

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 21-107

PROCEDURAL HISTORY

On December 1, 2021, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of two students (Student A and Student B) attending the Kent School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Students' education.

On December 6, 2021, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On December 21, 2021, OSPI received a request from the District to extend the timeline to respond. OSPI approved the extension. The deadline for most documentation was December 23, 2021. The deadline for the narrative response and emails were set at December 30, 2021.

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

On January 7, 2022, OSPI received part two of the District's response and it was forwarded to the Parent on January 10, 2022.

On January 14, 2022, OSPI received a reply from the Parent. The Parent's reply was forwarded to the District on January 18, 2022.

On January 19, 2022, the Parent provided additional information through a phone call with OSPI.

On January 20, 2022, OSPI conducted a telephone interview with the special education teacher for both Students.

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

SCOPE OF INVESTIGATION

The time period under investigation begins on December 2, 2020, as OSPI may investigate only those issues occurring during a one-year period. Any information included from events prior to date is mentioned for informative, background purposes only.

ISSUES

1. Did the District implement the special education services in conformity with Student A's and Student B's individualized education program (IEP) from December 2, 2020 to the end of the 2020–2021 school year?

2. Did the District consider the need for in-person special education services for Student A and Student B from December 2, 2020 to the end of the 2020–2021 school year?

LEGAL STANDARDS

When investigating an alleged violation, OSPI must identify the legal standard that the District is required to follow and determine whether the District met that legal standard. OSPI reviews the documentation received from a complainant and district to determine whether there was sufficient evidence to support a violation. If there was a violation, there will be corrective action to correct the violation and maintain compliance.

IEP Implementation: At the beginning of each school year, each district must have in effect an individualized education program (IEP) for every student within its jurisdiction served through enrollment who is eligible to receive special education services. 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. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105.

"When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007)

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

Recovery Services: Recovery services are intended to mitigate the impact of COVID-19 school facility closures and to enable the student to make progress on IEP goals, used if students have not been provided or were unable to access IEP services during the COVID-19 pandemic. While the need for recovery services may not be able to be fully measured until in-person school operations resume, districts were not prohibited from providing recovery services during the 2020-2021 school year and recovery services should be determined by IEP teams on a case-by-case basis. Districts should examine the effect of COVID-19 and the special education and related services provided during school building closures and during the 2020-2021 school year on the student's overall progress and engagement, including progress toward their IEP goals. *Questions and Answers: Provision of Services to Students with Disabilities During COVID-19 in Fall 2020* (OSPI, August 26, 2020).

FINDINGS OF FACT

STUDENT A

2020–2021 School Year

1. At the start of the 2020–2021 school year, Student A was eligible for special education services under the category of specific learning disability, was in the fifth grade, and attended a District elementary school. At that time, the Student's November 14, 2019 individualized education program (IEP) was in effect.
2. On September 3, 2020, the 2020–2021 school year began. According to the District, the District began the school year providing remote instruction to all students.
3. The District's documentation included a prior written notice, dated October 9, 2020. It is unclear whether there was an IEP meeting that preceded the notice. The notice stated Student A's IEP team proposed "a schedule to accommodate the student's virtual learning environment." The reason for the proposal was because the Student was having difficulty attending school in a virtual environment. The schedule was "created to make online learning easier and more accessible." The schedule included synchronous, online learning with a teacher Monday through Friday, and asynchronous learning which was accessible day or night.
4. The District reevaluated Student A and on October 28, 2020, the evaluation team met and determined the Student continued to be eligible for special education services and recommended services in the same areas as the Student was previously receiving. According to the evaluation report, the "conclusions from observations" stated, in part:

All raters (parent, teacher, and special education teacher) endorsed concerns in the areas of hyperactivity, aggression, depression, and atypicality. [Student's] general education and special education teacher endorsed concerns in the areas of conduct problems, attention, and learning problems. Additionally, his previous special education teacher endorsed concerns in the areas of somatization (i.e., he may be expressing frequent headaches, stomach aches, feeling sick, etc.) and withdrawal. Lastly, parent's endorsements all fell in the at risk range (no clinically significant scores), respectively. Overall, the results of the rating forms indicate that at school, [Student's] social/emotional skills are notably different compared to peers his same age and may indicate he needs significant support in the area of emotional and socialization skills.

