

## **SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 21-48**

### **PROCEDURAL HISTORY**

On June 4, 2021, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from an attorney (Complainant) representing the parent (Parent) of a student (Student) attending the Mount Vernon School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On June 7, 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 June 25, 2021, OSPI received the District's response to the complaint and forwarded it to the Complainant on June 26, 2021. OSPI invited the Complainant to reply.

On July 1, 2021, OSPI received the Complainant's reply. OSPI forwarded that reply to the District on July 28, 2021.

On July 27, 2021 OSPI requested additional information from the District. On July 28, 2021, the District responded that it did not have additional information to provide at that time.

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

### **ISSUES**

1. Did the District follow procedures for responding to the Parents' requests to consider the Student's need for recovery services during the 2020-2021 school year?
  - a. Did the Student's individualized education program (IEP) team appropriately consider the Student's need for recovery services when developing the Student's annual IEP in March 2021?
2. Did the District implement the Student's IEP in his least restrictive environment (LRE), including providing paraeducator support necessary to access the general education environment, from:
  - a. September 2, 2020 to November 29, 2020; and,
  - b. February 18, 2021 to April 19, 2021?

### **LEGAL STANDARDS**

IEP Development: When developing each child's individualized education program (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.

IEP Team Unable to Reach Consensus: The IEP team should work toward consensus, but the district has the ultimate responsibility to ensure an IEP includes the services that a student needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based upon a majority "vote" and no one team member has "veto power" over individual IEP provisions or the right to dictate a particular educational program. If the team cannot reach consensus, the district must provide the parents with prior written notice of the district's proposals or refusals, or both, regarding the student's educational program and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 48, 12,473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 9); *see also Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9<sup>th</sup> Cir. 2003); *Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1182-83 (9<sup>th</sup> Cir. 1984) (Holding that a school district is responsible for providing a student with a disability an education it considers appropriate, even if the educational program is different from a program sought by the parents.)

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. The initial IEP must be implemented as soon as possible after it is developed. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §§300.320 through 300.328; WAC 392-172A-03090 through 392-172A-03115. "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 (9<sup>th</sup> Cir. 2007).

Least Restrictive Environment: School districts shall ensure that the provision of services to each student eligible for special education, including preschool students and students in public or private institutions or other care facilities, shall be provided: 1) To the maximum extent appropriate in the general education environment with students without disabilities; and 2) special classes, separate schooling or other removal of students eligible for special education from the general educational environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.114; WAC 392-172A-02050.

Unless the student's IEP requires some other arrangement, the student must be educated in the school that the student would attend if not disabled. If the student needs other arrangements, placement must be as close as possible to the student's home. A student should not be removed from his or her age-appropriate general education classroom solely because of needed modifications in the general education curriculum. 34 CFR §300.116; WAC 392-172A-02060.

Districts must ensure that students eligible for special education participate in nonacademic and extracurricular services and activities to the maximum extent appropriate to the needs of each student. 34 CFR §300.117; WAC 392-172A-02065.

### **FINDINGS OF FACT**

1. September 2, 2020 was the first day of the 2020–2021 school year.<sup>1</sup>
2. At the commencement of the 2020–2021 school year, the Student was eligible for special education services under the category of autism, was in the third grade, attended an elementary school within the District. The Student’s April 23, 2020 IEP was in effect, which provided him with the following specially designed instruction:
  - Adaptive for 30 minutes, five times weekly in a *special education* setting
  - Social-emotional for 45 minutes, five times weekly, in a *special education* setting
  - Speech-language pathology (SLP)/communication, 15 minutes, two times weekly, in a *special education* setting
  - Reading, 45 minutes, five times weekly, in a *special education* setting
  - Written expression, 30 minutes, five times weekly in a *special education* setting
  - Mathematics for 45 minutes, five times weekly in a *special education* setting
  - Social/behavior for 60 minutes, five times weekly in a *general education* setting
  - Adaptive for 30 minutes, five times weekly in a *general education* setting

The Student’s IEP further provided for paraeducator support in the general education setting for 275 minutes, five times weekly. Overall, the Student’s IEP provided that he would spend approximately 42% of his school day in the general education setting.

3. From September 2 through November 29, 2020, the Student’s schedule was as follows:

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<sup>1</sup> At the start of the 2020–2021 school year, all District students returned to remote general education classrooms, which the District referred to as its “Remote PLUS Learning model.” However, for certain students with IEPs, the District also planned to begin in-person instruction “to the maximum extent possible as the public health conditions changed.” During this time, the Student received his special education services in the school’s Intensive Learning Classroom (ILC), which was the District’s magnet program and intensive intervention program designed for students with autism. The ILC cohort of students had priority regarding returning to in-person services to receive specially designed instruction.

