

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 18-117

PROCEDURAL HISTORY

On December 14, 2018, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Seattle 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 December 17, 2018, 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 December 26, 2018, the District requested an extension of time for their submission of its response regarding SECC 18-117. OSPI granted the District's request and required the District submit its response no later than January 15, 2019.

On January 15, 2019, OSPI received the District's response to the complaint and forwarded it to the Parent on January 16, 2019. OSPI invited the Parent to reply with any information she had that was inconsistent with the District's information.

On January 22, 2019, OSPI requested clarifying information from the District and spoke to the District on January 24, 2019. The District provided the requested additional information on January 24, 2019. OSPI forwarded the information to the Parent on the same day.

On January 24, 2019, the Parent requested an extension of time for their submission of her reply to the District's response regarding SECC 18-117. OSPI granted the Parent's request and required the Parent submit her reply no later than February 4, 2019.

On February 4, 2019, OSPI received the Parent's reply. OSPI forwarded that reply to the District the same day.

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

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation time period, which began on December 15, 2017. These references are included to add context to the issues under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.

ISSUE

1. Did the District follow procedures for implementing the Student's individualized education program (IEP) from June 2018 – December 2018?

LEGAL STANDARDS

Definition of a Free Appropriate Public Education (FAPE): A “free appropriate public education” (FAPE) consists of instruction that is specifically designed to meet the needs of the child with a disability, along with whatever support services are necessary to permit him to benefit from that instruction. The instruction and support services must be provided at public expense and under public supervision. They must meet the State’s educational standards, approximate the grade levels used in the State’s regular education system, and comport with the child’s individualized education program (IEP). *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 186-188, (1982). Every student eligible for special education between the ages of three and twenty-one has a right to receive a FAPE. 34 CFR §300.101; WAC 392-172A-02000. An eligible student receives a FAPE when he or she receives, at public expense, an educational program that meets state educational standards, is provided in conformance with an IEP designed to meet the student’s unique needs and includes whatever support services necessary for the student to benefit from that specially designed instruction. 34 CFR §300.17; WAC 392-172A-01080.

Provision of FAPE: An IEP is required to be “reasonably calculated to enable the child to receive educational benefit.” It does not require the absolute best or potential-maximizing education for that child. Rather, the district is obliged to provide a basic floor of opportunity through a program that is individually designed to provide educational benefit to a child with a disability. The basic floor of opportunity provided by the IDEA consists of access to specialized instruction and related services. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). For a district to meet its substantive obligation under IDEA, a school must “offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” An IEP must “aim to enable the child to make progress,” the educational program must be “appropriately ambitious in light of [the student’s] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom,” and the student should have the opportunity to meet challenging objectives. *Endrew F. v. Douglas County School District RE-1* 137 S.Ct. 988, 69 IDELR 174 (2017). A district must implement an IEP that is “reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so that the child can ‘make progress in the general education curriculum,’ commensurate with his non-disabled peers, taking into account the child’s potential.” *M.C. v. Antelope Valley Union High School District*, 852 F.3d 840, 69 IDELR 203 (9th Cir. 2017).

If a school district fails to comply with the procedural elements set forth in the IDEA or fails to develop and offer an IEP that is reasonably calculated to enable a child to receive educational benefits, the district is not in compliance with the IDEA. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176 (1982). Procedural violations of the IDEA amount to a denial of FAPE if they: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE; and (3) caused a deprivation of educational benefits. 20 USC §1415(f)(3)(E)(ii); see 34 CFR §300.513; WAC 392-172A-05105. “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: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction who is eligible to receive special education services. 34 CFR § 300.323(a); WAC 392-172A-03105(1). A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. 34 CFR §§300.320 through 300.328; WAC 392-172A-03090 through 392-172A-03115. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 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 §300.323; WAC 392-172A-03105.

Definition of Special Education: Under the IDEA, the term "special education" means specially designed instruction provided to a student who has been determined through an evaluation to be eligible for such services. Specially designed instruction must be provided at no cost to the parents, consistent with a properly formulated IEP, and designed to meet the unique needs of the student. 34 CFR §300.39; WAC 392-172A-01175.

Definition of Specially Designed Instruction: Specially designed instruction means adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction: to address the unique needs of the student that result from the student's disability; and to ensure access of the student to the general curriculum, so that the student can meet the educational standards within the jurisdiction of the public agency that apply to all students. 34 CFR §300.39(b)(3); WAC 392-172A-01175(3)(c). A need for special education is not limited strictly to academics. 34 CFR §300.39; WAC 392-172A-01175.

Continuum of Alternative Placement Options: Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a student eligible for special education, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings. WAC 392-172A-01175.

FINDINGS OF FACT

2017-2018 School Year

1. During the 2017-2018 school year, the Student was in the 2nd grade and attended a District elementary school (school 1). The Student was initially found eligible for special education services on October 27, 2017.
2. An IEP meeting was held on October 27, 2017, to review the results of the Student's initial evaluation. The Student's Parents, a general education teacher, school psychologist, and special education teacher attended the evaluation meeting and signed the evaluation. According to the Student's evaluation, the Student demonstrated strong cognitive skills but

struggled with following adult directives and classroom rules and routines, initiating and completing classroom tasks, organization, impulse control, controlling his emotional response to situations, and appropriately interacting with peers during times of conflict. The Student's eligibility category was determined to be "other health impairment." The Student's IEP team determined the Student required specially designed instruction in the area of social/behavior.

