

## **SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-75**

### **PROCEDURAL HISTORY**

On June 15, 2020, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Olympia School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On June 17, 2020, 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 July 16, 2020, OSPI received the first portion of the District's response to the complaint and forwarded it to the Parent on July 21, 2020. OSPI invited the Parent to reply.

On July 27 and 28, 2020, OSPI received the second portion of the District's response to the complaint and forwarded it to the Parent on July 29, 2020. OSPI invited the Parent to reply. The Parent did not provide a reply to the District's response.

On July 30, 2020, OSPI requested that the District provide additional information, and the District provided the requested information on August 4, 2020. OSPI forwarded the information to the Parent the same day.

On August 5, 2020, OSPI's investigator conducted a phone interview of the special education life skills teacher.

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

### **ISSUE**

1. Did the District implement the Student's individualized education program (IEP) during the March 2020 through June 2020 school facility closures?

### **LEGAL STANDARDS**

**IEP Implementation during School Facility Closures for COVID-19:** At the beginning of each school year, each district must have in effect an individualized education program (IEP) for every student within its jurisdiction served through enrollment who is eligible to receive special education services. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform exactly as called for

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

During the COVID-19 school facility closures, as students received general education instruction and student support services, districts must provide students with disabilities with the special education services—related services and specially designed instruction—supporting a free appropriate public education (FAPE). The U.S. Department of Education Office for Civil Rights (OCR) and Office for Special Education and Rehabilitative Services (OSERS) indicated the "exceptional circumstances" presented during the school facility closures caused by COVID-19 "may affect how all educational and related services and supports are provided" to students with disabilities. There is not an expectation that IEP services would be delivered exactly as the IEP states. *Questions and Answers: Provision of Services to Students with Disabilities During School Facility Closures for COVID-19* (OSPI March 24, 2020); *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (OCR/OSERS March 21, 2020) ("It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities...during this national emergency, schools may not be able to provide all services in the same manner they are typically provided...The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency...FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students.")

While there was not an expectation that districts implemented a student's IEP as written during school closures caused by COVID-19 in spring 2020, districts must have had a plan for how students with disabilities were to receive a FAPE, including the provision of special education. *Questions and Answers* (OSPI, March 24, 2020); *Questions and Answers* (OSPI, May 5, 2020). See also, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (U.S. Department of Education, March 13, 2020) ("SEAs, LEAs, and schools must ensure that to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under the IDEA").

All schools were expected to have begun providing educational services for all students by March 30, 2020, which OSPI termed "Continuous Learning 2020." OSPI Bulletin 024-20 (March 23, 2020). OSPI described the nature of instruction that students were to receive during the COVID-19 as follows: "[School districts] should avoid assuming that continuity of education outside of a typical school building can only occur through online means. Districts will provide instruction using printed online learning materials, phone contact, email, technology-based virtual instruction, or a combination to meet student needs." *Guidance for Long-term School Closures* (OSPI, March 23, 2020).

The individualized special education services being provided to a student during the school facility closures as part of continuous learning, were to be documented in writing using a student's annual

IEP, IEP amendment (particularly if services to be provided during the closure were significantly different from what the IEP indicated), prior written notice, or optional "Continuous Learning Plan" (CLP) or similar document. Districts had flexibility in how they chose to document decisions made in real-time. *Questions and Answers* (OSPI, April 13, 2020). Districts were encouraged to prioritize parent communication, including discussions of how special education services were to be provided during the closures. *Questions and Answers* (OSPI, May 5, 2020).

**Specially Designed Instruction**: The purpose of the IDEA is to ensure that all students eligible for special education have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 CFR §300.1; WAC 392-172A-01005. Special education includes specially designed instruction, which 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).

**Compensatory Education**: A state educational agency is authorized to order compensatory education, as appropriate, through the special education citizen complaint process. 34 CFR §300.151(b)(1); WAC 392-172A-05030. The state educational agency, pursuant to its general supervisory authority, has broad flexibility to determine appropriate remedies to address the denial of appropriate services to an individual child or group of children. *Letter to Lipsitt*, 181 LRP 17281 (2018). Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 56 IDELR 31, (9<sup>th</sup> Cir. 2011); *See also, Letter to Lipsitt*, 181 LRP 17281 (2018) ("The purpose of a compensatory services award is to remedy the public agency's failure to provide a child with a disability with 'appropriate services' during the time that the child is (or was) entitled to a free appropriate public education and was denied appropriate services.")

There is no requirement to provide day-for-day compensation for time missed. *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9<sup>th</sup> Cir. 1994). "There is no statutory or regulatory formula for calculating compensatory remedies. However, generally services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting." *In re: Mabton School District*, 2018-SE-0036.