Time	Monday	Tuesday	Wednesday	Thursday	Friday
9:00 – 9:30	9:00-10:00 SCHOOL	Morning Meeting w/ [REDACTED] Zoom Link [REDACTED]	Independent Learning	9:00-10:00 SCHOOL	Morning Meeting w/ [REDACTED] Zoom Link [REDACTED]
9:30 – 11:00		Instructional Time (Literacy OR Math)	One on One Zoom Lesson (10:00-11:00) Zoom Link [REDACTED]		Instructional Time (Literacy OR Math)
11:00 – 11:30		Independent Learning	Whole Class Zoom Lesson Zoom Link [REDACTED]		Independent Learning
11:30 – 12:30		Lunch / Recess			Lunch / Recess
12:30 – 1:00		Independent Learning	Independent Learning		Independent Learning
1:00-2:00	Health Health Link	One on One Zoom Lesson (1:30-2:15) Zoom Link [REDACTED]		PE PE Link	Music Music Link
2:00-3:00	Instructional Time (Literacy OR Math) Zoom Link [REDACTED]	Library (2:15-3:15) Library Link		Instructional Time (Literacy OR Math) Zoom Link [REDACTED]	One on One Zoom Lesson Zoom Link [REDACTED]
3:00 – 3:30	Independent Learning	Independent Learning	Independent Learning	Independent Learning	Independent Learning

The Student’s general education peers were scheduled to access 22 hours of remote instruction per week. The Student’s schedule included nine hours of learning in the general education setting. This included asynchronous (specialists—including health, library, physical education, music, and independent learning time), and synchronous learning (literacy or math provided via Zoom). The Student’s specially designed instruction was delivered during the remaining 13 hours. This included eight hours of in-person learning at the District elementary school on Mondays and Thursdays from 9 am to 1 pm, provided by the special education teacher (who was also the Student’s case manager) and her special education staff, an additional individual 45 minutes of synchronous Zoom session on Tuesdays and Fridays with one of the special education teacher’s paraeducators, and a synchronous one hour one-on-one group Zoom session with the special education teacher or one of her paraeducators on Wednesdays. The Student additionally had 30 minutes daily of independent asynchronous learning time in the special education setting. According to the District’s response, this resulted in the Student spending approximately 41% of his instructional week in the general education setting.<sup>2</sup>

<sup>2</sup> The Complainant alleged the Student did not access specially designed instruction during general education time because the Student was not provided paraeducator support, and that the Student also did not access specially designed instruction during independent learning time because the Student required constant prompting and support to pay attention, which the Student did not receive during independent learning.

4. On September 8, 2020, the paraeducator emailed the special education teacher a list of Zoom links for Zoom one-on-one sessions with the Student, scheduled for Tuesdays at 1:15,<sup>3</sup> Wednesdays at 2:00,<sup>4</sup> and Fridays at 2:00.<sup>5</sup>
5. Also, on September 8, 2020, the Parent emailed the special education teacher to request information on how to access "Seasaw," which housed the Student's general education specialist activities. The special education teacher responded the next day, providing the link to Seasaw and explaining asynchronous time to the Parent for fall 2020. The special education teacher added that the Student could choose to do these activities at a different time of day or skip them if he was feeling overwhelmed.
6. On September 15, 2020, one-on-one Zoom lessons between the paraeducator and the Student began. Prior to the first call, the Parent emailed the special education teacher for assistance locating the Zoom link. The special education teacher provided the link and the Parent confirmed receipt. At the request of the Parent, the Wednesday Zoom lesson was also changed to 10 am.
7. On September 24, 2020, the special education teacher emailed the general education teacher to request an update on the Student's performance in class. The general education teacher responded that the Student had been attending and "staying for an hour," which was "more than [she] thought" he would.<sup>6</sup>

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<sup>3</sup> Zoom lessons for Tuesdays at 1:15 pm were scheduled for the following dates: 9/15, 9/22, 9/29, 10/6, 10/13, 10/20, 10/27, 11/3, 11/10, 11/17, 11/24, 12/1, 12/8, 12/15.

<sup>4</sup> Zoom lessons for Wednesdays at 2 pm were scheduled for the following dates: 9/16, 9/23, 9/30, 10/7, 10/14, 10/21, 10/28, 11/4, 11/11, 11/18, 11/25, 12/2, 12/9, 12/16.

<sup>5</sup> Zoom lessons for Fridays at 2 pm were scheduled for the following dates: 9/18, 9/25, 10/2, 10/9, 10/16, 10/23, 10/30, 11/6, 11/13, 11/20, 11/27, 12/4, 12/11, 12/18.

<sup>6</sup> In its response, the District relayed that during fall semester, the Parents did not request, and the District did not provide a District paraeducator to go into the Student's home to assist the Student with any of asynchronous or synchronous instruction. The District added that the Parent was provided technical support to help the Student access general education instruction and in implementing the Student's behavioral intervention plan (BIP). The District relayed in its response that it was only providing in-person paraeducator support to students who were medically fragile because the support "was not viewed as necessary for Student given the expectation of in-home parental support for all students in the 3<sup>rd</sup> grade general education class." In her reply to the District's response, the Complainant emphasized that the Student's IEP included 1:1 paraeducator support in the general education setting and that the Parents were not able to provide support due to their work schedule and obligations to other school-aged children in the home. The Complainant stated that the emails between the general education and special education teacher, as well as between the Parents and the District during this time, were sufficient for the District to have known the Student may not have been accessing general education instruction. The District also did not provide remote 1:1 paraeducator support.