3. According to the prior written notice (PWN), dated October 27, 2017, the Parents were concerned that the resource room¹ placement available at school 1 was inappropriate. The PWN stated the Parents wanted to discuss the possibility of the Student attending an "ACCESS"² program, which "was not currently available at elementary school 1." ACCESS level services may include a combination of "pull-out" and "push-in" services that deliver specially designed instruction to students who spend most of their time in the general education setting and who have more intensive academic and functional special education needs than students receiving resource level supports and services. According to the District's response, the Parents were told at the October 27, 2017 IEP meeting that school 1 was unable or unwilling to provide ACCESS level services but another elementary school (school 2), which was not the Student's neighborhood school, could.
4. On November 16, 2017, the Student's IEP team met to develop an initial IEP for the Student. The Student's Parents, head teacher, school administrator, general education teacher, special education teacher, program specialist, and school psychologist participated in the meeting and signed the IEP. The IEP team agreed that the Student should be placed in the ACCESS program setting located at school 2. The November 16, 2017 IEP included five measurable annual goals in the area of social/behavior for which progress was to be reported in a written progress report every trimester. The IEP additionally contained 17 accommodations and special transportation "because the ACCESS program was not located at [the Student's] neighborhood school."

The November 16, 2017 IEP provided the Student with the following specially designed instruction in social/behavior:

- 150 minutes weekly, to be provided by a special education teacher in the special education setting;
- 100 minutes weekly, to be provided by a special education teacher in the special education setting;

¹ The District serves students with mild-to-moderate learning and social challenges in the "Resource Room." Students in the Resource Room receive specially designed instruction and modifications to help them meet grade-level expectations and individual IEP goals. Specially designed instruction is provided to students in the "Resource Room" in both the special education setting and in the general education setting according to a student's IEP.

² The District describes its "ACCESS" programs as having a ratio of 1 teacher and three instructional assistants to 10 students. The ACCESS program serves students with academic, social, and motor-skill challenges who require more intensive support than those served in the Resource Room. Students in the ACCESS program spend most of their day in the general education classroom, both with and without support from special education staff.

- 225 minutes weekly, to be provided by an instructional assistant (IA) in the general education setting;
- 225 minutes weekly, to be provided by a special education teacher in the general education setting.

The November 16, 2017 IEP additionally clarified that the 750 minutes of specially designed instruction weekly were to be provided as follows:

The IEP team agreed that 250 minutes per week of social/behavior [specially designed instruction] SDI in the special education setting should be divided into two blocks of SDI: the first block to focus on “safe body” instruction and the second block on “task initiation/completion” support and instruction. In addition, the team agreed to provide the total of 450 minutes a week push-in social/behavior SDI in two different blocks: 225 minutes provided by an IA in the general education setting and 225 minutes provided by the special education teacher in the general education setting.

The November 16, 2017 IEP provided the Student would spend 85.92% of his time in the general education setting. The November 16, 2017 IEP was to be implemented November 27, 2017.

5. On November 28, 2017, the Student’s Parent gave the IEP case manager permission to proceed with an IEP amendment without reconvening the IEP team to create a split matrix in the service section of the IEP. The changes reflected the Student’s temporary attendance at school 1 until January 2018—at which point, the Student would commence his attendance at school 2 and begin receiving services through the District’s ACCESS program. The Parent was told by the District that the only way the Student would be able to receive the full amount of specially designed instruction listed in his November 2017 IEP in the interim was for the Student to attend the “Focus”³ program at school 1 until January 2018, which the Parents refused. Unlike the ACCESS program, the Focus program served students who received most of their instruction in the special education setting. Instead, the Parents requested the start/transfer date to the ACCESS program be January 2, 2018 and that the November 2017 IEP be amended to clarify that starting January 2, 2018, the Student would begin receiving instruction in the ACCESS program at school 2, as determined during the November 16, 2017 IEP meeting. In the interim, from November 29, 2017 through December 31, 2017, the amended IEP stated the Student would receive the following specially designed instruction at school 1 in the area of social/behavior:
 - 225 minutes/weekly, to be provided by a special education teacher in a general education setting;
 - 225 minutes/weekly, to be provided by an IA in the general education setting;
 - 50 minutes/weekly, to be provided by a special education teacher in the special education teacher.

³ “Focus” classrooms serve students in the District with a wide variety of academic, social, motor-skill, self-help and communication challenges and who benefit from a high staff-to-student ratio and small class size. Students in the Focus classrooms spend most of their day in the special education setting, but may spend portions of the day with their general education peers, including physical education, art, music, and E-STEM.

From November 28, 2017 through December 31, 2017, the Student's IEP provided he would spend 97.18% of his time in the general education setting.

6. On January 2, 2018, the Student began attending school 2 and receiving services through the District's ACCESS program.

Summer 2018

7. On August 23, 2018, the Student's school 2 special education teacher from the 2017-2018 school year emailed the Student's 2018-2019 ACCESS room special education teacher who also served as the Student's IEP case manager (case manager) with clarifications regarding the Student's 2017-2018 schedule. She additionally emailed her understanding of the specially designed instruction the Student was to receive according to his November 16, 2017 IEP. In her email, the previous year's special education teacher stated, "I don't personally believe [the Student] requires as many minutes as listed in his IEP. He was coming from a resource level program so I'm assuming they added more minutes to 'fit' the access model."

