting times. No response."
- September 21: OT noted that they had not been able to contact Parent/Student during weekly occupational therapy sessions and Student had not been participating in Teams classroom.
- September 22: "PT/TVI Teams, Mom had difficult time moving [Student]. He looked at stimuli out of L eye 2x's-glances."
- September 24: Vision specialist texted the Parent asking to reschedule.
- September 28: SLP called Parent to schedule therapy and get to know the Student. OT noted they had been unable to make contact, Student had not been participating and "Student will be staying home for continued remote learning."
- September 30: Parent sent a message on teams that that day's session did not work for the Student and asked to reschedule. The PT responded and stated they would call the next day or Friday with times/days for the following week."



28. On October 1, 2020, the District began identifying "those students with the greatest need to return for in-person services and offer hybrid instruction." According to the District's response, the Parent opted to continue with remote instruction.
29. The Parent stated in her reply to the District's response that she opted to continue with remote instruction because she "feared COVID could be fatal to [the Student]" given his health concerns.
30. Also, on October 1, 2020, the vision specialist noted in the communication log that the Student did not attend therapy.
31. On October 5, 2020, the OT noted the Student had not been participating and they had "not [been] able to contact during weekly OT session." The PT also emailed the Parent regarding scheduling physical and vision therapy on Fridays. The Parent responded Fridays should work.
32. On October 7, 2020, the SLP noted the Student did not attend his virtual therapy session. The SLP noted they followed up with the Parent via a phone call and email. The Parent responded, asking for a call back. The SLP then emailed the Parent, asking about materials the Student was using and other activities. The SLP wrote, "I could start out by modeling that verbally when starting and stopping the activity and when I do it verbally you could model it by pressing the switch at those times. Then, we could have him try." The Parent responded, stating that sounded good.
33. On October 9, 2020, the vision specialist noted the Student did not attend vision and physical therapy.
34. On October 14, 2020, the SLP saw the Student for a virtual session.
35. On October 16, 2020, the vision therapist texted the Parent to let her know they were dropping off materials. The PT also called the Parent who stated she was "overwhelmed" and "thus having a difficult time making the online therapy meetings." The communication log noted the Parent was "agreeable to asynchronous [physical therapy] at this time."
36. On October 19, 2020, the Parent requested the Student have access to in-person services for therapies. The District response indicated the Parent "continued to have difficulties with accessing virtual services." The District's communication log and emails indicated that staff began taking steps to coordinate a date and time the Student could come weekly for in-person therapy. Based on the emails, steps included getting the Student cleared by the health room and coordinating staff.
37. According to the District's response, it "worked with the Parent to take the appropriate and necessary steps to ensure the Student's safe return, such as having medical clearance and medications ready."

38. On October 21, 2020, the Student attended virtual speech therapy. The SLP noted in the communication log that she spoke with the Parent and the Parent declined further virtual services due to scheduling difficulties. The notes stated:
- We discussed scheduling weekly according to her work schedule in order to ensure [Student] was getting his speech therapy. Then, when following up via phone to schedule the [next] session it was decided that we would wait for him to come in person. Phone call concluded with decision to follow up later if in person services were delayed and mom wanted to continue virtual speech therapy.
39. Also, on October 21, 2020, the SLP emailed the Student's school team regarding the Student coming for in-person therapy. The email noted they were waiting on the Student's medication and the case manager stated she would reach out the Parent to begin scheduling.
40. On October 28, 2020, the Student's case manager emailed the Parent to set up a schedule for in-person services.
41. On October 29, 2020, the OT noted in the communication log that they had not been able to connect with the Student.
42. On October 30, 2020, the Parent called the District's engagement team. The communication log indicated the Student was waiting to be cleared by the health room.
43. In November 2020, the communication log indicated the following occurred:
- November 5: The PT emailed the Student's team and noted the Parent "says virtual lessons were not working."
  - November 13: PT noted that if medical records are not available, PT would set up a further virtual appointment.
  - November 17: The PT emailed the Parent information about working with the Student on "range of motion." The PT noted the Student had recently had surgery and told the Parent to reach out with questions about the stretches for the Student.
  - November 18: The OT noted the Student had not started in person yet. The PT also emailed the Parent regarding a meeting on Friday.
  - November 20: The PT met with the Student and Parent; PT emailed the Student's team and noted the District nurse had received the Student's "paperwork...so he can come to school! Once mom hears from you which days he will be coming, she will bring his meds in." The email indicated they still needed to determine which days the Student would attend.
  - November 23: The OT noted they were waiting for the Student to start in-person.
  - November 30: The student engagement team called the Parent and left a voicemail.
44. The communication log in November 2020 also indicated the District and Parent were waiting on the Student's doctor to sign a medication order that was needed to have the Student cleared by the District nurse to attend in-person instruction.
45. The District stated the Student was scheduled to return to in-person instruction in early December; however, the Student had surgery and the communication log indicated they planned to have the Student start in-person after winter break and the Student's recovery from surgery.