**Progress Reporting**: The purpose of progress reporting is to ensure that, through whatever method chosen by a school district, the reporting provides sufficient information to enable parents to be informed of their child's progress toward the annual IEP goals and the extent to which that progress is sufficient to enable the child to achieve those goals. IEPs must include a statement indicating how the student's progress toward the annual goals will be measured and when the district will provide periodic reports to the parents on the student's progress toward meeting those annual goals, such as through the use of quarterly or other periodic reports concurrent with the issuance of report cards. 34 CFR §300.320(a)(3); WAC 392-172A-03090(1)(c).

## FINDINGS OF FACT

1. During the 2019-2020 school year, the Student attended a District high school, was in the eleventh grade, and was eligible for special education services under the category autism.
2. The District's 2019-2020 school year began on September 4, 2019.
3. The Student's February 5, 2020 individualized education program (IEP) was in effect prior to the COVID-19 school facility closures. The Student's February 2020 IEP included the following goals<sup>1</sup>:
  - **Social/emotional** (greeting/handshaking);
  - **Adaptive 1** (hand washing routine);
  - **Adaptive 2** (reading);
  - **Adaptive 3** (folding towels);
  - **Adaptive 4** (math);
  - **Adaptive 5** (navigation);
  - **Adaptive 6** (written language);
  - **Adaptive 7** (cardio exercise);
  - **Adaptive 8** (glove wearing);
  - **Communication 1** (body part identification);
  - **Communication 2** ('help' and 'all done');
  - **Communication 3** (receptively identifying people); and,
  - **Communication 4** (using signs).

The Student's February 2020 IEP provided the Student with the following specially designed instruction in a *special education setting*:

- **Adaptive:** 94 minutes 5 times a week (to be provided by a special education teacher)
- **Social/Emotional:** 95 minutes 5 times a week (to be provided by a special education teacher)
- **Adaptive Reading:** 50 minutes 5 times a week (to be provided by a special education teacher)
- **Adaptive Written Language:** 50 minutes 5 times a week (to be provided by a special education teacher)
- **Communication:** 30 minutes 2 times a week (to be provided by a speech language pathologist)
- **Adaptive Math:** 53 minutes 5 times a week (to be provided by a special education teacher)

The Student's February 2020 IEP provided the Student with the following related services in a *special education setting*:

- **Occupational Therapy:** 20 minutes 3 times a month (to be provided by an occupational therapist)
- **Student-Specific Support 1:** 357 minutes 5 times a week (to be provided by a Student-specific paraeducator)
- **Student-Specific Support 2:** 357 minutes 5 times a week (to be provided by a Student-specific paraeducator)
- **Behavior Analysis:** 210 minutes 1 time a week (to be provided by a board-certified behavior analyst)<sup>2</sup>

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<sup>1</sup> According to the Student's February 2020 IEP, progress on all goals was to be reported via a "copy of [the] goal page" once a semester.

<sup>2</sup> According to the Student's February 2020 IEP, the following related services were to be provided concurrently: Student-specific support 1; Student-specific support 2; and behavior analysis.

The Student's February 2020 IEP additionally provided the Student with the following accommodations: ability to take breaks; adult proximity; graphs sent home; home/school communication system; and reinforcements. The Student's February 2020 IEP also provided the Student with the following modifications: visual schedule; sensory breaks; speech-generating iPad device; quiet dedicated instructional area; and applied behavior analysis (ABA) techniques.

The Student's February IEP additionally provided the Student with the following 'supports for school personnel': "IEP service providers will be trained in the basics of ABA intervention prior to working with Student."

The Student's IEP indicated the Student would spend 0% of his time in the general education setting.

4. On March 13, 2020, the Washington Governor issued a proclamation, announcing the closures of all public and private K-12 school facilities in the state through April 24, 2020, due to the COVID-19 pandemic and resulting public health crisis.
5. According to the District's response, on March 16, 2020:

[The District] announced the closure of all schools [and] to lessen the potential for inequitable access to learning activities, the District engaged in regular wellness checks with families, and provided a menu of educational enrichment activities for students/families. This format continued through the District's spring break (April 6, 2020 through April 10, 2020). During this time, formalized instruction was not provided to Students within the District.
6. On March 23, 2020, OSPI issued guidance, instructing districts that while school facilities are closed and not providing traditional in-person instruction, education must continue. OSPI's guidance outlined the expectation that "continuous learning" would begin for all students by Monday, March 30, 2020.
7. On March 25, 2020, the special education life skills teacher emailed the Parent, stating, in part:

At this point, I just want to check in with all of you to see how you are doing and what I might be able to do to support you to continue learning in my class...I have created a Google form as a quick check-in. Based on your responses, I will figure out a plan to help you while we are out of school.