2018-2019 School Year

8. The District's 2018-2019 school year began on September 5, 2018.
9. During the 2018-2019 school year, the Student was in 3rd grade and attended the ACCESS program at school 2. According to the District, due to staffing shortages, the Student's ACCESS program contained, on average, 15 students instead of 10.
10. According to the District's response, during the 2018-2019 school year as part of his participation in the ACCESS program, the Student was provided specially designed instruction by his case manager, a general education teacher, a resource room special education teacher (special education teacher 2), and four different ACCESS classroom instructional assistants (IAs 1-4). IA 1 was the IA generally assigned to assist the Student, although the Student sometimes received services from one of the other IAs. The Student received specially designed instruction in the special education setting in the ACCESS classroom, which was delivered by his case manager or an IA, usually one on one (1:1). The Student also received push-in services in the general education setting, which were provided by his case manager, special education teacher 2, or an IA. These services were provided individually or in a group setting.
11. According to the District's response, for most of the 2018-2019 school year (beginning in September 2018 and continuing through December 2018), the Student's schedule was as follows:

Time/Place	Monday	Tuesday	Wednesday	Thursday	Friday
7:55-8:15 20 minutes Special Ed.	Morning check-in Social/Behavior SDI (case manager)	Morning check-in Social/Behavior SDI (case manager)	Morning check-in Social/Behavior SDI (case manager)	Morning check-in Social/Behavior SDI (case manager)	Morning check-in Social/Behavior SDI (case manager)

	20 min. (starting Oct. 2018)	20 min. (starting Oct. 2018)	20 min. (starting Oct. 2018)	20 min. (starting Oct. 2018)	20 min. (starting Oct. 2018)
8:15–10:00 Gen. Ed. 105 minutes	Math SDI (IA) 40 min.	Math SDI (IA) 40 min.	Math SDI (IA) 40 min.	Math SDI (IA) 40 min.	Math SDI (IA) 40 min.
10:00–10:35 Gen. Ed. 35 minutes	STEM	PE	Art	Library or Special Projects	PE
10:35–11:05 Gen. Ed. 30 minutes	Science/ Social Studies	Science/ Social Studies	Science/ Social Studies	Science/ Social Studies	Science/ Social Studies
11:05–11:45 Gen. Ed. 40 minutes	Writing	Writing SDI (Special Education Teacher 2), 35 min	Writing SDI (Special Education Teacher 2), 35 min.	Writing	Writing SDI (Special Education Teacher 2), 35 min.
11:45–12:05 Gen. Ed. 20 minutes	Flex	Flex	Flex	Flex	Flex
12:05–12:15 Gen. Ed. 15 minutes	Transition to Lunch/ Restroom	Transition to Lunch/ Restroom	Transition to Lunch/ Restroom	Transition to Lunch/ Restroom	Transition to Lunch/ Restroom
12:15–12:35 Gen. Ed. 20 minutes	Lunch	Lunch	Lunch	Lunch	Lunch
12:35–12:50 Gen. Ed. 15 minutes	Recess	Recess	Recess	Recess	Recess
12:50–1:00 Gen. Ed. 10 minutes	Reading	Reading	Reading	Reading	Reading
1:10–1:40 Special Ed. 30 minutes	Reading	Social/Behavior (case manager), 30 min.	EARLY DISMISSAL	Reading	Social/Behavior (case manager), 30 min.
1:40–2:00 Gen. Ed. 20 minutes	Flex Clean-up	Flex Clean-up	EARLY DISMISSAL	Flex Clean-up	Flex Clean-up
2:00–2:25 Gen. Ed. 25 minutes	Recess	Recess	EARLY DISMISSAL	Recess	Recess
2:25	Dismissal	Dismissal		Dismissal	Dismissal

12. The District’s response provided the following additional information regarding the Student’s schedule:

- Generally, on Tuesdays and Thursdays, the “Student’s case manager provided the Student 1:1 social/behavior instruction in the special education setting using the *Superflex* curriculum.⁴”

⁴ The *Superflex* curriculum “helps [the Student] develop further awareness of his social behaviors and learn strategies to help him develop better self-regulation across a range of behaviors. Using *Superflex*, [the Student] work[ed] with the case manager] on understanding his strengths and his weaknesses. [The case

- Special education teacher 2 “worked with [the Student] and a few other students in a small group setting during writing three times a week. According to the District’s response, the Student “benefit[ed] from social/emotional support when working on independent writing and requires prompting to assist with organization, focus, and production.”⁵
- The Student received specially designed instruction in social/behavior during a portion of math to address anxiety and behavior struggles. Specially designed instruction was provided by an IA in the general education setting in a small group setting. According to the District’s response, the “IA work[ed] with [the Student] and a few other students in a small group setting, assisting [the Student] with staying on task and providing needed reinforcement. With [IA 1’s] assistance, [the Student] is working on recognizing when he needs help and asking for it appropriately.

13. According to the District’s response, from September 5, 2018 to September 30, 2018, the Student received the following number of minutes of specially designed instruction in social/behavior:

- 60 minutes weekly in the special education setting (provided 1:1 by a special education teacher);
- 200 minutes weekly in the general education setting (provided in a group setting by an instructional assistant);
- 105 minutes weekly in the general education setting (provided 1:1 by a special education teacher).