The report also stated the following about Student A's behavior:

The teacher reports that compared to typical students, [Student] will work hard for a very short amount of time (less than 5 minutes). Often the work is incomplete and incorrect, and he needs 1:1 guidance to complete work. [Student] does not have the skills to continue working on something that is hard for him academically. He lacks stamina to stay focused, and needs many redirections to keep working, reminders of the directions, and needs individualized instruction for most activities in the classroom because he does not understand the vocabulary in the directions, questions, and other tasks. They also report that [Student] has difficulty with social interactions. He does not show any aggressive behaviors often, but he has difficulty expressing his emotions when he is upset, and shows

impulsive behavior often. In order to help [Student] be successful in the classroom, the teachers provide small group instruction, 1:1 support to help him finish assignments in the classroom without rushing, peer models, partners that help him in the classroom, and modified homework.

The health and developmental history in the evaluation report stated Student A had asthma and an inhaler was kept in the health room on an as needed basis. The inhaler was used very infrequently and “usually does not affect his daily routine.”

5. According to an email, dated November 6, 2020, from the school psychologist to the Parent and the District’s assistant director of special education (assistant director), the Parent requested to bring Student A to school for “laptop support.” In the complaint, the Parent stated Student A needed the support to access the curriculum. The District stated there was no data that “supported that either Student’s disabilities prevented him entirely from accessing remote instruction.”
6. On November 16, 2020, the District conducted a review of the Student’s IEP. The “Team Considerations” portion of the IEP included the following, in part:
 - Parent concerns: Has not attended school this year;
 - Qualified for support in the area of communication; and,
 - Student’s behavior impeded his learning.

The Student’s IEP provided the following specially designed instruction and related services:

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Special Education							
No	Basic Reading	Special Education Teacher	Special Education Teacher	300 Minutes/1 Time Weekly	Special Education	11/30/20	11/15/21
Yes	Reading Comprehension	Special Education Teacher	Special Education Teacher	120 Minutes/1 Time Weekly	Special Education	11/30/20	11/15/21
No	Math Calculation	Special Education Teacher	Special Education Teacher	300 Minutes/1 Time Weekly	Special Education	11/30/20	11/15/21
Yes	Math Problem Solving	Special Education Teacher	Special Education Teacher	120 Minutes/1 Time Weekly	Special Education	11/30/20	11/15/21
No	Written Expression	Special Education Teacher	Special Education Teacher	150 Minutes/1 Time Weekly	Special Education	11/30/20	11/15/21
Yes	Adaptive	Special Education Teacher	Special Education Teacher	120 Minutes/1 Time Weekly	Special Education	11/30/20	11/15/21

Yes	Social Emotional	Special Education Teacher	Special Education Teacher	120 Minutes/1 Time Weekly	Special Education	11/30/20	11/15/21
No	Oral Expression	Special Education Teacher	Special Education Teacher	80 Minutes/1 Time Weekly	Special Education	11/30/20	11/15/21
No	Speech Language – Articulation – SDI	Speech Language Pathologist &/or SLPA	Speech Language Pathologist	30 Minutes/3 Times Monthly	Special Education	11/30/20	11/15/21
Related							
No	Speech Language – Language – Related	Speech Language Pathologist &/or SLPA	Speech Language Pathologist	30 Minutes/3 Times Monthly	Special Education	11/30/20	11/15/21
No	Occupational Therapy – Related	Occupational Therapist &/or COTA	Occupational Therapist	30 Minutes/3 Times Monthly	Special Education	11/30/20	11/15/21

Total minutes per week student spends in school: 1,880 minutes per week

Total minutes per week student is served in a special education setting: 897.5 minutes per week

Percent of time in general education setting: 52.26% in General Education Setting