46. On December 4, 2020, the District entered progress reporting on some of the Student's IEP goals, as follows:
- **Fine Motor:** "NP – This goal has not been addressed this reporting period...Student has not been seen this trimester, although remote services were requested. The procedures have been started to allow in person services for therapy."
  - **Communication:** "ES – Emerging skill...December 2020: [Student] was seen once this semester. During the session, his mom held a 'more' switch and a 'no' switch. He independently selected these switches 10/11 times during the session. Mom had to move the switch to new places that were more easily within reach."
  - **Communication:** "NP...December 2020: [Student] has only been seen once this semester."
  - **Gross Motor:** "NP...This goal has not been addressed during this reporting period as [Student] has not attended school or online classes due to COVID 19 and scheduling difficulties. The plan is for [Student] to return to school soon and this goal will [be] a focus of his physical therapy sessions."
  - **Vision:** "NP...This goal has not been addressed during this reporting period as [Student] has not attended school or online classes due to COVID 19 and scheduling difficulties."
47. On December 8, 2020, the Student's case manager emailed the Parent about the Student's in-person schedule. The Parent responded that the Student was having surgery and would not be able to return to school until he had recovered. The Parent stated, "Once he's good and ready I'll call or shoot you an email to give you a heads up when he will be returning. Thank you so much!"
48. The District was on winter break from December 21, 2020 through January 1, 2021.
49. On January 6 and 15, 2021, the Parent delivered the Student's medication to school.
50. On January 8, 2021, the case manager spoke with the Parent on the phone and they discussed the Student's reevaluation. In an email to the Student's IEP team, the case manager provided an update on the Student's surgery. The case manager stated the Student was feeling better and "we are just waiting on transportation and confirmation that he will have a 1:1 when he comes in."
51. In January 2021, the District's communication log indicated the Student attended the following days in-person:
- January 14: Student began attending in-person instruction
  - January 19: Student attended vision therapy and the OT assessed "current mobility and engagement;" Staff discussed "how to increase communication and what devices [sic] may be appropriate;" Student attended physical therapy and PT trained two paraeducators and a teacher on lift transfers for the Student
  - January 22: Student attended; Worked with paraeducators; The PT also emailed the Parent regarding any precautions related to the Student's surgery; The Parent responded that the Student was "able to do what he usually did before the surgery"
  - January 26: Student attended; Vision specialist observed physical therapy
52. The District stated that "since the Student's return in January 2021, he has fully engaged with his service providers and made progress toward his IEP goals." The District further stated,

"Student does not make dramatic gains for measurable progress. Additionally, his demonstrated ability toward goals fluctuates based on factors such as his mood or interest in the activity. However, he does make progress when taking the totality of the data into consideration." The District noted that the Student's "rate of progress is similar to prior to the COVID-19 closures."

53. Following the Student's return to two days a week of in-person instruction, the Parent stated the Student has made some improvement, but "has not really advanced in any of his IEP goals and has not made up the loss he has suffered since March 2020." The Parent stated the Student's benefits from getting therapies daily and the Parent attempts to work with the Student at home. The Parent further stated the current, three days a week of remote learning "continues to be ineffective for the same reasons it has not ever worked for him."