14. On September 17, 2018, the Parent emailed the case manager with concerns that the Student told her he had not received any IA time at school. The Parent requested the case manager share the Student’s schedule with her and any scheduled meeting times the Student had with the IA. The Parent noted in her email to the case manager that at a meeting prior to the start of the school year, it was agreed that the Student would be having meetings with either the case manager or another teacher. The Parent expressed concern that these meetings were not occurring.

15. In response to the Parent’s September 17, 2018 email, the case manager replied:

Unfortunately, I am way over my caseload right now and I simply cannot meet the needs of all of my students. I should have 10 and I have 15 right now. [The school principal] and I have been working diligently to resolve this issue since last June and it is still being addressed by the district. I am really frustrated because it is affecting my students and me. With that said, I have been collaborating with the primary SPED staff, and they are aware of and supporting [the Student] and other students during independent Math and Writing times. And then this week, I will be adding my two Social/Behavior times with [the Student]. It is not ideal, but it is all I can do with the staff I have. We are hoping to get another Access teacher hired SOON so all of our students can get what they need.

16. On October 1, 2018, the case manager emailed the general education teacher and special education 2, requesting the time of reading and social/behavior be moved to 1:15-1:45 p.m.,

manager] also utilize[d] *Starving the Anxiety Gremlin* workbook with [the Student] to have productive conversations about his anxiety.”

⁵ Documents reviewed show that these minutes of specially designed instruction were most often provided by an IA and not a special education teacher, as asserted by the District in its response.

to accommodate the previous reading lesson which had been taking additional time in the schedule.

17. According to the District's response, from October 1, 2018 through November 19, 2018, the Student received the following amounts of specially designed instruction in social/behavior:
 - 160 minutes weekly in the special education setting (provided by a special education teacher);
 - 200 minutes weekly in the general education setting (provided by an IA);
 - 105 minutes weekly in the general education setting (provided by a special education teacher).
18. On October 2, 2018, the Parent emailed the general education teacher to request a meeting to review the Student's progress. In her email, the Parent raised concerns about "missing staff for kids that need additional resources." That same day, the general education teacher responded with her availability. The case manager, who was copied on the email, additionally responded with her availability.
19. On October 5, 2018, the case manager emailed the Student's previous general education and special education teacher from the 2017-2018 school year regarding her concerns with the Student's behaviors. The case manager wrote:

[The general education teacher] has been experiencing some tough times with [the Student]. He is making a lot of noise during class time: whooping, humming and whistling, to the point that she has to ask him to step outside of the room. When he does this, he makes a big scene, smiling and pressing his face against the glass into the classroom. We're trying to determine the function of this behavior. Is he doing it for attention? To escape work? Something else? He sometimes picks on peers during IDR [. . .]. We don't have breaks or a reward system in place currently. Can you provide any insights? We have a meeting with parent(s) Friday so the sooner we can get your feedback, the better.
20. On October 5, 2018, the Student's special education teacher from the 2017-2018 school year replied to the case manager that she believed the Student "[was] doing these things for attention and to hold power. She explained that the Student "likes to get the attention and reaction from peers, but he also likes the control of being able to decide if he's going to complete the work or try and engage in a power struggle." The previous year's special education teacher provided a list of strategies she found effective but mentioned that "peer interactions were especially challenging." She opined that the Student was unable to "see other's perspective and so he is frequently getting into conflicts with peers."
21. On October 12, 2018, the Parents met with the Student's case manager and general education teacher to discuss concerns regarding the Student's behaviors and progress.
22. On October 15, 2018, the case manager emailed special education teacher 2 and IA 1 regarding her meeting with the Parents on October 12, 2018. The case manager noted that the IA was "just getting to know [the Student]" and asked the IA if she had received the data sheets from the director of special education. The case manager additionally asked special education teacher 2, "How is the data collection going? If your sheets are looking full, I would love to take them to begin working on his IEP." The case manager informed both special education teacher 2 and the IA that it was agreed at the October 12, 2018 meeting that the

Student would begin receiving “preventative body breaks sprinkled in his day.” The case manager asked special education teacher 2 to take the Student to receive “a trampoline break around 8 am before math,” and requested the IA take the Student to receive one break “before writing.”

23. On October 23, 2018, the case manager emailed special education teacher 2 to confirm that she would begin providing the Student with 1:1 body breaks from 8:05–8:15 a.m. during morning check-in.⁶
24. On October 25, 2018, the case manager emailed the Parent to confirm an IEP meeting was scheduled for November 19, 2018. The case manager said she would send a draft IEP to the Parents a week before the IEP meeting and requested input on the draft. The case manager further reported that while “[the Student] has made progress on his current goals, [he has] not demonstrated enough consistency to consider them met.” The case manager additionally expressed her views that the Student was “responding well to his new behavior chart.”
25. On October 25, 2018, the case manager requested a summary from the general education teacher regarding the Student’s performance in the general education setting. The general education teacher provided the following summary via email the same day:

When [the Student is sitting with someone who can prompt him regarding the next step for a task, breaking each problem into the smallest task, he does quite well. If he does not have that kind of support he will draw on his paper, fold it, and tear chunks out of it. Many times he will hand in blank papers that are covered with drawings and folded into impressive shapes. In small groups he will sometimes work along with the group but most times, argues, and diverts the other students from their tasks.
26. On October 26, 2018, the Parent emailed the special education program supervisor, the special education program specialist, a district representative on the District board of directors, and the superintendent regarding her concerns that the Student’s IEP was not being implemented. Specifically, the Parent alleged the Student was not receiving the number of minutes of specially designed instruction provided in his IEP.