...

As for the rest of the time during the emergency closure, I will provide a variety of enrichment materials. These activities or assignments are voluntary but will continue to engage you in the material of our class. At this point, I will be holding virtual office hours...I will be available from 9:00 a.m. – 10:00 a.m. on Tuesdays and Thursdays and from 3:00 p.m. – 4:00 p.m. on Wednesdays. I will extend these hours if needed. I will also respond to emails each day throughout the day.
8. On March 31, 2020, the special education life skills teacher emailed the Parent, inviting both the Parent and Student to a virtual office meeting on Zoom scheduled for April 1, 2020, between 9:00–10:30 am.

9. On April 3, 2020, the special education life skills teacher emailed the Parent, stating, in part:  
9:00 a.m. – Morning virtual zoom meeting with students and parents. This meeting will allow those who want to come and say hi for the day and encourage one another for the day ahead.

10:00 a.m. – 12:00 p.m. – I will be available through email so that parents and students who have questions, needs, or concerns can contact me and I can assist you.

12:00 p.m. – 2:00 p.m. – I will have virtual office hours on zoom – this time will be reserved for students or parents who want to meet face-to-face (virtually). Once again [this] time is meant to give support to students and parents in any way that you need. This time will not be a group meeting unless requested. There will be a waiting room for this time period and I will reserve the right to see students and parents individually.

10. The District was on spring break from April 6 through April 10, 2020.

11. On April 6, 2020, the Governor extended the March 13, 2020 school facility closure directive through the remainder of the 2019-2020 school year.

12. Also, on April 6, 2020, OSPI issued guidance on Continuous Learning 2020, which included recommended guidelines for maximum student commitment each day, as follows: Grades 9-12: 30 minutes per class (3 hours maximum).

13. According to the District's response:

[A] formalized Distance Learning Plan was adopted on April 13, 2020...[Under the Distance Learning Plan], all staff (including special education) were required to conduct at least three formal contacts with students each week, shifting the focus from enrichment to specific and targeted learning activities.

14. The District's response included a Distance Learning Plan, dated April 13, 2020. It read, in part:

**Communication**

Staff will formally communicate with students and families three times per week; once for providing learning activities/assignments/projects/etc., and two times for providing formal assistance, feedback, and check-in using District-approved technology and tools. If you support students (i.e., interventionist, counselor, speech language pathologist, occupational therapist, physical therapist, psychologist, etc.), please seek guidance from your Principal on how you can be of assistance. Outside of those formal communications, teachers will be available via flexible and reasonable virtual office hours throughout the week, during which they are expected to respond to inquiries from students [and] families.

...

**Instruction**

...

Our learning plan now shifts from mainly student enrichment to continuous learning, focusing on critical standards and enduring understandings. Lessons and activities will be based on our current curriculum and state standards in order to better ensure student preparation for the next grade level or post-secondary opportunities.

...

Work assigned beginning April 13, 2020 through the remainder of the 2019-2020 school year should be required and/or assessed or graded. All classrooms will have formal assessment processes in place by April 20, 2020.

15. On April 14, 2020, the special education life skills teacher emailed the Parent, stating, in part: "I just wanted to check-in this week and see how you are all doing?...I also wanted to ask you if there is anything I can do to help you and Student?"

From the emails provided to OSPI during the course of this investigation, it does not appear the Parent responded to this email.

16. On April 15, 2020, the special education life skills teacher emailed the Parent, stating, in part: "Just a reminder that we have started our 9:00 a.m. morning virtual check-in meeting[s]—the purpose of [these] meeting[s] is to allow those who want to come and say hi for the day and encourage one another for the day ahead."

According to the special education life skills teacher, the Parent responded to the foregoing email by stating that she was still working outside of the home and that she would not be able to assist the Student in logging into the morning sessions until she could be home.

17. The District's response included a letter, dated April 16, 2020, which informed the District's families of the recently-developed, District-wide Distance Learning Plan.

18. On April 23, 2020, the Parent emailed the special education life skills teacher, stating, in part: "When is the group zoom meeting? Please send the link again."

From the emails provided to OSPI during the course of this investigation, it does not appear the special education life skills teacher responded to this email.

19. On April 26, 2020, the occupational therapist emailed the Parent, stating, in part:

Now that things are settling down, have you given any thought as to how I can support you all at home?...I'd like to formally reach out and extend occupational therapy services, just as I would have provided if we were still attending school in the buildings. On your child's IEP, I am listed as a related service, typically supporting a specific goal. I am happy to review things that I was doing in the classroom as well as make suggestions for activities that can be done while at home in efforts to support Student's progress. With that said, given how difficult the distance learning situation can be for some families, I'm happy to collaborate and support any need Student and/or your family may be experiencing.