7. According to the prior written notice, dated November 24, 2020, total special education service minutes were increased from 605 minutes to 898 minutes per week. The notice also stated: "The team has agreed upon a change of placement to a non-neighborhood school. [Student A] will receive services through a program with a higher staff to student ratio 3:12 and core replacement [English language arts] ELA and math periods using alternate instructional curricular resources." The notice stated Student A had a behavioral intervention plan (BIP) (dated February 25, 2020) and a new one would be developed when Student A returned to in-person instruction. The target behavior was refusal to work.
8. According to the District, the Parent wanted to tour the new school prior to the transfer that was to take place beginning November 27, 2020, but it took "many weeks" to arrange the tour because of scheduling and the building being closed. The District and the Parent exchanged many emails, planning the tour with the Parent, scheduling the transition meeting, and having the Parent provide the necessary paperwork to enroll in the new school. The Parent also expressed concern in the emails that Student A could not access the online instruction and needed in-person services.
9. On December 2, 2020, the one-year timeline for the complaint began.
10. In response to the Parent's concerns, on December 10, 2020, the assistant director emailed the Parent and stated, in part: "I am still available to work with both students on accessing Teams and some tutorials that will allow them to access remote learning more routinely. We can schedule that for next week and I can have transportation arranged if that is also needed." It was unclear whether the Parent followed up on the offer for Student A to receive assistance.

11. The District was on break from December 21, 2020 through January 1, 2021.
12. On January 28, 2021, the District held a transition meeting with the Parent to discuss Student A's new program at a different school. According to the District, the Parent agreed for the transition to begin on February 11, 2021. On March 1, 2021, the Parent completed the enrollment information at the new school. Meanwhile, according to the District, remote IEP services continued to be offered to Student A. Student A continued to not attend remote instructional sessions.
13. On January 29, 2021, the District provided a report of Student A's progress towards the annual goals. The progress reported for all the goals was "insufficient progress demonstrated to meet this annual goal and may not achieve annual goal within duration of IEP." The comments stated, "Instruction was provided for this goal, but student has not participated in any of the sessions this school year. Asynchronous work was provided."
14. According to the "Speech/Language therapy attendance log," Student A missed many sessions from December 2020 to February 2021. The log stated:

<ul style="list-style-type: none"> • 12/1/2020: showed offline • 12/4/2020: showed offline • 12/8/2020: SLP out • 12/15/2020: showed offline • 12/18/2020: showed offline • 1/5/2021: showed offline • 1/8/2021: showed offline • 1/12/2021: showed offline • 1/15/2021: showed offline 	<ul style="list-style-type: none"> • 1/19/2021: showed offline • 1/22/2021: showed offline • 1/26/2021: showed offline • 1/28/2021: Transition meeting with school team • 1/29/2021: Teacher Workshop Day • 2/2/2021: showed offline • 2/5/2021: showed offline • 2/9/2021: showed offline • 2/10/2021: Withdraw from [school]
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15. According to the occupational therapy "Professional Service Log" from December 3, 2020 to March 1, 2021, Student A missed nine sessions out of approximately nineteen sessions. Other sessions involved the occupational therapist communicating with the Parent and meetings involving Student A. Student A did not receive any direct occupational services during this time.
16. On March 29, 2021, Student A's IEP team met and determined that Student A would return to hybrid instruction on April 19, 2021. But the Parent expressed concern about Student A having to wear a mask at school and requested in-home services from the District.

The Parent later clarified to OSPI that because Student A had asthma, Student A could not wear a mask "eight hours a day."
17. The prior written notice, dated March 31, 2021, stated the District refused the Parent's request for an in-home paraeducator. The reason for the refusal was "on site in person services will be offered under the current plan and those better meet [Student A's] needs." The notice included the following factors regarding the decision:

It has been difficult for [Student A] to access instruction during remote learning. As community rules/laws/etc. allow for more in person education special attention should be

given to include [Student A] in in person instruction as much as possible. The following things will take place to make sure a return to on site in person services is successful.

- a. Nurse will send home documents to capture current health concerns as well as the [District] Medical Mask Exemption Form.
- b. Parent will fill out all paper work [sic], schedule doctor visits, and return all forms to nurse.
- c. Special education teacher will communicate before hand [sic] with parent the specific details of starting at [Student A's] new school.