⁶ The District’s response stated that the Student began receiving 1:1 body breaks from the case manager during morning check in for 20 minutes starting in October 2018. Documents reviewed partially substantiated this claim. The Student began receiving specially designed instruction during morning check in on October 23, 2018 for 10 minutes. On October 30, 2018, instruction began being provided for 15 minutes (see fact 29). Additionally, it was noted that the Student’s schedule fluctuated multiple times between September 2018 and December 2018—both during morning check in and during other times of day—affecting the number of minutes of specially designed instruction the Student received. For these reasons, a more detailed approximation of the Student’s general schedule from September 2018 through December 2018 was constructed using the facts obtained in the documents provided by the District and the Parent for the purpose of assisting OSPI in estimating the number of minutes of specially designed instruction provided to the Student from September 2018 through December 2018. These schedules have been provided as an appendix to this decision (see Appendix).

27. On October 29, 2018, the special education program supervisor provided the following written response to the Parent's concerns:

We are in continued collaboration and reviewing staffing for each and every school to ensure alignment with the Collective Bargaining Agreement. Central office works with building administrators to monitor student services and provide support in meeting all student's individual IEPs. If there are specific questions or concerns about services in [the Student's] IEP the first point of contact would be your building administrator or to convene an IEP team meeting.

28. Also on October 29, 2018, special education teacher 2 emailed the case manager to notify her that an IA was no longer able to provide body breaks to the Student in the morning due to a conflict in the IA's schedule.

29. On October 30, 2018, the case manager emailed the general education teacher that she would shift the Student's body break to 8:15-8:30 a.m. (See Appendix).

30. On November 12, 2018, the case manager emailed the Parents a draft copy of the IEP. In her email, she stated that "[the Student] made some progress on his goals, but he still needs work in these areas." For his proposed goals, I have reduced the amount of prompts/reminders he would get to meet the goals, and added a couple new ones. I left the minutes blank for now; as we all know, his minutes are not being met."

31. In her November 12, 2018 email to the Parents, the case manager additionally stated her understanding that the Student should be receiving the following amount of specially designed instruction:

- Special education – social/behavior, 150 minutes weekly
- General education – social/behavior, 225 minutes weekly
- General education – social/behavior, 225 minutes weekly
- Special education – social/behavior, 100 minutes weekly

The case manager then added:

Regardless of the provider ([special education] teacher or IA) this equals 250 minutes in the [special education] setting, and 450 minutes in the [general education] setting, for a total of 700 minutes weekly. Currently (regardless of the provider), [the Student] is getting 410 minutes of SPED support. Ideally, I would support him at recess, perhaps some FLEX time (like Social Studies/Science) and/or Specialist classes [if] I had more time.

32. On November 13, 2018, the general education teacher emailed the case manager her input regarding the Student's performance in the general education setting:

[The Student] is spending most of his day in general education class. It is difficult to assess where he is academically because most of his assessments are not completed. Several had no answers, just elaborate drawings. He frequently says he doesn't know how to do the assignments but when I sit with him he refuses my assistance. He will sometimes shout out the answer in whole group while also saying he doesn't understand. His answers are almost always right which leads me to believe he does understand, at least to some degree.

33. According to the District's response, the Student generally received specially designed instruction from a special education teacher during writing on Tuesdays, Wednesdays, and Fridays from 11:05–11:40 a.m. from September 2018 through December 2018.⁷
34. On November 15, 2018, special education teacher 2 sent an email confirming that a new IA would be starting November 26, 2018. According to the schedule attached to the email, the new IA would begin working with the Student in writing on Tuesdays, Wednesdays, and Fridays from 11:05–11:40 a.m.
35. On November 19, 2018, the IEP team met for the Student's annual IEP meeting. A District administrator, general education teacher, the Student's Parents, and a special education teacher were present at the meeting and signed the Student's IEP. The IEP team determined the Student continued to qualify for special education with a qualifying diagnosis of other health impairment. The November 19, 2018 IEP included 19 accommodations and five measurable annual goals in social/behavior (following directions, initiating tasks, requesting help, body to self, and self-regulation). The IEP indicated that monitoring on the measurable annual goals was to be reported in a written report every trimester.

The November 19, 2018 IEP documented that progress monitoring on the previous IEP goals was collected during September and October 2018. The Student's progress was reported in the IEP as follows:

- Goal 1: The Student met his goal across all environment 10/15 or 67% of observed observations;
- Goal 2: The Student met his goal across all environments 4/7 or 57% of observed opportunities;
- Goal 3: The Student met his goal across all environments 35/37 or 68% of observed opportunities;
- Goal 4: The Student met his goal across all environments 6/11 or 55% of observed opportunities;
- Goal 5: The Student met his goal 100% of observed opportunities.

The November 19, 2018 IEP provided the Student with the following specially designed instruction:

- Social/behavior, 335 minutes weekly, to be provided by an IA in the *general education setting* and monitored by a special education teacher:
 - 135 of the 335 minutes weekly, ideally to be provided during recess (social skills, coaching);
 - 150 of the 335 minutes weekly, ideally to be provided during whole group instruction (math, or writing);
 - 50 of the 335 minutes weekly, ideally to be provided during unpacking (materials management, organization).
- Social/behavior, 310 minutes weekly, to be provided by an IA in a *special education setting* and monitored by a special education teacher:
 - 100-150 of the 310 minutes weekly to be provided during independent academic support (writing, math [math preferably 1:1]);

⁷ The documents reviewed show the Student first began receiving specially designed instruction during writing on November 26, 2018 for 35 min. (See Appendix).