Due to my own family circumstances during the school closure, my availability is variable depending on when my son is scheduled to meet with his classroom and teacher, as well as my attendance [at] a variety of meetings. However, I do my best to respond to emails within 24 hours. In addition to email, I would be happy to schedule phone or zoom conferences to best meet your family's needs.

From the emails provided to OSPI during the course of this investigation, it does not appear the Parent responded to this email.

20. On April 29, 2020, the special education life skills teacher emailed the Parent, informing her that the recurring Zoom meetings each had the same link, so as to making signing in as easy as possible for students and parents.
21. On May 5, 2020, the special education life skills teacher emailed the Parent, stating, in part: "I was wondering if we could set up a time to meet either by phone or zoom to discuss how we can assist you and Student long distance through this closure....my schedule is fairly flexible so please let me know what will work best for you."
22. Between May 5 and 8, 2020, the special education life skills teacher and the Parent exchanged several other emails. In those emails:
  - The Parent discussed the following concerns:
    - Because both of the Student's parents worked, and because the Student's sibling also had intensive educational needs and was at home during the closure, it was difficult for Parent "to arrange to even have a phone conversation [with the District]."
    - No applied behavior analysis (ABA) therapy for the Student was taking place at home.
    - "I believe Student sat in on possible three or four of the zoom social ½ hour groups [and] his engagement has been limited to waving hi and bye."
    - Her belief that the Student's IEP goals were not being worked on during the closure.
    - Whether extended school year (ESY) services would be an option for the Student, and whether ESY, if they did occur, would be remote or in-person.
    - That a certain BCBA consultant who had previously been a member of the Student's IEP team had to leave the Student's IEP team because he had accepted employment elsewhere.
  - The special education life skills teacher discussed scheduling a virtual IEP meeting to discuss the Parent's concerns. The special education life skills teacher also stated the District anticipated being able to provide ESY services to students during the summer of 2020, but "whether that will be via virtual learning, in a building, or a combination of both is yet to be decided."
23. On May 7, 2020, the special education life skills teacher emailed the special education director (director 1), stating, in part: "Student has attended 3-4 of the morning check-ins, after Parent stopped working around April 23, 2020."
24. On May 12, 2020, director 1 emailed the special education life skills teacher, stating in part:

Review all IEP goals for Student and determine whether there are any that could be addressed virtually in some way or another...Based on what you think might be reasonable and practical, put together a draft prior written notice (send to this group for preview). Once reviewed, send home as a proposal to mom, inviting her to provide us with any suggestions she might have. Review her response, then send out a final prior written notice.
25. On May 15, 2020, the Parent emailed director 1, stating, in part:

Just so you understand: I don't believe that any education can happen for Student virtually. This is the reason why I keep asking specifically about in-person [ESY]



services...[Additionally], there will need to be discussions about compensatory education beyond [ESY from July 6, 2020 through August 6, 2020].

26. In an email thread dated May 18, 2020, District staff discussed the creation of a prior written notice, detailing the Student-specific services the District would propose be provided to the Student during the closure.

27. The District's response included a prior written notice, dated May 20, 2020, that read, in part:

Description of the proposed or refused action:

Services outlined on this IEP will be modified during the school closure as noted in "Any other factors..." section below.

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

Services related to some of the student's goals are not available due to the school closure.

The following modified services that will be provided during the school closure are outlined in the "Any other factors..." section.

...

Any other facts that are relevant to the action:

Specially designed instruction and/or related services will be provided on the following goals during the school closure:

Goal areas:

1. Adaptive Hand Washing Routine
2. Communication: Help and All Done
3. Communication: Using Signs – when given opportunities to sign, bathroom, break, IPAD and music independently STUDENT will sign bathroom, break, iPad and music
4. Adaptive Folding Towels
5. Adaptive: Cardio Exercise –

Related Services:

Speech – Available on a consultative basis. Also is willing to provide the pictures we have set up in the classroom to further support Student's progress in signing.

Occupational Therapy – Available for consultation to problem solve and provide suggestions based on the home report. This service is available through email communication, phone appointments/conferences by phone, as well as attending scheduled zoom sessions with the teacher/team.

The following accommodations will be provided to access the online learning format:

- Ability to take breaks
- Access/Use of the following: visual schedule and pictures
- Adaptive/Use of the Following: touch screen and adaptive equipment for the computer
- Allow extra time to respond
- Reinforcements

Mom has declined the COVID 19 distance learning services offered.<sup>3</sup>

An updated IEP will be developed if needed when school reopens.