18. In the Parent's reply to the District's response, the Parent stated that until in-person services began, the District "continued to rely on me or my mother to provide the boys with services either via remote learning, which the boys could not tolerate and with which our family struggled to access or via work packets which still did not address their need for professional instruction or their identified struggles with learning in general (work refusal and the need for constant adult prompting among others)." The Parent stated: "...There was only one right way—in-person."
19. On April 19, 2021, the District began implementing a hybrid model of instruction for all students in the District.
20. During the week of April 19, 2021, according to the District, Student A began in-person instruction but did not wear a mask as required. The District stated the "Parent indicated her belief that he should not be masked." The District provided the Parent with the necessary paperwork to participate in in-person instruction, including a mask exemption. The District response stated, "The Parent did not complete the form or otherwise provide the opinion of someone with applicable medical expertise supporting that either Student could not wear a mask while at school."
21. On May 25, 2021, the District conducted a review amendment of Student A's IEP to address Student A's possible need for an "in-home para" and extended school services (ESY) during the summer. The prior written notice, dated May 27, 2021, stated the District agreed to provide ESY services to Student A. The notice did not address the proposal or refusal of an in-home paraeducator.
22. According to the District, Student A had attended school two to three weeks when Student A developed a cold and the Parent kept Student A home for the remainder of the school year.
23. On June 21, 2021, the District issued another progress report. The progress for all the goals was described as "insufficient progress demonstrated to meet this annual goal and may not achieve annual goal within duration of IEP." The comments mostly stated, "[Student] has not participated in online sessions. Due to the nature of remote learning this year it has been very difficult engaging in learning. Most days have been asynchronous and difficult. Concrete data after an established routine on this goal is not available." For related services, the comments were "[Student] has not participated in offered therapy sessions in the remote setting for the 2020-2021 school year to date. His mother has expressed that he attends private speech therapy and that school based services are not a priority at this time."

24. According to Student A's general education report card at the end of the 2020–2021 school year, the Student received all "1's" in ELA, mathematics, science, and social studies.¹

2021–2022 School Year

25. On August 26, 2021, the 2021–2022 school year began. All students in the District were provided an in-person instructional model, according to the District. Students were required to wear a mask, unless they had a medical exemption.

26. The Parent expressed concern that Student A was not able to wear a mask and requested placement at a private tutoring agency. The District met with the Parent on September 22, October 5, and October 28, 2021. The prior written notices following these meetings stated that masks were required for Student A to attend in-person, unless there was a medical exemption. The October 2021 prior written notice stated Student B had a medical exemption, but Student A did not. But the Parent did not want Student B to attend school without Student A. The District denied the request for a private placement based on the District's standing offer of a free appropriate public education (FAPE) at the Students' school in the District.

27. On December 1, 2021, the Parent filed this complaint.

28. Regarding the use of masks, the Parent later clarified to OSPI that Student A received a medical exemption in December 2021. The District reported Student A is currently attending school and being provided in-person services.

29. In an interview with OSPI, Student A's and B's special education teacher during last school year and the current school year stated the services on the Students' November 2020 IEPs were offered to both Students to the extent practicable, which was not necessarily minute-for-minute. In the mornings, the schedule provided synchronous instruction in math, reading, and written expression. In the afternoon, asynchronous instruction was provided along with individual assistance from the teacher or paraeducators. The teacher also met with parents as needed.

Since neither Student attended synchronous or asynchronous instructional sessions, the teacher provided the Parent with printed worksheets and materials for them to work on. The teacher stated the worksheets were not returned. When hybrid instruction began in April 2021, the Students attended two to three weeks before remaining at home for the rest of the school year.

According to the teacher, during the time attending in-person, Student A showed no difficulty wearing a mask. The teacher provided "mask breaks," which Student A declined. Student A also did not exhibit any work refusal during in-person services. The teacher reported that he was not able to conduct progress monitoring for both Students due to short period of time. The teacher believed the Students were capable of logging on the computer and following directions, but would need occasional assistance.

¹ "1" meaning "Well Below Grade Level Standard (Needs to Progress)."

STUDENT B

2020–2021 School Year

30. At the start of the 2020–2021 school year, Student B was eligible for special education services under the category of specific learning disability, was in the fifth grade, and attended a District elementary school.