- 60 minutes of the 310 minutes weekly to be provided for developing social skills/self-regulation skills.

The November 19, 2018 IEP provided that the Student would spend 82.54% of his time in the general education setting, and was to be implemented on November 26, 2018.

36. On November 19, 2018, the District sent the Parents a PWN to document the discussions that occurred, and the decisions made by the IEP team during the Student's annual IEP meeting. It documented the District's proposal to change the Student's IEP goals to reflect his progress on previous goals and that the IEP team recommended the Student have access to assistive technology (AT) to help with writing tasks.
37. According to the District's response, from November 18, 2018 through December 14, 2018, the Student received the following amounts of specially designed instruction in the area of social/behavior:
 - 160 minutes a week in the special education setting, provided by a special education teacher;
 - 200 minutes per week in the general education setting, provided by an IA; and,
 - 105 minutes per week in the general education setting, provided by a special education teacher.
38. On November 25, 2018, the Parent emailed the case manager with concerns about the draft IEP she received. Specifically, the Parent expressed concerns that unlike on the Student's current IEP, the draft IEP indicated that all specially designed instruction minutes would be provided by an IA. The Parent expressed concern that the notation differed from the current IEP, which provided "[the Student] have minutes with IAs and the [special education] teacher."
39. On November 26, 2018, the case manager responded by email to the Parent's concerns in which the case manager explained:

I often write minutes as served by IAs to help with scheduling, maintain compliance and avoid unnecessary amendments," but "always deliver [my special education] students their [specially designed instruction] social skill minutes that are served in Lunch Bunch or outside groups. Since [the Student's specially designed instruction minutes] are a big lump of minutes, I said served by an IA. The breakdown of how the minutes should be met have been added to [the Student's] present levels [. . .].
40. On November 28, 2018, the AT consultant for the District responded to the case manager in an email that she had received the case manager's request for AT for the Student. The AT consultant and case manager later met on December 11, 2018 with the Student to complete the AT assessment.
41. A referral for an AT consultation, to address concerns in the areas of writing and math, was completed for the Student by the District on November 26, 2018.
42. Also on December 11, 2018, the case manager emailed special education teacher 2 and an IA that a new behavior data sheet was available for the Student. According to the email, the case

manager scheduled time to meet with special education teacher 2 and the IA on December 12, 2018, to review the updated behavior data sheet.

43. On December 12, 2018, the District provided a meeting notice via email to the Parent to amend the IEP to add AT. The Parent responded with permission to proceed without a meeting. On January 7, 2019, the Student's IEP was amended by the case manager to include the use of an iPad with "Co-Writer" (word processing and word prediction).
44. In its response, the District conceded that the Student's IEP has not been implemented with respect to the number of minutes of specially designed instruction in social/behavior but asserts the Student "has received meaningful educational benefit and that the District's failure to fully implement [the Student's IEP has not constituted a denial of FAPE."⁸

CONCLUSIONS

Issue 1: IEP Implementation (Specially Designed Instruction) – The Parent alleged that the District failed to implement the Student's individualized education program (IEP) from September 5, 2018 through December 14, 2018. Specifically, the Parent alleged that the Student did not receive the full number of minutes of specially designed instruction as required by the Student's November 2017 and November 2018 IEPs during that time. The District conceded that it failed to provide the Student with the required number of minutes of instruction as indicated in the Student's IEP but argued that the Student suffered no educational harm and therefore, did not require any compensatory instruction in order to receive a free appropriate public education.

A "free appropriate public education" (FAPE) consists of instruction that is specially designed to meet the needs of a student with a disability. A student receives a FAPE when he receives—at public expense—an educational program that meets state educational standards and is provided as outlined in the student's IEP. In addition, the IEP must be reasonably calculated to enable the student to receive educational benefit in light of his unique circumstances. When a school district does not perform exactly as called for by the IEP, the district violates the IDEA if it materially failed to implement the student's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a student with a disability and those required by the student's IEP.

Here, the District materially failed to implement the Student's IEP by not providing the Student with a significant amount of specially designed instruction indicated in the Student's IEP from September 5, 2018 through December 14, 2018. The District has consequently denied the Student a FAPE during this time and is required to provide compensatory instruction and hold an IEP meeting to determine how the District will implement the Student's current IEP for the remainder of the 2018-2019 school year.

⁸ The District cites to *Catalan ex rel. EC v. DC*, 478 F. Supp.2d 73 (D.D.C. 2007) ("[F]ailure to implement all services outlined in an IEP does not constitute a per se violation of the IDEA.")

The Parent and District do not dispute the appropriateness of the Student's November 2017 and November 2018 IEPs, which were in place from September 2018 through December 2018, and which documented the Student's unique needs—including high cognitive capabilities combined with intensive social/behavioral needs related to the Student's disability. The Student's IEPs included a recommendation that the Student attend school 2 so he could receive instruction and other supports through the District's ACCESS program. This recommendation required the Student to attend a school other than his neighborhood school and provided the Student with special transportation. The Parents were told that the ACCESS program would offer the Student a high number of minutes of specially designed instruction in social/behavioral skills while enabling the Student to spend most of his time in the general education setting. Prior written notices sent to the Parents and the Student's IEP both documented the IEP team's determination that the Student's neighborhood school was unable to offer the Student these same services and benefits. The Student's Parents agreed with the IEP team's recommendations.