28. On May 22, 2020, the special education life skills teacher emailed the Parent and special education director 2 (director 2) a copy of the May 20, 2020 prior written notice. The special education life skills teacher's email read, in part:

The goals we propose to address through distance learning [are] the adaptive goals of handwashing, towel folding, and cardio exercise (bike riding) and the communication goal of signing...The occupational therapist is more than happy to consult with you about what [the handwashing goal] looks like and some exercises she was working on in the classroom to support this goal. A simple parent note of progress or a data-sheet could help us track progress.

The towel folding goal could be videotaped and sent to us so that we could track the data on the progress made.

Cardio exercise of riding his stationary bike could be tracked simply by making notes of day and amount of time spent on the bike.

The signing goals of signing help, all done, and using signs such as bathroom, break, iPad, and music at appropriate times could be tracked by using a data sheet that shows how many times in the day he appropriate uses each sign.

If you have any questions or concerns, please feel free to contact me.

That same day, the Parent responded to director 2, stating: "Exactly how much an hour are you gonna pay me to do this?"

29. On May 26, 2020, the Parent emailed the special education life skills teacher and director 1. In that email, the Parent expressed the following concerns:

- It had "been 60 plus days since Student had last received appropriate education services."
- The prior written notice "was developed without the family's input, and appears to shift the daily instruction to the family."
- Given the family situation (both of Student's parents work, Student's sibling also has intensive educational needs), it would be nearly impossible for Parent to be significantly involved in educating Student at home.
- That Student required in-person ESY services.
- That the District address the need for compensatory education—either, or with each of, the following: "the District cover the expense of Student's attendance for two weeks at Camp Stand by Me;" the District provide intensive, in-person ESY services to the Student; the District "make a financial offer to the family [for the family] to use that money, once Student turns 21, to hire an ABA company to continue to work on educational goals."

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<sup>3</sup> Upon knowledge and belief, this last sentence—pertaining to the Parent's purported refusal of the offer in the May 20, 2020 prior written notice, would only have been added sometime after May 20, 2020. See email communications between the District and the Parent, below.

On May 26, 2020, director 1 responded. In her response, director 1 stated that an additional response would be forthcoming, but that she could state, in part, the following:

In proposing the only viable options we have at this time, it is completely within your family's prerogative to respond that it is undoable, which is what I am understanding you have done. I fear it wasn't clear in the wording of the prior written notice and/or the attached email that the team was indeed offering a collaborative model of instruction, but yes, even then, a significant amount of effort would be required by the family, and we understand how undoable that is for you.

30. On June 4, 2020, the Parent emailed the special education life skills teacher, stating: "I am trying to set up Student's school Chromebook that I received from the District office for his zoom social time with you. I need his email and his password."

From the emails provided to OSPI during the course of this investigation, it is not clear the special education life skills teacher responded to this email.

31. On June 15, 2020, OSPI received the Parent's complaint. It read, in part:

No education services [were] received [by the Student during the COVID-19 closure]. [A] prior written notice was not sent until May 20, 2020. The District [also] did not include our input [throughout the process] and had an IEP meeting without us...The District [also] requested that the family at home run all programs.<sup>4</sup>

32. June 16, 2020 was the District's last school day for the 2019-2020 academic year.

33. On June 17, 2020, the Parent met with certain District staff members to discuss the impact of the closure on the Student, as well as what services (e.g., ESY services, compensatory education, and/or a BCBA to work with Student throughout the summer of 2020) were needed to address this impact.

According to the District, the following individuals attended the June 17, 2020 IEP meeting: Parent, director 1, special education life skills teacher, assistant principal, dean of students, and speech language pathologist. At the meeting, the Student's IEP team developed an ESY IEP. The June 2020 ESY IEP stated the following goals were to be worked on during ESY: communication (Student's ability to identify body parts; Student's ability to sign to communication 'help' and 'all done'; and, Student's ability to sign for bathroom, break, iPad, and music); and adaptive (Student's ability to fold towels).

The Student's June 2020 ESY IEP read, in part: "Student requires intensive summer services to maintain progress on emerging skills. Additionally, time away from the routine of school causes Student to lose skills. Recouping those skills within a reasonable time frame is difficult."

The June 2020 ESY IEP provided the Student with the following specially designed instruction in a *special education setting* from July 6, 2020 through August 6, 2020:

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<sup>4</sup> As per this quoted language, on the copy of the complaint provided to OSPI, the last word is cut off. Upon knowledge and belief, the word is 'programs.'