31. Student B was reevaluated at the start of the 2020–2021 school year, and on October 28, 2020, the evaluation group met to review the evaluation results and changed Student B’s eligibility category from specific learning disability to autism. The evaluation report’s “conclusions from observations” stated, in part:

All raters (parent, teacher, and special education teacher) endorsed concerns in the areas of anxiety, depression, attention and learning problems, atypicality, and withdrawal. These endorsements may indicate [Student B] is experiencing high levels of internal distress such as persistent sadness, irritability, poor concentration, lethargy, and/or difficulty sleeping. Additionally, parent and special education teacher ratings revealed concern in the area of aggression. This may indicate that in the special education setting and at home, [Student B] is exhibiting aggressive like behaviors (e.g., inattention, verbal and/or physical aggression), respectively. Based on these results and previous evaluation data, [Student B’s] social/emotional functioning continues to adversely impact him at school.

32. After the reevaluation was completed and the evaluation group met, the District conducted an IEP meeting on November 17, 2020, to review Student B’s IEP. The IEP’s “team considerations” section reported the following:

- The Parent expressed concerns regarding “all academic areas.”
- Student B qualified in the area of communication.
- Student B required assistive technology for writing.
- Behavior impeded learning.

Student B’s October 2020 IEP provided for goals in the areas of social/emotional, adaptive behavior, math, reading, written expression, oral expression, speech/language, and occupational therapy. The IEP provided the following specially designed instruction and related services to Student B:

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Special Education							
No	Basic Reading	Special Education Teacher	Special Education Teacher	300 Minutes/1 Time Weekly	Special Education	11/27/20	11/26/21
Yes	Reading Comprehension	Special Education Teacher	Special Education Teacher	120 Minutes/1 Time Weekly	Special Education	11/27/20	11/26/21

No	Written Expression	Special Education Teacher	Special Education Teacher	150 Minutes/1 Time Weekly	Special Education	11/27/20	11/26/21
No	Math Calculation	Special Education Teacher	Special Education Teacher	300 Minutes/1 Time Weekly	Special Education	11/27/20	11/26/21
Yes	Math Problem Solving	Special Education Teacher	Special Education Teacher	120 Minutes/1 Time Weekly	Special Education	11/27/20	11/26/21
No	Social Emotional	Special Education Teacher	Special Education Teacher	100 Minutes/1 Time Weekly	Special Education	11/27/20	11/26/21
No	Adaptive	Special Education Teacher	Special Education Teacher	100 Minutes/1 Time Weekly	Special Education	11/27/20	11/26/21
No	Oral Expression	Special Education Teacher	Special Education Teacher	150 Minutes/1 Time Weekly	Special Education	11/27/20	11/26/21
No	Speech Language – Articulation	Speech Language Pathologist &/or SLPA	Speech Language Pathologist	30 Minutes/3 Times Monthly	Special Education	11/27/20	11/26/21
Related							
No	Speech Language – language	Speech Language Pathologist &/or SLPA	Speech Language Pathologist	30 Minutes/3 Times Monthly	Special Education	11/27/20	11/26/21
No	Occupational Therapy	Occupational Therapist &/or COTA	Occupational Therapist	30 Minutes/3 Times Monthly	Special Education	11/27/20	11/26/21

Total minutes per week student spends in school: 1,880 minutes per week

Total minutes per week student is served in a special education setting: 1,167.5 minutes per week

Percent of time in general education setting: 37.9% in General Education Setting

33. According to an email, dated November 6, 2020, from the school psychologist to the Parent and assistant director, the Parent requested to bring Student B to school for “laptop support.” The Parent stated in the complaint that Student B needed the support to access the curriculum. The District stated there was no data that “supported that either Students’ disabilities prevented him entirely from accessing remote instruction.”
34. According to the prior written notice, dated November 24, 2021, Student B’s placement was changed to increase the instructional time in a small group special education setting along with a 3:12 staff-to-student ratio for additional adult support.
35. On December 2, 2020, the one-year timeline began in the complaint.