Taking into consideration the Student's absences, between September 5, 2018 and December 14, 2018, the Student should have received approximately 8,117 minutes (or approximately 138 minutes per day) of specially designed instruction. Out of those minutes, 5,011 minutes should have been provided in the general education setting and 3,106 minutes should have been provided in the special education setting.⁹ Typically, instruction minutes provided in the general education setting were provided in a small group setting, and instruction minutes provided in the special education setting were provided individually. However, from September 5, 2018 through December 14, 2018, the Student only received approximately 4,130 minutes (approximately 70 minutes per day) of instruction. Approximately 2,172 minutes were provided in the general education setting and 1,286 minutes were provided in the special education setting.¹⁰

During this time, progress data collected on the Student's IEP goals showed the Student was making steady progress on his goals but also suggested his progress was inconsistent. The Parent raised valid concerns that inconsistency in the Student's progress was at least partially caused by the Student not regularly and consistently receiving the instruction as provided in his IEP. For

⁹ How many minutes of specially designed instruction the Student should have been provided were calculated using the November 2017 IEP, which was implemented during the 2018-2019 school year from September 5, 2018 through November 26, 2018, and the November 2018 IEP, which was implemented from November 26, 2019 through the filing of this complaint on December 14, 2018. The Student's attendance was taken into consideration when calculating how many minutes of instruction the Student should have received.

¹⁰ In its response, the District alleged that between June 2018 and December 2018, it provided 5,568 minutes of specially designed instruction (3,816 minutes in the general education setting and 1,752 minutes in the special education setting). OSPI was unable to substantiate the full number of minutes of instruction the District alleged it provided to the Student. To obtain its approximation of the number of minutes the District provided the Student, OSPI reviewed all documents provided in the District's response and Parent's reply, including provider logs, emails, the Student's schedule, the Student's attendance records, and all other communications between the District and Parent. It appears there were some discrepancies between the general schedule provided by the District and what OSPI determined to be the schedule provided to the Student, which was used by OSPI in its calculations. (See Appendix).

example, instead of receiving daily 1:1 instruction by a special education teacher in a special education setting, the Student received instruction only twice a week. At the time the complaint was filed, the Student had only met one of his IEP goals. Emails from the Student's teachers expressed concerns that while the Student was making progress on his IEP goals, he was also struggling with staying on task and with organization and required continued support to demonstrate desired progress in accordance with his IEP goals.

Emails from teachers and staff working with the Student additionally revealed that teachers were unable to provide the Student with the number of minutes in his IEP due to shortages in staff at school 2, especially within the ACCESS program. Teacher emails further revealed that problems with staffing the ACCESS program at school 2 were likely known to the District prior to the commencement of the 2018-2019 school year and have continued through the filing of this complaint. It was not clear from the District's response if it has resolved its staffing problem since the filing of this complaint, or if the District has a plan for how it will implement the Student's current IEP at school 2 for the remainder of the 2018-2019 school year should staffing shortages continue.

OSPI acknowledges that the Student made some progress on his IEP goals during this time; however, the District's failure to implement the Student's IEP as written was not a minor discrepancy and does not alleviate the District of its legal obligation to implement the Student's IEP as written. From September 5, 2018 through December 14, 2018, the District denied the Student approximately 70 minutes of specially designed instruction per day according to the Student's IEPs. In addition, the District continued to recommend a placement for the Student when it had knowledge that it was unable to implement the Student's IEP in that placement and when it was seemingly unclear to the District when it would be able to do so. The District has consequently materially failed to implement the Student's IEP and has denied the Student a FAPE.

From September 5, 2018 through December 14, 2018, the Student was supposed to receive 8,117 minutes of specially designed instruction. During that time, the Student received approximately 4,130 minutes instruction. Taking into consideration that generally the Student would have received specially designed instruction in the general education setting as small group instruction and all instruction received in the special education setting individually, the District will provide the Student with **1,350 minutes (or 22.5 hours)** of compensatory education in individual instruction sessions to address social/behavioral skills. The instruction will occur outside the District's school day and be provided by a certified special education teacher.

Additionally, considering the District's admission regarding the effect of staffing shortages on its ability to implement the Student's current IEP for the 2018-2019 school year, the District will be required to hold an IEP meeting to discuss the Student's current IEP and how it plans to implement the IEP for the remainder of the 2018-2019 school year.

CORRECTIVE ACTIONS

By or before **March 22, 2019, May 6, 2019, July 3, 2019, and September 13, 2019**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

1. Compensatory Instruction: By or before **March 12, 2019**, the District will work with the Parent to develop a schedule for delivering a total of **22.5 hours** of specially designed instruction in the area of social/behavioral skills. Services will occur in a one-on-one setting and be provided by a certified special education teacher. The instruction will occur outside of the District's school day and may be accessed over the summer months. 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 with at least 24 hours' notice of the absence, the District does not need to reschedule. The services must be completed no later than **September 4, 2019**. The District will provide OSPI with documentation of the schedule for services by or before **March 22, 2019**.