8. On October 29, 2020, the special education teacher informed the Parents that as part of the evolving COVID-19 planning, the District was able to change the Student's learning model to increase the amount of specially designed instruction delivered to the Student in-person.<sup>7</sup> That same day, the Parent raised concerns about keeping the Student in Zoom classes every day, relaying his belief that the Student was not benefiting from his general education instruction and activities provided in that model and that the Student also required general education to be provided in-person with paraeducator support. He added that he did not believe the Student was "called on enough" during remote synchronous instruction and that observed the Student "regularly getting dismissed from general education classes during quizzes and tests."
9. Also, on October 29, 2020, the special education teacher emailed the general education teacher to request an update on the Student's performance in her class, inquire about the Student's participation, and ask about any homework he may have. She also offered support to the general education teacher, including support modifying instruction if more modification was needed, and asked if the Student had all of the materials he needed. The general education teacher responded that the Student works on whole group math and participates some in science and art. She also expressed concerns; however, that "[Student] has been alone in his room the past week and is basically playing." She explained that she did not send home worksheets or homework. The general education teacher additionally explained that she did excuse the Student early when the other students were taking tests that the Student was not taking.
10. On October 30, 2020, the special education teacher responded to the Parent's concerns that the Student was not successful in the remote setting but relayed that she felt like the Student was making "great" progress in her class, asking for more specific information on areas where the Parents felt the work may be "too easy" for the Student. She reminded the Parents progress reports were coming up and that she was excited to share with them the progress the Student was making.<sup>8</sup> She also relayed that the general education teacher may not have known the

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<sup>7</sup> Specifically, the District proposed that the Student begin receiving 2.5 hours of in-person special education services at the District elementary school on Mondays, Tuesdays, Thursdays, and Fridays, and that he participate in his general education Zoom classes in the morning. This increased the Student's in-person special education time to 10 hours per week.

<sup>8</sup> The special education teacher explained that the Student "was no longer working on single digit addition and subtraction," was "understanding many more concepts [and] working on telling time to the nearest five minutes." She relayed that they had started a new math curriculum and he had "made great progress." She offered to show the Parents a recent assessment the Student had completed so the Parents could compare the Student's work with an assessment he had completed at the beginning of the school year. She also noted that he was "getting to the point where he's able to do double digit addition and subtraction independently," which was one of his IEP goals. In addition, the special education teacher informed the Parent that the Student began the year reading at a level D and had progressed to reading with at least 90% accuracy at level H. The Student had also improved in spelling.

expectations for the Student and said she would speak with the general education teacher to remedy any misunderstandings to ensure the Student was successful.

11. On November 11, 2020, the Parents unilaterally unenrolled the Student from the District and enrolled him in a local parochial school (school 2) where the Student received full-time in-person instruction. The Student attended school 2 through mid-February 2021.
12. On December 1, 2020, the SLP emailed the Parents after being informed that the Student would be attending school 2 to provide information on how to continue speech therapy while at school 2. The SLP explained the Parents could choose to not have the Student receive speech services at that time.
13. On December 11, 2020, the SLP assistant (SLP-A) contacted the SLP and told her that that she had been told the family wanted to proceed without speech services. She asked for confirmation that this was correct. The SLP told SLP-A that she had contacted the family about receiving speech services and did not hear back.
14. On January 28, 2021, the director of student support services (director) and Parent spoke on the phone about the educational needs of the Student, including 1:1 paraeducator support in the general education setting, and the possibility of reenrolling the Student in the District to obtain certain supports that school 2 was unable to provide.
15. During the first week of February 2021, the District distributed progress reports for students with IEPs. According to the District's response, because the Student was not enrolled in the District at that time, the District did not prepare a progress report for the Student.
16. On February 9, 2021, the superintendent at school 2 emailed the Parents to advocate that the Parents reenroll the Student in school 2. In his email, the superintendent explained that he believed that the Student required three things it could not provide: (1) time in the ILC classroom; (2) specially designed instruction (which school 2 explained it hoped to provide in the future but currently was unable to deliver at the time due to the pandemic); and, (3) a 1:1 paraeducator for six hours a day to access the general education setting. That same day, the Parent emailed the District regarding re-enrollment of the Student.
17. On February 16, 2021 the District convened a re-entry meeting. Also, on February 16, 2020, the SLP informed the SLP-A that the Student had returned to the District and confirmed that he would be reconvening speech services that week.
18. On February 17, 2021, the Parent emailed the executive director with concerns about the schedule he received for the Student. The Parent wrote that the model proposed to him only provided 600 minutes of classroom time in a special education setting—resulting, according to his calculations, in 300 hours of lost minutes of specially designed instruction between that date and the end of the school year. The Parent asked for "some sort of recovery or

compensatory services,<sup>9</sup> possibly in person, in a general education setting.” The Parent further requested, “At the very least, [the Student] be provided a remote learning option for his mornings with support as required by his IEP,” adding, “There has to be a way that we can have [Student] participate in General Education with his peers in the mornings, and receive his [specially designed instruction] support in the afternoon.” The executive director responded that it had offered the maximum amount of on-site instruction it could due to the pandemic and that he would inform the Parent of opportunities for recovery services if they arose. The executive director did not address the Parent’s request for remote general education instruction.

19. On February 18, 2021, the Parent reenrolled the Student in the District. The Complainant alleged that from February 18 through April 16, 2021, the Student did not receive any general education instruction (synchronous or asynchronous) or paraeducator support to access general education services, a period of 29 school days.<sup>10</sup>
20. At the time the Student reenrolled, the Student’s peers were continuing to attend their general education classes full time via remote instruction through both asynchronous and synchronous learning.