36. According to the District, the Parent wanted to tour the new school prior to the transfer that was to take place beginning November 27, 2020, but it took “many weeks” to arrange the tour because of scheduling and the building being closed. The District and the Parent exchanged many emails, planning the tour with the Parent, scheduling the transition meeting, and having the Parent provide the necessary paperwork to enroll in the new school. The Parent also expressed concern that Student B could not access the online instruction and needed in-person services.
37. In response to the Parent’s concerns, on December 10, 2020, the assistant director emailed the Parent and stated, in part: “I am still available to work with both students on accessing Teams and some tutorials that will allow them to access remote learning more routinely. We can schedule that for next week and I can have transportation arranged if that is also needed.” It was unclear whether the Parent followed up on the assistance offered to Student B.
38. On January 28, 2021, the District held a transition meeting with the Parent to discuss Student B’s new program at a different school. According to the District, the Parent agreed for the transition to begin on February 11, 2021. On March 1, 2021, the Parent completed the enrollment information at the new school. Meanwhile, according to the District, remote IEP services continued to be offered to Student B.
39. On January 29, 2021, the District reported on the Student’s progress toward his IEP goals. The report stated: “Insufficient progress demonstrated to meet this annual goal and may not achieve annual goal within duration of IEP.” All goals included the same comment: “Instruction was provided for this goal, but student has not participated in any of the sessions this school year. Asynchronous work was provided.”
40. According to the “Speech/Language therapy attendance log,” Student B missed many sessions from December 2020 to February 2021. The log stated:
- 12/1/2020: showed offline
 - 12/4/2020: showed offline
 - 12/8/2020: SLP out
 - 12/15/2020: showed offline
 - 12/18/2020: showed offline
 - 1/5/2021: showed offline
 - 1/8/2021: showed offline
 - 1/12/2021: showed offline
 - 1/15/2021: showed offline
 - 1/19/2021: showed offline
 - 1/22/2021: showed offline
 - 1/26/2021: showed offline
 - 1/28/2021: Transition meeting with school team
 - 1/29/2021: Teacher Workshop Day
 - 2/2/2021: showed offline
 - 2/5/2021: showed offline
 - 2/9/2021: showed offline
 - 2/10/2021: Withdraw from [school]
41. According to the occupational therapy “Professional Service Log” from December 3, 2020 to March 1, 2021, Student B missed seven sessions of out of approximately nineteen sessions. Other sessions involved communicating with the Parent and meetings. The log also noted that the occupational therapist called Student B on session days, but Student B did not respond. Student B did not receive any direct occupational services during this time.
42. On March 29, 2021, Student B’s IEP team met to discuss the Parent’s request for “In Home Paraprofessional Support” for Student B.

43. The prior written notice, dated March 31, 2021, stated the District refused the Parent's request for an in-home paraeducator. The reason for the refusal was "on site in person services will be offered under the current plan and those better meet [Student B's] needs." The notice included the following factors regarding the decision:

It has been difficult for [Student B] to access instruction during remote learning. As community rules/laws/etc. allow for more in person education special attention should be given to include [Student B] in in person instruction as much as possible. The following things will take place to make sure a return to on site in person services is successful.

- Nurse will send home documents to capture current health concerns as well as the [District] Medical Mask Exemption Form.
- Parent will fill out all paper work [sic], schedule doctor visits, and return all forms to nurse.
- Special education teacher will communicate before hand [sic] with parent the specific details of starting at [Student B's] new school.

44. In the Parent's reply, the Parent stated that until in-person services began, the District "continued to rely on me or my mother to provide the boys with services either via remote learning, which the boys could not tolerate and with which our family struggled to access or via work packets which still did not address their need for professional instruction or their identified struggles with learning in general (work refusal and the need for constant adult prompting among others)." The Parent stated, "...There was only one right way—in-person."

45. On April 19, 2021, the District began implementing a hybrid model of instruction for all students in the District.

46. During the week of April 19, 2021, according to the District, Student B began in-person instruction but did not wear a mask as required. The District stated the "Parent indicated her belief that he should not be masked." The District provided the Parent with the necessary paperwork to participate in in-person instruction, including a mask exemption. The District response stated, "The Parent did not complete the form or otherwise provide the opinion of someone with applicable medical expertise supporting that either Student could not wear a mask while at school."

47. On May 25, 2021, the IEP team determined Student B required ESY services according to the prior written notice dated May 27, 2021.

48. On June 21, 2021, Student B's progress report noted the Student had made insufficient progress towards all the goals. The comment for all goals stated: "Due the nature of remote learning this year it has been very difficult engaging learning. Most days have been asynchronous and difficult. Concrete data after an established routine on this goal is not available."