The District must provide OSPI with documentation by **May 6, 2019** and **July 3, 2019**, of the compensatory services provided to the Student. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled by the District or missed by the Student. By or before **September 13, 2019**, 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 reimburse the Parent for round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation that it has fulfilled this requirement by **September 13, 2019**.

2. IEP Meeting: The District will schedule and hold an IEP meeting by **March 12, 2019** with the Parents, general education teacher, special education teacher (case manager), district administrator/designee, and any other relevant parties to discuss how the District will implement the Student's IEP regarding the number of minutes of specially designed instruction the Student should be receiving.

By **March 22, 2019**, the District will submit: 1) a copy of the meeting invitation; 2) a copy of the agenda or notes regarding the topics discussed at the meeting; 3) a copy of the Student's IEP if amended; 4) a copy of any prior written notices; and, 5) any other related documentation.

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.

RECOMMENDATIONS

Recommendation One: Review Least Restrictive Environment – In the District’s response, the District argued that progress made by the Student during the 2018-2019 school year should be interpreted to mean the Student had received a FAPE and did not require any compensatory instruction. While it was noted by OSPI that the Student did make some progress on his IEP goals, OSPI also considered that the Student’s IEP documented the Student’s need for specially designed instruction to make consistent academic progress, which the Student’s Parents and teachers had expressed concern about due to the failure of the District to fully implement the Student’s IEP, and the continued need of the Student—according to the Student’s IEP team—to be placed outside the Student’s neighborhood school to receive the amount of instruction listed in the Student’s IEP. However, while the Student’s progress alone is not indicative that he received a FAPE, evidence of the Student’s progress on IEP goals—as described by the District—despite his significant denial of specially designed instruction, does raise questions regarding whether the Student was placed in the least restrictive environment for his unique needs and circumstances. OSPI encourages the IEP team to further explore whether the Student is currently in the least restrictive environment at the next IEP meeting.

As part of its investigation, OSPI reviewed emails by at least one District staff member who questioned the number of minutes of specially designed instruction written in the Student’s IEP—specifically stating her belief that the Student may not require as many minutes of instruction listed in his IEP and that a specific number of minutes may have intentionally been added to the Student’s IEP by the IEP team so that the Student’s IEP would fit the ACCESS program model offered at school 2. Further investigation into this concern revealed the minutes were added to the Student’s IEP when it was first recommended the Student be removed from his neighborhood school and transferred to school 2. It appears the Parent was told by the District that the amount and nature of specially designed instruction the IEP team recommended could only be provided to the Student if he attended school 2. More specifically, the Parent was told that the only way the Student could receive the amount of specially designed instruction listed on the Student’s IEP at the Student’s neighborhood school was for the Student to receive the instruction from the “focus” program offered by the school, which supports students who spend the majority of their day in the special education setting.

OSPI reminds the District that a student’s needs and what is the least restrictive environment for that student should drive development of the IEP, including how many minutes of specially designed instruction are added to the IEP. A student’s IEP should not be developed to fit a staffing or a program model, nor to justify refusing to provide specially designed instruction to a student in the least restrictive environment at the student’s neighborhood school.

Here, there was no dispute between the Parent and the District as to the appropriateness of the current IEP. However, OSPI cautions the District that its response to the complaint—specifically that the District should not be obligated to provide compensatory instruction because the Student was making some progress on IEP goals despite the District’s significant failure to implement the IEP as written—raises questions regarding whether the District has considered whether the Student’s current environment is the least restrictive environment for the Student. If Student was

able to make progress—as argued by the District—on his IEP goals despite being denied a significant amount of specially designed instruction, then the District should consider whether the Student required removal from his neighborhood school to make progress on his IEP goals.

As written, the Student’s IEP indicated the Student required a high number of minutes of specially designed instruction—both in the general and special education setting—for the Student to make progress. It further indicated that part of the instruction should be delivered 1:1 by a certified special education teacher, and that the Student’s neighborhood school was unable to provide the Student with the level of support the Student required in the general education setting. It does not appear that the District first attempted to provide the level of support the Student required in his neighborhood school. Instead, the District has relied on the Student’s IEP—which provides that the Student requires a high number of minutes of specially designed instruction in the general and special education setting—to justify the IEP team’s recommendation to remove the Student from his neighborhood school and to place the Student at school 2 in the “ACCESS” program. The documents show the Parents were told the District was unable to provide similar services at Student’s neighborhood school. However, from September 2018 through December 2018, it appears what the Student received from school 2 did not differ significantly from what the Student should have been able to receive from his neighborhood school and that the Student was able to make some progress while receiving almost half the number of minutes listed in the Student’s IEP. Accordingly, if the Student was making progress—even though his IEP was not being implemented as written, which is what the District asserts, the District should be considering whether the Student could be making progress in his neighborhood school, even if that required the addition of specially designed instruction at levels greater than what it considered “resource level,” but which may not rise to the level of what considers appropriate for its ACCESS level programs.

Accordingly, in addition to holding an IEP meeting to discuss how the District is going to implement the Student’s IEP for the current 2018-2019 school year, the District is strongly encouraged to hold an IEP meeting before the end of the school year to review the Student’s progress and to discuss what is the least restrictive environment for the Student. As part of that discussion, the District may wish to consider whether it is possible to provide an appropriate program for the Student at his neighborhood school.

Dated this ____ day of February, 2019

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.)