- Communication: 20 minutes 4 times a week (to be provided by a speech language pathologist)
- Adaptive: 20 minutes 4 times a week (to be provided by a special education teacher)

34. According to progress reporting, as of June 18, 2020, the Student had made the following progress on the annual goals in his February 2020 IEP:

- **Social/emotional** (greeting/handshaking).
  - Insufficient progress: Due to the COVID 19 school closure which happened right after instituting this new goal Student has not had the appropriate social environment to practice this goal.
- **Adaptive 1** (hand washing routine).
  - Insufficient Progress: While school was in session, treatment sessions worked on increasing tolerance to tactile input on his palms; increasing activity tolerance in a variety of planes (e.g., vertical, horizontal) to support the goal and increase functional strength; and staff education to support progressing independence with participation. During the COVID-19 school closure, alternative occupational therapy programming was offered as a consultative service to assist family with continuing and/or developing a program that could be completed in the home setting and/or address questions/concerns of the family specific to their child. Due to the various constraints associated with the closure (availability, resources, etc.) no data was collected on skill development.
- **Adaptive 2** (reading).
  - Insufficient Progress: Due to the COVID 19 school closure which happened right after instituting this new goal Student has not had the appropriate community environment to practice this goal.
- **Adaptive 3** (folding towels).
  - Insufficient progress: Due to the COVID 19 school closure Student has not had the circumstances that have allowed for practice and the opportunity to measure progress on this goal.
- **Adaptive 4** (math).
  - Insufficient progress: Due to the COVID 19 school closure and stay at home orders Student has not had the community environment to practice and progress in this goal.
- **Adaptive 5** (navigation).
  - Insufficient progress: Due to the COVID 19 school closure and stay at home orders Student has not had the community environment to practice and progress in this goal.
- **Adaptive 6** (written language). [No progress reported.]
- **Adaptive 7** (cardio exercise).
  - Insufficient progress: During the COVID-19 school closure, alternative occupational therapy programming was offered as a consultative service to assist family with continuing and/or developing a program that could be completed in the home setting and/or address questions/concerns of the family specific to their child. Due to the various constraints associated with the closure (availability, resources, etc.), no data was collected on skill development.
- **Adaptive 8** (glove wearing).
  - Insufficient progress: Due to COVID-19 school closure which happened right after instituting this new goal Student has not had the circumstances to practice this goal.
- **Communication 1** (body part identification).
  - Insufficient Progress: Due to COVID19 and school closures effective March 13, 2020 data has not been taken. Prior to closures charts were sent home with up to date data.

Since school closures, Student has not been able to work on his goals. Attempts were made the few times he was able to attend zoom meetings, but rather than identify body parts that were being touched, he imitated when the teacher asked, "where's your nose?" as she touched her own nose.

- **Communication 2** ('help' and 'all done').
  - Insufficient Progress: Due to COVID19 and school closures effective March 13, 2020 data has not been taken. Prior to closures charts were sent home with up to date data. Since school closures, Student has not been able to work on his goals.
- **Communication 3** (receptively identifying people).
  - Insufficient Progress: Due to COVID19 and school closures effective March 13, 2020 data has not been taken. Prior to closures charts were sent home with up to date data. Since school closures, Student has not been able to work on his goals.
- **Communication 4** (using signs).
  - Insufficient progress: Due to COVID19 and school closures effective March 13, 2020 data has not been taken. Prior to closures charts were sent home with up to date data. Since school closures, Student has not been able to work on his goals due to therapy being attempted via zoom. Student struggled to participate and therefore zoom was not an effective model for him.

35. On June 30, 2020, director 1 emailed the Parent a copy of the finalized prior written notice, resulting from the June 17, 2020 IEP meeting. That prior written notice read, in part:

Description of the proposed...action:

Initiate ESY IEP for virtual ESY due to COVID-19 closure.

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

Student requires intensive summer services to maintain progress on emerging skills.

Services related to some of the Student's goals are not available due to the school closure.

...

Any other factors that are relevant to the action:

This ESY IEP was developed during the 2020 COVID-19 school closure.

Specially designed instruction and/or related services will be provided on the following goals during the Virtual ESY 2020:

1) Communication: help and all done;

2) Communication: using signs—when given opportunities to sign, bathroom, break, iPad, and music independently Student will sign bathroom, break, iPad, and music;

3) Communication: identifying body parts;

4) Adaptive folding towels.

...

Since the District is only in a position at this time to offer Virtual ESY [and] not in-person services, the Parent has declined online ESY services.

36. According to the District's response:

The District acknowledges that, in the present case, there was inordinate delay in establishing a continuous learning plan for Student. While Parent alleges a lack of service commencing on March 16, 2020, the proper measure should be delay from April 13, 2020 (commencement of District-wide distance learning). Prior to this date, formalized instruction had been suspended for all students.

Accordingly, the District has agreed to provide Student with direct, in-home applied behavior analysis (ABA) therapy at a total of 50 hours to take place during the remainder of July [and] August 2020.