54. In February 2021, the District's communication log indicated the Student attended the following days in-person:

- February 2: Student attended occupational and physical therapy
- February 5: Student attended vision therapy
- February 9: Student vision, physical, and occupational therapy; SLP observed
- February 16: Student attended vision and occupational therapy
- February 18: Student attended speech therapy
- February 19: Student attended physical therapy
- February 23: Student attended vision, physical, and occupational therapy
- February 26: Staff started using a communication notebook; Paraeducator provided an update; Student worked with the SLP

55. On February 18, 2021, the Student's case manager emailed the Parent regarding the Student's annual IEP meeting and whether there were any concerns the Parent wanted noted in the IEP. The Parent responded, requesting a communication notebook so she could "know what he's doing in school. Even for therapies if possible so I can work on things at home with him." The Parent also stated, "I don't see any progress from home and I want to be involved and help." The Parent also requested additional in-person time or staff to provide services in the home.

56. On February 24, 2021, the Student's IEP team met to develop the Student's new annual IEP. The IEP was updated with current progress and included annual goals in the areas of adaptive (indicating preference by facial expression or eye gaze), cognitive (reach and object manipulation), communication (expressive language, social and expressive language), fine motor, gross motor (head control), vision (visual attention). Progress toward the annual goals was to be measured at the trimester. The Student's IEP provided the Student with the following specially designed instruction and related services, all in the special education setting:

- Occupational Therapy: 30 minutes weekly (provided by an OT)
- Speech Language Therapy: 30 minutes weekly (provided by an SLP)
- Physical Therapy: 100 minutes monthly (provided by a PT)
- Vision: 180 minutes monthly (provided by a vision specialist)
- Vision: 150 minutes weekly (provided by special educations staff)
- Adaptive Skills: 280 minutes weekly (provided by special educations staff)
- Cognitive Development: 350 minutes weekly (provided by special educations staff)

- Communication: 350 minutes weekly (provided by special education staff)
- Fine Motor: 260 minutes weekly (provided by special education staff)
- Gross Motor: 220 minutes weekly (provided by special education staff)

The Student's February 2021 IEP additionally provided the Student with several accommodations, right response training as a support for school personnel, and a 1:1 paraeducator (for educational and medical needs) for 1,740 minutes weekly as a supplementary aid and service. The Student's IEP indicated the Student would spend 100% of his time in the special education setting.

57. Regarding the February 2021 IEP, the District noted the Student had not made progress toward his goals as he did not access available services throughout the pandemic. The IEP included some updated goals, while other goals were continued pending the Student's triennial reevaluation.

58. In March 2021, the District's communication log (incorporating information from the communication notebook) indicated the Student attended the following in-person:

- March 1: Student worked with SLP
- March 2: Student worked with PT, OT, and vision specialist; Student worked with the paraeducator on math/counting, listening to stories, and painting
- March 4: The Parent wrote in the communication notebook, thanking the staff and providing information about the Student's private physical therapy
- March 5: Paraeducator provided an update, including information about sensory activities
- March 9: Student worked with the vision specialist and OT; Parent wrote in the communication notebook, thanking the staff and providing information about the Student's private physical therapy
- March 12: Student worked with vision specialist and PT; Paraeducator provided an update on counting, working with the switch button, reading, and painting
- March 16: Student worked with the SLP and paraeducator
- March 18: Student worked with vision specialist; Vision specialist provided the Student a sensory kit
- March 19: Student worked with vision specialist, PT, and SLP (the OT noted that due to early releases, the Student did not receive occupational therapy that week)
- March 23: Case manager provided an update on sensory activities, reading, and reaching
- March 26: Student worked with the PT and OT
- March 30: Student worked with the vision specialist and PT

59. On March 22, 2021, the District completed the Student's triennial reevaluation. The reevaluation noted the Student continued to be eligible for special education under the category multiple disabilities. The reevaluation report documented the evaluation group's recommendation that the Student receive specially designed instruction in vision, cognitive development, adaptive skills, communication, and fine motor. The evaluation also recommended vision, physical therapy, speech language therapy, and occupational therapy as related services.

60. On March 29, 2021, OSPI received this complaint.<sup>2</sup> In her complaint, the Parent alleged the Student is unable to access “virtual/video-based remote instruction, due to the nature of his disabilities” and that between spring 2020 and January 2021, the Student “was only offered one half-hour of video-based therapy in October 2020.”