2021–2022 School Year

49. On August 26, 2021, the 2021–2022 school year began. Students in the District were provided in-person instruction, according to the District. Students were required to wear a mask, unless they had a medical exemption.

50. The Parent expressed concern that Student B was not able to wear a mask and requested placement at a private tutoring agency. The District met with the Parent on September 22, October 5, and October 28, 2021. The prior written notices stated that masks were required for Student B to attend in-person, unless there was a medical exemption. The October 2021 notice stated Student B had a medical exemption. The Parent did not want Student B to attend school without Student A. The District denied the request for a private placement based on the District's standing offer of a free appropriate public education (FAPE).

51. On December 1, 2021, the Parent filed this complaint.

CONCLUSIONS

Issue 1: In-Person Services – The Parent alleged the District failed to consider providing in-person services to both Student A and B from December 2, 2020 to the end of the 2020–2021 school year.

Here, the Parent continually requested the District provide in-person services to the Students because they could not access their remote instruction. The District had an obligation, even in the midst of COVID-19, to determine if in-person services were required for the Students to receive a free appropriate public education (FAPE). Although the District continually denied the request based on safety reasons, there was no indication the individualized education program (IEP) teams discussed, reviewed Student-specific data and information, and made an individual decision about whether in-person services were needed for Students A and B to receive FAPE. Here, the decision about FAPE was not merely perfunctory; it had implications about the services that were being offered and accessed, and whether recovery/compensatory services were needed (discussed below).

The District stated in its response there was no data that “supported that either Student’s disabilities prevented him entirely from accessing remote instruction.” But there was evidence that indicated the Students had considerable difficulty with remote instruction. For example, Student A had a behavior plan for refusing to work. The October 2020 evaluation stated: “In order to help [Student A] be successful in the classroom, the teachers provide small group instruction, 1:1 support to help him finish assignments in the classroom without rushing, peer models, partners that help him in the classroom, and modified homework.” Student B’s October 2020 evaluation stated: “Additionally, parent and special education teacher ratings revealed concern in the area of aggression. This may indicate that in the special education setting and at home, [Student B] is exhibiting aggressive like behaviors (e.g., inattention, verbal and/or physical aggression), respectively.” The District’s March 31, 2021 prior written notices indicated that remote instruction was inappropriate and inaccessible for both Students, stating, “It has been difficult for [Student A and B] to access instruction during remote learning. As community rules/laws/etc. allow for more in person education special attention should be given to include [Student A] in in person instruction as much as possible.” Further, the special education progress reports for both Students did not provide any data because no progress monitoring was conducted due to the Students not accessing instruction.

In addition, because the Parent was expected to provide assistance to the Students, some deference to the Parent was necessary to determine what the Students needed since the District did not conduct any kind of evaluation or observation of the Students attempting to engage in remote learning. This might have led to offering different or additional behavioral strategies and supports that could be used to help the Students engage in remote instruction, while discussions of whether in-person instruction was needed and safely were ongoing. At minimum, the IEP team could have discussed whether some amount of in-person instruction could have been provided in a safe manner prior to April 2021. The District offered assistance in "some tutorials" to access remote learning, but this was not a substitute for behavioral supports to the Students developed through the IEP team.

The Parent was adamant that the Students needed in-person services. In response, the District changed the Students' placement to a different school (virtually) where they would receive more instruction in a special education setting. But the change of placement did not seem to have an effect on the Students' engagement with remote learning. Suffice to say that somewhere between the Parent's insistence on in-person services and the District's refusal to provide any in-person services, there could have been additional supports and services provided. It was the District's responsibility to have considered if additional supports and interventions were required, even if in-person services were not an option based on the individual circumstances of each Student. Based on the failure of the District to consider if in-person services were required for FAPE by an IEP team, making an individual decision whether in-person could be provided safely, and not considering other supports and interventions to address engagement, a violation is found. Corrective actions will be discussed below in issue two.

Issue 2: Implementation of the IEP – The Parent alleged the District failed to implement the IEPs of both Students from December 2, 2020 to the end of the 2020–2021 school year. A district is required to implement special education and related services in conformity with a student's IEP. Given that districts were required to (and continue to be required to) meet Department of Health COVID-19 health and safety guidelines, OSPI understands that the ability to provide special education services may continue to be impacted by COVID-19. In situations where COVID-19 health and safety restrictions impacted the provision of services, districts were required to address individual student needs for recovery services.