37. According to emails, during the week of July 6, 2020, director 1 reached out to a private behavior therapy medical group in regard to providing the Student with services.
38. According to the director, as of August 6, 2020, "the Parent's preferred [ABA] therapy provider just completed the contract" to provide the Student with 50 hours of direct, in-home service.
39. During the course of this investigation, OSPI's investigator conducted a phone interview of the special education life skills teacher. OSPI's investigator's notes from that interview are as follows:

The majority of the special education life skills teacher's students "cannot function independently—they need adult assistance for most every activity."

The special education life skills teacher did not provide her students with worksheets or hardcopy packets.

On several occasions, the Student was able to attend the morning zoom sessions.

All of Student's goals were related to physical abilities. These physical abilities could only be worked on if an adult who was physically present with the Student was able to engage in interpersonal exercises with the Student. The special education life skills teacher says she made an effort in May 2020 to invite the Parent to meet to discuss different interpersonal exercises Parent could work on with the Student, but Parent was unable to meet.

## **CONCLUSIONS**

**Issue One: IEP Implementation** – The Parent alleged the District did not implement the Student's February 2020 individualized education program (IEP) that was in effect during the COVID-19 closure.

During the COVID-19 closure, school districts were responsible for providing a free appropriate public education (FAPE) to students with IEPs. FAPE includes specially designed instruction, which 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. Due to the exceptional nature of the COVID-19 closure, though, districts were not expected to deliver IEP services exactly as stated in students' IEPs.

OSPI described the nature of instruction that students were to receive during the COVID-19 closure as follows: "[School districts] should avoid assuming that continuity of education outside of a typical school building can only occur through online means. Districts will provide instruction using printed online learning materials, phone contact, email, technology-based virtual instruction, or a combination to meet student needs."

All schools were expected to have begun providing educational services for all students by March 30, 2020, which OSPI termed "Continuous Learning 2020." And OSPI guidance stated districts were to provide students with IEPs student-specific continuous learning opportunities beginning March 30, 2020. Thus, beginning March 30, 2020, the District should have begun providing the Student with opportunities to access individualized instruction. Here, though, that did not occur. From March 30 through April 3, 2020, the District was closed and did not provide educational services to any students. From April 6 through April 10, 2020, the District was on spring break.

Beginning April 13, 2020, the Student was given the opportunity to access a remote group meeting each day from 9:00 to 10:00 a.m. This was a voluntary meeting time for "those [students] who want to come and say hi for the day and encourage one another for the day ahead," and no individualized instruction was provided to the Student during these morning meeting times.

Outside of the morning meeting times, it does not appear the Student received any other educational services from April 13 through June 16, 2020 (the end of the school year). For example, the May 20, 2020 prior written notice shows that the intention had been to provide the Student with opportunities to work on the following February 2020 IEP goals during the COVID closure: adaptive (hand washing); communication (signing 'help' and 'all done'); communication (signing for bathroom, break, iPad, and music); adaptive (folding towels); and adaptive (cardio exercise). The May 20, 2020 prior written notice also shows the intention was to provide the Student (and the Parent) with occupational therapy consultations on an as-needed basis.

However, it also appears these opportunities were largely dependent on the Parent being able to provide the instruction, work with the Student, and collect progress data. For example, the special education life skills teacher, in her interview with OSPI's investigator, stated as follows:

- All of Student's goals were related to physical abilities. These physical abilities could only be worked on if an adult who was physically present with the Student was able to engage in interpersonal exercises with the Student.
- The special education life skills teacher says she made an effort in May 2020 to invite the Parent to meet to discuss different interpersonal exercises the Parent could work on with the Student, but the Parent was unable to meet.

And the Parent stated that she was unable to serve as the Student's in-person, one-on-one paraeducator because she had full-time work responsibilities and the Student's sibling, who was also home during the COVID-19 closure, also had significant educational needs.

So, in other words, during the closure, the Student did not receive educational services outside of the remote group meetings in the mornings. Importantly, the Student did not receive specially designed instruction during the spring 2020 COVID disruptions, as the District was unable to safely provide in person educational services. This is a violation of the IDEA and compensatory education is warranted.

Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. There is no requirement

to provide day-for-day compensation for time missed. There is no statutory or regulatory formula for calculating compensatory remedies. However, generally services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting.