The Parent noted in her complaint that things had improved since February 2021, but that while the Student was getting “some therapy now...he is still missing 6.5 [hours] 3x week.” The Parent stated the Student has experienced regression and requires additional supports.

The Parent calculated the amounts of missed instruction as follows:

<b>Special Education Services</b>	<b>Minutes Per Week</b>	<b>Total Missed Spring 2020<sup>3</sup></b>	<b>Total Missed Fall 2020<sup>4</sup></b>	<b>Total Missed Jan. 2021<sup>5</sup></b>
Occupational therapy	30	330 min.	360 min.	120 min.
Speech therapy	30	330 min.	360 min.	120 min.
Physical therapy	100	1,100 min.	1,200 min.	400 min.
Vision therapy	240	2,640 min.	2,880 min.	960 min.
Vision	150	1,650 min.	1,800 min.	600 min.
Adaptive skills	275	3,025 min.	3,300 min.	1,100 min.
Cognitive development	350	3,850 min.	4,200 min.	1,400 min.
Communication	350	3,850 min.	4,200 min.	1,400 min.
Fine Motor	240	2,640 min.	2,880 min.	960 min.
Gross Motor	230	2,530 min.	2,760 min.	920 min.

<sup>2</sup> OSPI notes the District argued in its response that the Parent failed to “exhaust [her] administrative remedies” and is therefore “not entitled to any relief under the citizen complaint process.” The District stated the “administrative process presumes that certain administrative processes have already occurred. Namely that an IEP team has met, that a dispute arose between the District and the Parent, and that disagreement may only be resolved by a due process hearing.” The District argued that, here, there was no dispute and no “opportunity to meet to give rise to a dispute.” The District stated it “did not have the opportunity to offer anything to which the Parents could dispute.” Thus, the District argued that the complaint was premature and should be dismissed “pending the outcome of discussion between the Parents and District on the issue of Recovery Services.”

While OSPI appreciates that the District has offered recovery services and is still in the process of finalizing those details, OSPI notes the District incorrectly cites to the requirement to exhaust administrative remedies as it does not apply to the written state complaint process. This principle applies to the requirement to exhaust administrative remedies—namely the due process hearing process—before filing a lawsuit. There is no requirement that an IEP meeting occur prior to a parent filing a special education complaint with OSPI. While OSPI supports and encourages districts and families to engage in lower level, informal dispute resolution, including working things out with the IEP team, there is no requirement that this occur prior to filing a complaint.

<sup>3</sup> Minutes per week multiplied by approximately 11 weeks.

<sup>4</sup> Minutes per week multiplied by approximately 12 weeks.

<sup>5</sup> Minutes per week multiplied by approximately 4 weeks.

61. The District was on spring break April 5–9, 2021.
62. In April 2021, the District’s communication log (incorporating information from the communication notebook) indicated the Student attended the following in-person therapy: occupational therapy on April 2 and vision therapy on April 13, 2021.
63. On April 21, 2021, the District and Parent met to discuss developing a new IEP now that the triennial reevaluation was complete, ESY, and recovery services. The Parent expressed a desire to have the Student participate in both ESY and recovery services.

The District stated the plan, at present, is for the Student to attend two days a week for ESY and two days a week for recovery services, for all three sessions (June 21-July 1; July 6-16; and, July 19-29, 2021). Services will be for half days, and the District stated the IEP team would be reconvening to identify specific areas of concern.

64. The prior written notice from the April 21, 2021 IEP meeting noted the team reviewed the Student’s IEP and recent evaluation. The team also reviewed this complaint and discussed recovery services. The prior written notice indicated the team agreed the Student qualified for recovery services and ESY. The notice indicated the team would meet again, “prior to the end of the school year to review data and [discuss] what specific areas of specially designed instruction will be provided to [Student] during this time.”
65. The Parent stated in her reply to the District’s response that the proposed recovery services do not fully meet the Student’s needs. The Parent noted she was requesting “compensatory education that [Student] can meaningfully access and engage with. That means additional in-person instruction, ideally in school, but if that is not possible, then in the home, with a qualified teacher and therapists.”
66. In addressing IEP implementation during the 2020-2021 school year, the District emphasized that it offered in-person instruction as early as October 1, 2020, and the Parent declined. The District noted that when the Parent did voice interest in in-person services, the District “immediately set procedures in place for a safe transition, including getting medical approval.”