In its response, the District stated the Student also attended and participated in asynchronous general education instruction that was provided for 12 out of 22 hours. The District reported the Student spent 54% of his time in the general education setting. The District included two schedules with its documentation: “Schedule A” and “Schedule B” (see below). In its narrative response to the complaint, the District implied schedule A was correct. According to schedule A, the Student attended synchronous general education Zoom classes in the morning, and the rest of the Student’s school week was spent in the special education setting, where the Student’s instruction was delivered in-person from 1 to 3:30 pm in the special education setting. During this time, the District stated the Student received in-person specially designed instruction from 1 to 3:30 pm on Monday, Tuesday, Thursday, and Friday. On Wednesday mornings, the District stated the Student also participated in a whole class session with the special education teacher or special education staff and received an additional hour of in-person specially designed instruction with special education staff.

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<sup>9</sup> During Spring 2020, the District buildings closed on March 17, 2020, for two weeks for all students. Following the District-wide school closures, the Student was provided a continuous learning plan (CLP). The Complainant alleged the services provided were minimal, and that the Student had a difficult time accessing what was provided because the Student did not receive 1:1 full time paraeducator support as provided for in his IEP. The Student required prompting to pay attention and stay on-task, which the Student’s Parents were unable to consistently provide due to work and family obligations. The Complainant further alleged the Student did not receive speech language pathology supports for 11 weeks during spring 2020. Although the events of this time period are outside the timeframe for this complaint, the Parents provided this information because they believed it relevant to the issue raised regarding their request for recovery services at the Student’s annual review.

<sup>10</sup> The Student received speech services during this time per his IEP.



The District additionally included schedule B with its response as an example of the Student's schedule. Schedule B was included as an exhibit to the response without explanation. The Complainant noted in her reply to the District that schedule B more closely reflected what was offered to the Student, noting that the Parent never received Zoom links to access general education synchronous instruction, and maintained the Parents never received either a schedule or a list of general education activities for the Student to complete during asynchronous general education time.<sup>11</sup>

Schedule A:

Time	Monday	Tuesday	Wednesday	Thursday	Friday
9:00 – 9:30			Whole Class Zoom Lesson (9:00)		
9:30 – 11:00	<b>HOMEWORK SENT HOME</b> MENU <input type="checkbox"/> Go for a walk for 20 minutes <input type="checkbox"/> 20 minutes of reading/ Epic Books <input type="checkbox"/> Watch News2You article	<b>HOMEWORK SENT HOME</b> MENU <input type="checkbox"/> Go for a walk for 20 minutes <input type="checkbox"/> 20 minutes of reading/Epic Books <input type="checkbox"/> Watch News2You article	10:30-11:30 <b>SCHOOL</b> One on One Academic work session	<b>HOMEWORK SENT HOME</b> MENU <input type="checkbox"/> Go for a walk for 20 minutes <input type="checkbox"/> 20 minutes of reading/ Epic Books <input type="checkbox"/> Watch News2You article	<b>HOMEWORK SENT HOME</b> MENU <input type="checkbox"/> Go for a walk for 20 minutes <input type="checkbox"/> 20 minutes of reading/ Epic Books <input type="checkbox"/> Watch News2You article
11:00 – 11:30	<input type="checkbox"/> 20 minutes of IXL <input type="checkbox"/> 20 minutes of Lexia <input type="checkbox"/> 20 minutes of Happy Numbers	<input type="checkbox"/> 20 minutes of IXL <input type="checkbox"/> 20 minutes of Lexia <input type="checkbox"/> 20 minutes of Happy Numbers	<b>HOMEWORK SENT HOME</b> MENU <input type="checkbox"/> Go for a walk for 20 minutes <input type="checkbox"/> 20 minutes of reading/Epic Books <input type="checkbox"/> Watch News2You article <input type="checkbox"/> 20 minutes of IXL <input type="checkbox"/> 20 minutes of Lexia <input type="checkbox"/> 20 minutes of Happy Numbers	<input type="checkbox"/> 20 minutes of IXL <input type="checkbox"/> 20 minutes of Lexia <input type="checkbox"/> 20 minutes of Happy Numbers	<input type="checkbox"/> Do two worksheets from your pocket <input type="checkbox"/> 20 minutes of IXL <input type="checkbox"/> 20 minutes of Lexia <input type="checkbox"/> 20 minutes of Happy Numbers
11:30 – 12:30	Lunch / Recess	Lunch / Recess			Lunch / Recess
12:30 – 1:00	Health	Library		PE	Music
1:00-2:00	<b>SCHOOL</b> 1:00-3:30	<b>SCHOOL</b> 1:00-3:30		<b>SCHOOL</b> 1:00-3:30	<b>SCHOOL</b> 1:00-3:30
2:00-3:00					
3:00 – 3:30					
Parent Signature					

<sup>11</sup> OSPI reached out to the District for clarification regarding the two schedules. The District was unable to provide documentation confirming the Parent received either schedule. The District's response also did not include documentation to confirm the general education teacher ever contacted the Parent to provide a list of asynchronous activities. It is unclear if there was miscommunication between the District and the Parent regarding where the general education activities were housed online, or another error prevented the Parents from receiving information about general education instruction during spring 2021.