In December 2020, both Students' IEPs provided for services in reading, math, written expression, social/emotional, oral expression, adaptive behavior, speech/language, and occupational therapy. At the time, the District was operating in a remote instructional model and offered remote instruction to the Students consistent with their IEPs. However, the Students were not attending the synchronous and asynchronous instruction because according to the Parent, the Students were incapable of accessing their instruction on their own. The Parent stated she was not available during all times the Students needed assistance at home. As discussed above, the District failed to address the Students' need for in person services and relatedly failed to address the fact that the Students were not able to access remote instruction.

In April 2021, the District began to provide hybrid instruction and offered both of the Students in-person services while keeping masking requirements in place. The Parent insisted the Students

should not wear a mask despite the masking requirements. The District offered a medical exemption if the Parent provided a physician's statement that the Students could not wear a mask. Despite the mask requirements, the Students were able to attend in-person instruction without masks for 2–3 weeks at the end of the 2020–2021 school year. The documentation was unclear when exactly Student B received the mask exemption, but Student A received the exemption sometime in December 2021—according to the Parent—neither Student had a mask exemption during the 2020–2021 school year.

Ultimately, the District was required to take the necessary steps to ensure the Students' special education services were implemented in conformity with their IEPs. Up to April 19, 2021 when the District began offering in-person services at school for both Students, the District offered remote synchronous and asynchronous instruction. However, as discussed above, despite the Parent's frequent communications that remote instruction was not accessible for the Students, the District failed to explore any other supports or services to help with access to remote instruction or explore whether in-person services could have been provided sooner. Thus, while the District offered instruction, that instruction was inaccessible to the Students and the District did not ensure the Students' IEPs were implemented and a violation is found. However, for the period at the end of the school year after the Students attended for a few weeks and then the Parent chose to keep the Students at home rather than comply with the mask requirement or the exemption, no violation is found.

The District is required to provide compensatory services to make up for the special education services that were not implemented between December 2, 2020 to April 19, 2021. Since there was no progress monitoring conducted, the District is required to conduct assessments to determine the Students' present levels and rate of learning. Based on this information, the District and the Parent will recommend to OSPI to what compensatory education is required to bring the Students to the levels they would have been at had they received the services during this period.

CORRECTIVE ACTIONS

By or before **March 18, 2022, April 29, 2022, June 30, 2022, November 30, 2022, and January 13, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Compensatory Education

By **March 4, 2022**, the District is required to conduct the necessary assessments to determine the Students' present levels and rates of learning. Based on this information, the District and Parent will recommend to OSPI what areas and amounts of compensatory education are required to place the Students at the levels that the Students would have been at had the District provided the services. The recommendation must include a rationale for the decisions. The District and Parent must also develop a schedule for the proposed compensatory education.

By **March 18, 2022**, the District will provide OSPI with a copy of the assessment results, copies of the Students' updated progress reporting, and a copy of the compensatory services

recommendation. Once the information is received, OSPI will either accept the recommendation or determine whether further compensatory education required.

The compensatory education will occur in a one-on-one setting—or small group setting—with both Students receiving instruction together if appropriate, and be provided by a certificated special education teacher or under the supervision of a special education teacher. The instruction will occur outside of the District’s school day and may occur on weekends or during District breaks. If the District’s provider is unable to attend a scheduled session, the session must be rescheduled. If the Students are 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 **January 6, 2023**, including those needing to be rescheduled.*

The District must provide OSPI with an update on the amount of compensatory services provided to the Students by providing documentation on **April 29, 2022, June 30, 2022, and November 30, 2022** of the compensatory services provided to the Students at that point. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled or missed by the Students.

No later than **January 13, 2023**, the District shall provide OSPI with documentation that all of the compensatory education has been completed. 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 Students.

The District either must provide the transportation necessary for the Students to access these services, or reimburse the Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must provide reimbursement for round trip mileage at the District’s privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **January 13, 2023**.

DISTRICT SPECIFIC:

None.

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

Dated this ____ day of January, 2022

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.)