## **CONCLUSIONS**

**Issue One: IEP Implementation, Spring 2020** – The Parent alleged the Student was unable to access remote instruction due to the nature of his disabilities and therefore did not receive instruction in spring of 2020. The Parent calculated that the Student missed approximately 21,945 minutes (365.75 hours) of instruction in spring 2020.

Given the exceptional circumstances of the COVID-19 global pandemic, the federal Department of Education and OSPI recognized that individualized education programs (IEPs) could not be implemented as written as school facilities closed and districts transitioned to distance learning. Here, the Student’s February 2020 IEP was in place prior to the school facility closures. The IEP included goals in the areas of adaptive, cognitive, communication, fine motor, gross motor, and

vision. The Student's IEP provided the Student with the following specially designed instruction and related services, all in the special education setting:

- Occupational Therapy: 30 minutes weekly (provided by an occupational therapist (OT))
- Speech Language Therapy: 30 minutes weekly (provided by a speech language pathologist (SLP))
- Physical Therapy: 100 minutes monthly (provided by a physical therapist (PT))
- Vision: 240 minutes monthly (provided by a vision specialist)
- Vision: 150 minutes weekly (provided by special educations staff)
- Adaptive Skills: 275 minutes weekly (provided by special educations staff)
- Cognitive Development: 350 minutes weekly (provided by special educations staff)
- Communication: 350 minutes weekly (provided by special educations staff)
- Fine Motor: 240 minutes weekly (provided by special educations staff)
- Gross Motor: 230 minutes weekly (provided by special educations staff)

This amounted to a total of 1,740 minutes of specially designed instruction per week and included 1,740 minutes per week of 1:1 paraeducator support for educational and health needs.

The Student's IEP and information provided in the complaint indicated that the Student is highly impacted by his disabilities. The IEP documented the Student's visual impairment and significant medical needs. The Parent also shared that the Student "profound disabilities...has cortical blindness, cannot move or use his limbs, spends all his time in a wheelchair, and cannot speak."

After the District closed school facilities on March 16, 2020, the Student's IEP was not implemented as written, which during this time alone does not represent a violation of the IDEA. However, that does not end the analysis as the District still had an obligation to provide students with special education services during the school facility closures. On March 23, 2020, OSPI communicated the expectation that districts would begin providing educational services to all students by March 30, 2020 ("continuous learning"); and, as instruction was being provided to all students, districts must have a plan for how students eligible for special education services would receive a free appropriate public education (FAPE), which consists generally of specially designed instruction and related services.

Based on the District's documentation, it offered the Student instruction through a variety of formats in spring 2020. This included the Student's related service providers (vision specialist, SLP, and OT) and case manager attempting to get into contact with the Parent throughout the spring, with little response. The District created a continuous learning plan for the Student on May 1, 2020, which explained how services would be provided through online classrooms, small group virtual instruction, pre-recorded lessons, learning videos, printed packets, emails between the teachers and Parent, office hours, parent coaching, and other asynchronous learning opportunities. The Student's vision specialist dropped off materials for the Student, had some communication with the Parent, and scheduled at least one virtual session with the Student (see e.g., email on May 4, 2020—noting materials had been dropped off—and June 8, 2020 email exchange with the Parent—noting she had been working with the materials from the vision specialist). However, despite these efforts, the Student did not engage in any education services between March and June 2020, aside from minimal engagement with the vision specialist/vision materials. The Student's progress reporting also confirmed the lack of engagement, as no progress was reported on the June 2020 progress report.



The Parent explained that remote learning did not work for the Student due to his disabilities, noting the Student is unable to engage online, cannot see or focus on what is on a laptop, and needs stimulation and focused attention to benefit from education. The Parent acknowledged that she may have missed responding to messages during spring 2020 due to the circumstances of life during the pandemic, but also stated it was unfair and unreasonable to expect that she could function as the Student's (and his sibling's) full time teacher. The Parent also acknowledged she declined the District's offer of extended school year services during summer of 2020, as those services were remote, and the Student would not be able to engage with or benefit from further remote services.