Schedule B:

Time	Monday	Tuesday	Wednesday	Thursday	Friday
9:00 - 9:30			Whole Class Zoom Lesson (9:00)		
9:30 - 11:00	Mrs. Brooks Third Grade Zoom Zoom Link [REDACTED]	Mrs. Brooks Third Grade Zoom Zoom Link [REDACTED]	10:00-11:00 SCHOOL One on One Academic work sessions	Mrs. Brooks Third Grade Zoom Zoom Link [REDACTED]	Mrs. Brooks Third Grade Zoom Zoom Link [REDACTED]
11:00 - 11:30	HOMEWORK SENT HOME MENU <ul style="list-style-type: none"> <li>☐ Go for a walk for 20 minutes</li> <li>☐ 20 minutes of reading/ Epic Books</li> <li>☐ Watch News2You article</li> <li>☐ 20 minutes of IXL</li> <li>☐ 20 minutes of Lexia</li> <li>☐ 20 minutes of Hoppy Numbers</li> </ul>	HOMEWORK SENT HOME MENU <ul style="list-style-type: none"> <li>☐ Go for a walk for 20 minutes</li> <li>☐ 20 minutes of reading/ Epic Books</li> <li>☐ Watch News2You article</li> <li>☐ 20 minutes of IXL</li> <li>☐ 20 minutes of Lexia</li> <li>☐ 20 minutes of Hoppy Numbers</li> </ul>	HOMEWORK SENT HOME MENU <ul style="list-style-type: none"> <li>☐ Go for a walk for 20 minutes</li> <li>☐ 20 minutes of reading/ Epic Books</li> <li>☐ Watch News2You article</li> <li>☐ 20 minutes of IXL</li> <li>☐ 20 minutes of Lexia</li> <li>☐ 20 minutes of Hoppy Numbers</li> </ul>	HOMEWORK SENT HOME MENU <ul style="list-style-type: none"> <li>☐ Go for a walk for 20 minutes</li> <li>☐ 20 minutes of reading/ Epic Books</li> <li>☐ Watch News2You article</li> <li>☐ 20 minutes of IXL</li> <li>☐ 20 minutes of Lexia</li> <li>☐ 20 minutes of Hoppy Numbers</li> </ul>	HOMEWORK SENT HOME MENU <ul style="list-style-type: none"> <li>☐ Go for a walk for 20 minutes</li> <li>☐ 20 minutes of reading/ Epic Books</li> <li>☐ Watch News2You article</li> <li>☐ 20 minutes of IXL</li> <li>☐ 20 minutes of Lexia</li> <li>☐ 20 minutes of Hoppy Numbers</li> </ul>
11:30 - 12:30	Lunch / Recess	Lunch / Recess		Lunch / Recess	Lunch / Recess
12:30 - 1:00	Health	Library		PE	Music
1:00-2:00					
2:00-3:00	SCHOOL 2:00-3:00	SCHOOL 2:00-3:00		SCHOOL 2:00-3:00	SCHOOL 2:00-3:00

21. On February 22, 2021, the Parent emailed the special education teacher and wrote that the Student had made progress during his time at school 2, asking to move up the Student's annual IEP meeting to ensure the Student's IEP services and special education setting were appropriate. The special education teacher and District agreed to obtain new present levels of performance on the Student and move up his annual review accordingly.
22. On February 24, 2021, the Parent informed the special education teacher that the Student had begun exhibiting an increase in behaviors at home since his schedule changed and asked for support. The special education teacher responded that she added a token economy system to help incentivize him to complete his work to see if it would help, per the Student's behavioral intervention plan (BIP).
23. On February 28, 2021, the SLP informed the SLP-A that the Student's annual IEP meeting date had been moved up, that the Parents did not believe the Student still required speech services due to progress the Student had made at school 2, and asked the SLP-A to target all of the Student's speech goals when working with him. The SLP requested input from the SLP-A who had been working directly with the Student, including a video from the previous and current week of her work with the Student to use when assessing the Student's present levels.
24. On March 2, 2021, the special education teacher emailed the Parent to schedule an IEP meeting for the following week.
25. On March 3, 2021, the District sent the Parents an IEP meeting invitation, notifying them a meeting had been scheduled for March 11, 2021. The Parents confirmed their expected attendance the next day.

26. On March 4, 2021, the SLP-A provided the SLP with the requested data collected on the Student's speech goals, as well as a video of the Student. Additional data was provided to the SLP on March 11, 2021 prior to the IEP meeting.
27. On March 5, 2021, the Parent emailed the executive director with an agenda to the meeting, which was revised on March 9, 2021. The Parent requested to discuss at the meeting how the Student was accessing his general education minutes, the Student's access to his least restrictive environment, implementation of the Student's specially designed instruction, in person services, and the Student's need for recovery services.
28. On March 11, 2021, the Student's IEP team met for his annual review. At the meeting, the team reviewed the Student's present levels of performance and developed new IEP goals.