Here, the Student's IEP team will be required to meet to determine how much compensatory education, and in which areas, the Student potentially requires. OSPI will then review this determination, and approve or revise it as necessary. On this point, OSPI notes the Student has recently started receiving 50 hours of service from an in-person, ABA therapist. But it is not clear the ABA therapist is working specifically on the Student's IEP goals. It is also not clear whether the 50 hours of ABA therapy services was intended as a portion of compensatory education for the Student for the lack of individualized instruction of the spring of 2020, or as a substitute for the original extended school year (ESY) plan. OSPI notes the Student's IEP team found the Student eligible for ESY; however, the District stated it was only able to offer virtual ESY. The Parent declined the ESY services because virtual services were not appropriate for the Student, which the District acknowledges. Thus, the Student's IEP team must consider whether the Student requires additional compensatory services, in addition to the ABA services.

Finally, districts must provide parents with progress reporting on the student's measurable annual goals. The purpose of progress reporting is to ensure that, through whatever method chosen by a school district, the reporting provides sufficient information to enable parents to be informed of their child's progress toward the annual IEP goals and the extent to which that progress is sufficient to enable the child to achieve those goals.

Here, the Student's February 2020 IEP stated progress on all goals was to be reported via a "copy of [the] goal page" once a semester. On June 18, 2020, the District provided the Parent with a progress report.

The June 2020 progress reported stated that the Student made insufficient progress because the following goals were not worked on during the spring 2020 COVID disruption: Social/emotional (greeting/handshaking); Adaptive 2 (reading); Adaptive 3 (folding towels); Adaptive 4 (math); Adaptive 5 (navigation); Adaptive 8 (glove wearing); Communication 1 (body part identification); Communication 2 ('help' and 'all done'); Communication 3 (receptively identifying people); and, Communication 4 (using signs). In relation to adaptive 6 (written language), the June 2020 progress report did not include an entry, detailing the Student's progress. And, in relation to adaptive 1 (hand washing routine) and adaptive 7 (cardio exercise), the June 2020 said that "alternative occupational therapy programming was offered as a consultative service to assist family [but] no data was collected on skill development."<sup>5</sup>

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<sup>5</sup> The record does not indicate the Student (or the Student's family) was provided with any occupational therapy consultations during the spring 2020 COVID disruptions.



Since the June 2019 progress report did include some data—namely, that the Student made “insufficient progress” on most all of his goals, as none were worked on during the spring 2020 COVID disruption, this does not represent a violation of the IDEA.

Again, however, the Student’s IEP team will be required to meet to determine how much compensatory education, and in which areas, the Student potentially requires. To make this determination, the District will need to collect progress data or conduct new assessments to determine the Student’s baseline on his IEP goals, and then hold an IEP team meeting. After the Student’s IEP team meets, the District will provide OSPI with a copy of the prior written notice that documents the IEP team’s answers to the following questions:

1. Where does the Student currently stand on the goals in his February 2020 IEP? For example, has the Student’s ability in the February 2020 goal areas regressed, stayed the same, or progressed?<sup>6</sup>
2. Based on the foregoing answers, does the Student require additional recovery services and/or compensatory education, and, if so, how much and in which areas, does the Student require additional recovery services and/or compensatory education?
3. Does the Student’s February 2020 IEP need to be revised in any way?
4. What will the plan be to provide the Student with individualized instruction at the start of the 2020-2021 school year?

### **CORRECTIVE ACTIONS**

By or before **September 18, 2020**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

##### **IEP Meeting**

By or before **September 11, 2020**, the Student’s IEP team will meet to discuss, and answer, the following questions:

1. Where does the Student currently stand on the goals in his February 2020 IEP? For example, has the Student’s ability in the February 2020 goal areas regressed, stayed the same, or progressed?<sup>7</sup>
2. Based on the foregoing answers, does the Student require additional recovery services and/or compensatory education, and, if so, how much and in which areas, does the Student require additional recovery services and/or compensatory education?
3. Does the Student’s February 2020 IEP need to be revised in any way?
4. What will the plan be to provide the Student with individualized instruction at the start of the 2020-2021 school year?

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<sup>6</sup> This question will need to be answered by gathering existing data and communicating with the Parent and the Student. It is possible the District will be required to seek consent from the Parent for a partial or complete reevaluation to determine the Student’s current standing on the February 2020 goals.

<sup>7</sup> This question will need to be answered by gathering existing data and communicating with the Parent and the Student. It is possible the District will be required to seek consent from the Parent for a partial or complete reevaluation to determine the Student’s current standing on the February 2020 goals.

By **September 18, 2020**, the District will provide OSPI with the following documentation from the IEP meeting: 1) Invitation or scheduling documentation; 2) Agenda or meeting notes; 3) Information used to determine the Student's progress on IEP goals during school facility closures; 4) Updated progress report; 5) IEP or amended IEP, if applicable; 6) Plan for additional special education services, if applicable; 7) prior written notice; and, 8) any other relevant 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.

Dated this \_\_\_\_ day of August, 2020

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.)