OSPI notes that the Parent faced real barriers and challenges with engagement in spring 2020. At the same time, the District did offer services in a variety of formats and attempted to communicate and connect with the Parent throughout the spring. Given the Parent's lack of response and lack of specific requests for different or additional services at that time, OSPI cannot fault the District, given the efforts staff made to provide services. Here, OSPI finds that the District offered continuous learning opportunities consistent with OSPI guidance. OSPI finds no violation of the IDEA or state special education regulations related to spring 2020.

Although no violation is found for spring 2020, the District is still required to individually determine whether recovery services are necessary to make up for any lack of progress and considering the Student lost a significant number of hours of special education services as a result of the pandemic. The Student's IEP team has already identified that the Student will need recovery services beginning, but not limited to, during summer 2021. The IEP team still needs to meet again to determine the details of the Student's recovery services. OSPI expects and recommends that this will be a discussion that continues into next school year as appropriate, based on the Student's individual needs.

**Issue Two: IEP Implementation, 2020-2021 School Year** – The Parent alleged the Student was unable to access remote instruction due to the nature of his disabilities and therefore did not receive instruction during the 2020-2021 school year, aside from 30 minutes of teletherapy in October 2020. The Parent calculated that the Student missed approximately 31,920 minutes (532 hours) between September 2020 and January 2021. During this period, the Student's February 2020 IEP remained in place.

Each district must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 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. Further, despite the ongoing impact of the pandemic and state and local health and safety requirements, districts were expected to implement special education services consistent with student IEPs.

Here, the District noted the Student's participation in the fall of 2020 was sporadic and that the District "attempted to reschedule, work around conflicts, and otherwise ensure the Student's access to education services." The District's documentation and communication log indicate

related service providers consistently reached out to the Parent, reminded the Parent about virtual sessions, and worked to reschedule teletherapy when needed. Staff also provided coaching on how the Parent and service provider could work together to provide instruction (the SLP) and dropped off materials for the Student (the vision therapist). There is documentation that the Student participated in a few teletherapy sessions or virtual classes on September 18, September 22, October 14, and October 21, 2020.

Beginning October 1, 2020, the District began identifying students who required in-person instruction, including the Student. At that time, the Parent opted to remain remote. The Parent explained that given the Student's medical conditions, she was concerned about the Student contracting COVID; thus, the Parent stated she remained remote despite the challenges. Further, when the Parent communicated to staff that she was overwhelmed and having a difficult time with teletherapy, the Parent expressed that she agreed to have largely asynchronous therapies. While it is relevant that the Parent elected to remain remote, it is concerning that the Student's IEP team did not, at that point, take steps to address the Student's challenges engaging with remote learning. The District knew the Student's engagement was sporadic and it is clear remote instruction was inappropriate for the Student given his disabilities. Yet, the District continued to offer only remote instruction without any documented consideration of whether there were any other options to serve the Student.

On October 19, 2020, the Parent requested that the Student have access to in-person instruction for his therapies. Once requested, the District took steps to bring the Student back for in-person learning. Unfortunately, there were a variety of delays, including getting the Student cleared by the health room (getting medication orders from the Student's doctor, which were delayed, and having the Parent bring the Student's medications too school), coordinating staff (including ensuring there was a 1:1 paraeducator), coordinating the Student's schedule, and the Student's surgery. Initially, the Student was scheduled to come for in-person instruction in the beginning of December; however, the Student ended up having surgery, needing to recover, and then it was winter break. Ultimately, the Student began attending two days a week of in-person instruction on January 14, 2021. The District's communication log indicated the Student has consistently attended two days a week since then and attended vision, speech, physical, and occupational therapies, and worked with his 1:1 paraeducator. OSPI finds that once the Parent requested in-person instruction, the District took reasonable steps to bring the Student back to school safely and worked as quickly as it could given a variety of barriers, including delays such as the Student's surgery that were outside the control of the District.