The Student's progress was discussed at the Student's March 11, 2021 IEP meeting and the following progress was recorded in notes maintained during the meeting:<sup>12</sup>

- **Reading:** Student met two out of three goals (did not meet his reading comprehension goal)
- **Written Expression:** Student met two goals
- **Math:** Student met all three goals
- **Adaptive:** The March 11, 2021 IEP did not include data on Student's progress on IEP adaptive goals (following directions and self-regulating) and included the same benchmarks as previous IEP, suggesting Student had not made progress.<sup>13</sup>
- **Social Emotional:** Student made progress two out of three social emotional goals (did not make progress on settling conflict with peers goal)

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<sup>12</sup> The District provided documentation that data was collected on the Student's progress in reading, math, and writing on the following dates in 2020: September 14, 15, 17, 22, 24, 25, 29, October 1, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 26, 27, 28, 29, 30, November 2, 4, 5, 9, 10, 11 1319, 20, 23; the following dates in 2021: January 24, February 18, 19, 22, 23, 24, 25; March 1, 2, 3, 4, 5, 8, 9, 10 11, 15; May 5, 6, 10, 12, 13, 14, 17, 18, 25, 26, 27, 28; June 1, 2, 3, 4, 7, 9. Data was collected on the Student's speech goals on March 4, 11, 16, 17, 19, 2021.

<sup>13</sup> Because the Student was not enrolled in the District when the District completed progress reports in February, the District had not completed a written progress report for the Student. In its reply to the District's response, the Complainant wrote that at the IEP meeting on March 11, 2021, the special education teacher requested the IEP team discuss whether progress had been made on each goal before proposing new goals, but that the information did not get recorded in the IEP or elsewhere. In the District's response, the District wrote that the special education teacher indicated the "[Student] met two out of three of his social-emotional, both adaptive, all three math, both writing, and all three reading goals for the year. He met all his goals except for one social-emotional goal that he was close to meeting during the academic year." The Complainant disagreed with this statement regarding adaptive and written expression and provided her handwritten notes from the IEP meeting, documenting the team's discussion. Although OSPI acknowledges the special education teacher is the closest to the Student and has particular knowledge of the Student's progress, because the Complainant's notes were taken contemporaneously at the time of the meeting with all IEP team members present, including the Parent and general education teacher, in absence of a written progress report or other written documentation, OSPI finds these notes persuasive.

- **Speech:** Student did not meet the answer “wh” questions having to do with abstract thinking, but made progress on two out of the five sounds he is working on. The “wh” questions goal is therefore being repeated while he continues to work on other sounds.

The IEP team decreased the amount of specially designed instruction the Student received in speech to 20 minutes one time weekly. The Student’s IEP provided for increased paraeducator support (to 360 minutes, five times weekly) to support the Student’s increased time in the general education setting. The Student’s new IEP provided he would spend approximately 45% of his school day in the general education setting—an increase from the previous IEP.

At the IEP meeting, the IEP team considered the Parents’ request for recovery/compensatory services for the Student. The team deferred any determinations regarding recovery/compensatory services until the Student could be assessed after having been in the general education setting in person.

The IEP team additionally discussed the Parents’ concerns about the Student not having in-person access to general education peers. The District responded that:

...at that time, [school] was not yet back to full-time in-person instruction for all students. Rather, general education students were only attending school remotely due to COVID-19 restrictions on the number of students on campus. Consequently, it was explained to Parent that Student would continue to access his general education classes via remote instruction, as that was the only modality available to general education students in March 2021.

The District documented the change in specially designed instruction and denial of Parents’ request regarding in-person access to general education peers on a prior written notice, noting limitations caused by COVID-19 prevented a full day of in-person schedule requested by Parents.

29. Following the IEP meeting on March 11, 2021, the District sent the Parent a prior written notice (PWN) that the IEP team decided to adjust the Student’s minutes of specially designed instruction because his “schedule has changed and service minutes need to be adjusted based on time spent in the Special Education setting.” The PWN further stated that the Student’s goals needed to be adjusted “due to synchronous, asynchronous and/or in-person instruction.” The PWN documented that the IEP team considered the Student’s need for a full school day of in-person instruction that provided access to both general and special education settings, but rejected this due to limitations of the ongoing COVID-19 pandemic. The PWN also noted that compensatory and/or recovery services were considered but rejected because they “cannot be considered until such needs can be assessed objectively following a conclusion to a disruption of current services.”
30. Between March 30 and April 8, 2021, District administration and building staff exchanged emails to develop a program to implement the conditions agreed to at the March 11, 2021 IEP meeting, including the provision of transportation.
31. On April 19, 2021, the District again adjusted the Student’s schedule based on its Remote PLUS learning model in the District. According to the District, the Student began attending school

in-person for a total of five hours each Monday, Tuesday, Thursday and Friday. On these days, the District stated the Student received in-person instruction for 2.5 hours in the morning with his general education cohort, and 2.5 hours in the afternoon with his special education cohort. On Wednesdays, the Student's schedule remained the same as it had been since the Student's re-enrollment in February 2021. During this time, the Student was provided a 1:1 paraeducator.

32. On May 13, 2021, the Student's IEP team convened to discuss the Parent's concerns and to review data on the Student's progress since the Student's annual IEP meeting. The District again declined to consider the Student's potential need for recovery services. In the PWN issued after the meeting, the District wrote that "Student is not yet back into school programming pre-March 2020, thus still potential for learning loss and difficulty fully establishing learning loss needs." Further, the District is still determining available staffing, program options, etc., for recovery services. The PWN also noted that a decision at that time would result in a "premature and potentially inappropriate or ineffective determination of necessary recovery services." Regarding the basis of the decision, the PWN cited a "discussion of current progress both within special education and general education settings." The PWN also documented the IEP team's proposal that the Student transition to a less restrictive setting for fall 2021 school year due to "current discussed successes: Student is currently showing success and progress in his current general education placement (3<sup>rd</sup> grade) with 1:1 support. He is displaying grade level behaviors and is appropriate in class. He is able to follow along with the help of an instructional assistant. Proposed placement would be in a general education classroom with 1:1 resource supports."