The District stated that during in-person instruction, the Student has engaged with his service providers and made some progress toward his IEP goals. The District further noted that the Student "does not make dramatic gains for measurable progress...his demonstrated ability toward goals fluctuates based on factors such as his mood or interest in the activity...he does make progress when taking the totality of the data into consideration...[the Student's] rate of progress is similar to prior to the COVID-19 closures." Other documentation in the complaint, including a reevaluation, the Student's February 2021 IEP (which contain the same or very similar goals and approximately the same amount of services), and the Parent's observations, indicate the Student

has made minimal progress over the last year. The Parent stated the Student has made some improvement since returning to partial in-person instruction.

Yet, once the Student returned to in-person instruction, he was only provided two days a week of in-person and the remaining three days a week were remote. OSPI notes this is a serious concern, given the clear indication that the Student could not engage with or benefit from remote instruction, and given the documentation that the Student has made very little progress. Overall, OSPI finds the District was unable to provide the Student a FAPE during the 2020-2021 school year. Specifically, despite the Parent's decision to keep the Student remote as the District started bringing students back in person, the District and the Student's IEP team failed to explore whether there were other options to provide the Student instruction, knowing that remote services were not being provided in alignment with the Student's IEP. Further, once the Student returned to a hybrid in-person schedule, the District only provided two days a week of in-person instruction when it was clear that remote learning was not providing the Student a FAPE. Taken together, OSPI finds the District in violation and the District will be required to provide the Student with compensatory education.

Compensatory education is an equitable remedy and there is no requirement that the Student be provided minute for minute compensation for the time lost. The Student's IEP team has already determined that the Student will participate in ESY and recovery services this summer, for a total of 24 half-days. This will provide some opportunity for the Student to recover lost progress. Additionally, given that the District has already begun planning these recovery services, the fact that the Parent did initially choose to keep the Student remote, and the fact that the Student has made some—albeit slow yet similar to pre-COVID progress—it is equitable to reduce the compensatory award to approximately 1/8 of the missed time or 66 hours, which the Student will receive *in addition to* the ESY and recovery services during summer 2021.

### **CORRECTIVE ACTIONS**

By or before **June 18, 2021, August 30, 2021, November 30, 2021,** and **May 20, 2022,** the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

By or before **June 11, 2021,** the District and Parent will develop a schedule for 66 hours of compensatory education, divided as follows:

- Occupational Therapy: 1
- Speech Therapy/Communication: 13
- Physical Therapy: 4
- Vision Therapy/Vision: 13
- Adaptive: 8
- Cognitive development: 11
- Fine Motor: 8
- Gross Motor: 8

**Note:** The Student's IEP team can agree to provide the services through any combination of the following: immediately increase the Student's in-person time for the remainder of the 2020-2021 school year; provided additional services this summer (services in addition to already planned ESY and recovery hours); and provided additional services outside of the District's school day during the 2021-2022 school year, including extended days, weekends, and District breaks. Additionally,

the District and Parent could agree to provide some amount of the above as a reimbursement for the private services the Student currently attends.

*The IEP team may consider other ideas of proposals for the compensatory services; and, if the IEP team is in agreement, OSPI will consider requested modifications to the corrective action plan.*

Unless otherwise agreed to by the District and Parent, services will be provided by a certified special education teacher or related service provider. Services may be provided in a 1:1 setting or a group setting, if appropriate. The District will provide OSPI with documentation of the schedule for services by or before **June 18, 2021**.

If the District's provider is unable to attend a scheduled session, the session must be rescheduled. If the Student is absent, or otherwise does not attend a session without providing the District or provider with at least 24 hours' notice of the absence, the session does not need to be rescheduled. The services must be completed no later than **May 13, 2022**.

The District must provide OSPI with an update on the amount of compensatory services provided to the Student by providing documentation on **August 30, 2021** and **November 30, 2021** of the compensatory services provided to the Student at that point. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled or missed by the Student. By or before **May 20, 2022**, the District must provide OSPI with documentation that it has completed compensatory services for the Student.

The District either must provide the transportation necessary for the Student to access these services or reimburse the Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must provide reimbursement for round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **May 20, 2022**.

**DISTRICT SPECIFIC:**

None.

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

Dated this \_\_\_\_ day of May, 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.)