## **CONCLUSIONS**

**Issue One – IEP Development & Recovery Services:** The Complainant alleged the District, including the Student's individualized education program (IEP) team, did not follow procedures when responding to the Parents' request for recovery services, particularly during the Student's annual review in March 2021. When developing each child's IEP, the IEP team must consider the Student's individual, student-specific needs, this includes considering the impact of the COVID-19 pandemic and requests for recovery services. The IEP team should work toward consensus, but the district has the ultimate responsibility to ensure an IEP includes the services that a student needs in order to receive a free appropriate public education (FAPE). If the team cannot reach consensus, the district must provide the parents with prior written notice (PWN) of the district's proposals or refusals, regarding the student's educational program and the parents have the right to seek resolution of any disagreements by utilizing the IDEA dispute resolution remedies.

At the Parents' request, the Student's IEP team reconvened for an early annual review on March 11, 2021. As part of the agreed upon agenda, the team discussed whether the Student was eligible for recovery services due to the impact of the COVID-19 pandemic and special education supports not being provided as written in the Student's IEP. In particular, the Complainant alleged the Student was not provided 1:1 paraeducator support to access the general education setting since spring 2020, and that the Student had not received all of his specially designed instruction (some of which was to be provided in the general education setting).

A parent may request an IEP meeting to discuss a student's need for recovery services if they believe their student has not made appropriate progress or requires recovery services to receive a FAPE. Part of that discussion may include what additional data or assessments are required to determine a student's need for recovery services, and what timelines are appropriate for determining need and for delivery of services. However, there is no required timeline during which IEP teams must complete these activities. Rather, what is appropriate depends upon each student's individual needs based on student-specific data. The Student's IEP team met in response to the Parent's request for an IEP team meeting and decided a final decision about recovery services would be premature because there was still a potential for learning loss and that accordingly, the IEP team would be unable to determine what services were appropriate. The IEP team's decision was based on Student-specific information, including progress data on the Student in both the general and special education setting since fall 2020.<sup>14</sup> The rejection of the Parents' request was documented in the PWN. The District followed IEP meeting procedures when considering the Parents' request and OSPI accordingly finds no violation. The Parents may continue to request IEP meetings to reconsider the Student's ongoing need for recovery services and OSPI encourages the District to continue considering the Student's need for recovery services in fall 2021 as districts are expected to return to full in-person learning.

#### March 2021 IEP

According to the prior written notice (PWN) sent to the Parents following the IEP meeting on March 11, 2021, when the Student's IEP team determined the services for the Student's IEP, among other factors, the Student's IEP team decided to adjust the number of minutes of specially designed instruction the Student received "because his schedule has changed, and service minutes need to be adjusted based on time spent in the Special Education setting." Among other student-specific factors, IEP teams make decisions about a student's IEP after reviewing a student's present levels of academic achievement and functional performance (PLAAFP) and data on student progress, not a student's schedule. The IEP team's decision to adjust the number of minutes of specially designed instruction based on the Student's schedule accordingly was inappropriate and OSPI finds the District to be in violation. The District will be required to develop written guidance on the requirement for IEP teams to consider a student's PLAAFP and goal progress, and not schedules or staffing when developing a student's IEP.

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<sup>14</sup> OSPI notes that in addition to Student-specific factors, the IEP team discussed and listed in the PWN some non-Student specific factors as a basis for its decision—including concerns about staffing and not yet knowing what program options would be available. In its response, the District wrote that "consistent with state's requirement of all school districts, the District had not yet completed its Academic and Student Well-Being Recovery Plan, which was due to OSPI on June 1, 2021. Thus, the District was still in the process of determining available staffing, program options, and other decisions that would impact the determination of appropriate recovery services for Student. Consequently, the team again reasonably declined to reach a recovery service determination at that meeting." These reasons, which are not related to the Student's specific *need* for services, would not be appropriate reasons to delay a determination about whether the Student required recovery services now to receive a FAPE. However, because the IEP team additionally discussed and documented Student-specific factors for its determination, OSPI found no violation in this particular scenario.

**Issue Two – IEP Implementation:** The Complainant alleged the District did not implement the Student’s individualized education program (IEP) in the Student’s least restrictive environment (LRE) from (a) September 2, 2020 to November 29, 2020 and (b) February 18, 2021 to April 19, 2021.

At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. A school district must develop a student’s IEP in compliance with the procedural requirements of the IDEA and state regulations. It must also ensure it provides all services in a student’s IEP, consistent with the student’s needs as described in that IEP. School districts shall also ensure that the provision of services to each student eligible for special education are provided to the maximum extent appropriate in the general education environment with students without disabilities. Removal of students eligible for special education from the general educational environment should occur only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily. A student further should not be removed from his or her age-appropriate general education classroom solely because of needed modifications in the general education setting. 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.

The Student’s IEP provided him with 1,005 minutes (approximately 17 hours) of specially designed instruction per week in the special education setting and 450 (7.5 hours) in the general education setting. The Student’s IEP indicated he would spend approximately 42% of his time with students without disabilities.

September 2 to November 29, 2020

From September 2 to October 29, 2020, the District offered the Student a schedule that provided approximately 13 hours of instruction in the special education setting. The Student additionally received approximately nine hours of time in the general education setting. The Student did not receive the support of a 1:1 paraeducator during this time as indicated on his IEP, but the Student’s special education teacher did regularly check in with the Student’s general education teacher to provide support with IEP implementation. The Complainant alleged that the Student did not access all of his specially designed instruction during asynchronous time due to lack of consistent adult support. On October 29, 2020, the Student began receiving 10 hours of in-person instruction per week in the special education setting (in addition to 2.5 hours of one-on-one synchronous instruction and 2.5 hours of asynchronous learning time). Thus, the Student’s time educated in the general education environment was between 31% and 41% during this time. Because the Parents unenrolled the Student from the District at the end of November 2020, the District did not complete progress monitoring at the end of the fall semester. However, upon reenrolling the Student in the District in February 2021, the District reevaluated the Student’s present levels for his annual review and found the Student had met or made progress on almost all IEP goals. The exception was in the area of adaptive skills, which focused on the Student’s ability to self-regulate

and adhere to grade level standards when in the general education environment, instruction that was supposed to be provided, in part in the general education setting. Absent progress data and information, the IEP team continued the same adaptive goals on the Student's new IEP. The lack of data and information on the Student's adaptive IEP goal is consistent with the Complainant's allegation that the Student was not receiving all of his specially designed instruction in this area. However, despite having not receiving his specially designed instruction in this area, at the end of the 2020–2021 school year, the IEP team determined the Student's behaviors were adhering to grade level standards enough to recommend his time in the general education setting be increased with continued 1:1 support. Thus, while the Student's IEP was not implemented exactly as written, as the minutes of specially designed instruction were not exactly as provided for in the Student's IEP from September 2 through November 29, 2020, and the setting in which the services were provided did not reflect the Student's LRE the entire duration, the failures in implementation do not appear to have been material. The services provided to the Student enabled him to make progress on IEP goals and resulted in the Student moving toward accessing a less restrictive environment next school year due to his continued progress. OSPI accordingly finds no violation.

#### February 18 to April 19, 2021

The Complainant's primary allegation from February 18 to April 19, 2021 was that the District did not provide the Student access to any general education instruction and accordingly did not implement the Student's IEP in the Student's LRE. As an initial matter, in the documents provided to OSPI in response to the complaint, the District provided two different schedules as examples of services provided to the Student during this time period. The first included links to synchronous general education Zoom classes in the morning. The second did not include links to general education Zoom classes, but instead included a list of asynchronous activities. The District did not provide the Student with 1:1 paraeducator services as indicated in the Student's IEP as necessary for the Student to access the general education environment. The Complainant alleged the Parents received neither schedule offered by the District or any other communication from the District regarding access to general education time, and that the Student accordingly received services 100% in the special education setting.

The documentation reviewed by OSPI supported the Complainant's allegation that the Student was not accessing general education instruction, as OSPI found no documentation of the Parent having received the schedules provided by the District or other means of access to the general education synchronous Zoom classes or other general education activities during this time. While it is noted that the Student was making progress on his IEP goals during this time and transitioned to a less restrictive environment because the IEP team determined he had shown progress during the year in his current grade level placement with 1:1 support, the District did not implement the Student's IEP in his LRE, as the Student was not receiving general education instruction. Accordingly, OSPI finds the District to be in violation.

However, OSPI acknowledges that after April 19, 2021, the Student began receiving access to the general education setting with 1:1 support as required in his IEP. Further, the time the Student spent without access to the LRE in his IEP did not appear to have a material impact on progress and as the Student continued to transition to a less restrictive environment as a result of meeting



grade level expectations. OSPI accordingly is not ordering any Student specific corrective actions. The District will be required to develop written guidance for special education staff regarding its obligation to implement IEPs in students' LREs, including when in a remote learning model.

### **CORRECTIVE ACTION**

By or before **August 13, 2021** and **August 27, 2021**, the District will provide documentation to OSPI that it has completed the following corrective action.

#### **STUDENT SPECIFIC:**

None.

#### **DISTRICT SPECIFIC:**

The District will develop written guidance to be provided to all District certificated special education staff, principals, and District special education administration staff, which will address the following:

- The requirement to implement individualized education programs in a student's least restrictive environment, including when in a remote learning model.
- The requirement for IEP teams to consider a student's present levels of academic achievement and functional performance (PLAAFP) and progress on IEP goals, not on a building or program schedule when developing a student's IEP.

The guidance will include examples. By **August 13, 2021**, the District will submit a draft of the written guidance. OSPI will approve the written guidance or provide comments by August 20, 2021, and provide additional dates for review, if needed.

By **August 27, 2021**, the District will provide OSPI with documentation showing that it provided all District certificated special education staff, including ESAs, principals, and District special education administration staff with the written guidance. This documentation will include a roster of all staff members who were required to receive the written guidance, so OSPI can cross reference the list with the actual recipients.

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

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