

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 21-33

PROCEDURAL HISTORY

On April 13, 2021, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from an attorney (Complainant) representing the parents (Parents) of a student (Student) attending the Bellevue School District (District). The Complainant alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA regarding the Student's education.

On April 13, 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 May 3, 2021, the District requested an extension of time to respond to the complaint. OSPI granted the extension to May 7, 2021.

On May 7 and 25, 2021, OSPI received the District's response to the complaint and forwarded it to the Complainant on May 10 and 26, 2021. OSPI invited the Complainant to reply.

On May 19, 2021, the Complainant requested an extension of time to reply to the District's response. OSPI granted the extension to May 26, 2021.

On May 26, 2021, OSPI received the Complainant's reply. OSPI forwarded that reply to the District on May 28, 2021.

On June 1, 2021, OSPI asked the District to provide additional information and respond to questions related to assertions and evidence cited in the Complainant's reply by June 3, 2021. The District provided the requested information on June 3, 2021. OSPI forwarded the information to the Complainant on June 4, 2021.

OSPI requested additional information from the District via three emails sent on June 4, 2021. The District provided responses on June 7, 2021. OSPI forwarded the information to the Complainant the same day.

OSPI requested additional information from the Complainant on June 4, 2021. The Complainant provided responses on June 7, 2021. OSPI forwarded the information to the District on June 7, 2021.

OSPI also sought clarifying information from the District by phone and email, which it received on June 7 and 8, 2021, from the District's counsel. OSPI forwarded the written information received from the District on June 8, 2021 to the Complainant the same day.

OSPI also sought clarifying information from the Complainant via email, which it received on June 8, 2021. OSPI forwarded the clarifying information to the District the same day, June 8, 2021.

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

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on April 14, 2020. These references are included to add context to the issues under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.

ISSUE

1. Did the District follow procedures to implement the Student's individualized education program (IEP) during the 2020-2021 school year, including considering the Student's need for in-person services and the location of in-person services (i.e., at school, at childcare, or at home)?

LEGAL STANDARDS

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

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

IEP 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.

Supplementary Aids and Services: Supplementary aids and services means aids, services, and other supports that are provided in general education classes or other education-related settings to enable students eligible for special education to be educated with nondisabled students to the maximum extent appropriate in accordance with the student's least restrictive environment. 34 CFR §300.42; WAC 392-172A-01185. A student's IEP must include a statement of the supplementary aids and services to be provided to the student or on behalf of the student. 34 CFR §300.320(a)(4); WAC 392-172A-03090(1)(d).

IEP Must State Amount of Services: An IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the student, or on behalf of the student to enable the student to: advance appropriately toward attaining the annual IEP goals; be involved and progress in the general curriculum in accordance with present levels of educational performance and participate in extracurricular and other nonacademic activities; and be educated and participate with other children with disabilities and nondisabled children in the above activities. 34 CFR §300.320(a)(4); WAC 392-172A-03090(1)(d). "The amount of services to be provided must be stated in the IEP, so that the level of [the district's] commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be (1) appropriate to the specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP." Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,475, 12,479 (March 12, 1999) (34 CFR Part 300, Question 35).

IEP Amendments: After the annual IEP team meeting for a school year, the parent of a student eligible for special education and the school district may agree not to convene an IEP team meeting for the purposes of making changes to the IEP, and instead may develop a written document to amend or modify the student's current IEP. If changes are made to the student's IEP the school district must ensure that the student's IEP team is informed of those changes and that other providers responsible for implementing the IEP are informed of any changes that affect their responsibility to the student. Changes to the IEP may be made either by the entire IEP team at an IEP team meeting, or by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated. 34 CFR §300.324; WAC 392-172A-03110.

Continuum of Alternative Placement Options: Each school district shall ensure that a continuum of alternative placements is available to meet the special education and related services needs of students. The continuum required in this section must: include the alternative placements listed in the definition of special education in WAC 392-172A-01175, such as instruction in general education classes, special education classes, special schools, home instruction, and instruction in hospitals and institutions; and make provision for supplementary services such as resource room or itinerant instruction to be provided in conjunction with general education classroom placement. 34 CFR §300.115; WAC 392-172A-02055. Special education means specially designed instruction,

at no cost to the parents, to meet the unique needs of a student eligible for special education, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings. WAC 392-172A-01175.

Compensatory Education: A state educational agency is authorized to order compensatory education through the special education citizen complaint process. *Letter to Riffel* 34 IDELR 292 (OSEP 2000). 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, (9th Cir. 2011). 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 (9th Cir. 1994). The award of compensatory education is a form of equitable relief and the IDEA does not require services to be awarded directly to the student. *Park ex rel. Park v. Anaheim Union School District*, 464 F.3d 1025, 46 IDELR 151 (9th Cir. 2006).

FINDINGS OF FACT

Background: 2019–2020 School Year

1. The Student was initially evaluated and found eligible for special education at a meeting held on January 21, 2020. The Student was determined eligible for special education services under the category of autism and required specially designed instruction in the areas of reading and social-emotional skills. The Student was in first grade and attended a District language immersion elementary school.
2. The Student's initial individualized education program (IEP) was developed on February 14, 2020, to be implemented on February 24, 2020. The Student's IEP included two annual goals for reading, three annual social-emotional goals, and sixteen daily accommodations. The Student's IEP required the following as specially designed instruction:
 - Reading: 100 minutes weekly (provided by a special education teacher in a special education setting)
 - Social emotional: 40 minutes weekly (provided by the special education and general education teacher in a general education setting)

It also required as supplementary aids and services: 20 minutes of speech and language consultation provided once a semester in general education by a speech-language pathologist (SLP).

The Student's IEP indicated the Student spent 1,710 minutes per week in school: 94.15% (1,610 minutes per week) in the general education setting and 100 minutes per week in a special education setting. She was to receive regular transportation and would participate in "PE, library, music, art, special activities, assemblies and field trips with her peers."

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

pursuant to the Governor's proclamation. The school facility closures were subsequently extended for the remainder of the 2019-2020 school year.

2020–2021 School Year

4. The District's 2020–2021 school year began on September 3, 2020.
5. The Student was in second grade and remained eligible for special education services under the category autism. The Student's February 2020 IEP remained in place.
6. Like all students in the District, the Student began the school year with remote/online education (synchronous and asynchronous), which was provided on Mondays, Tuesdays, Thursdays, and Fridays from 9:05 am to 3:35 pm. Wednesdays were a shorter school day with asynchronous remote/online learning from 9:05 am to 1:20 pm.
7. On October 2, 2020, the Student's IEP team met to review and discuss the Student's IEP reading goals, accommodations, and service minutes. At that time, the Student and others in the District were attending school remotely. At the meeting, the Student's Parents requested: contracted programming to address reading goals; an English reading goal; and, math as a service area in the Student's IEP. These options were considered and rejected, and the Parent was provided a prior written notice (PWN), explaining the IEP team's rationale. The contracted programming was rejected since the District offered for the Student to attend her school four days per week when school resumed in-person in a hybrid model (part-time remote/online and part-time in person). The Student's second grade peers would be attending two days in-person in the hybrid model, so she would be attending two additional days per week. Math goals were rejected because assessments demonstrated that she was at or above the grade-level benchmark.

At the October 2, 2020 IEP team meeting, the IEP team agreed to address concerns related to the lack of progress on reading goals by increasing reading service minutes to 180 minutes per week. Her other goals, minutes, and services were not changed. Thus, the amended IEP indicated the Student spent 1,710 minutes per week in school: 89.47% (1,530 minutes per week) in the general education setting and 180 minutes per week in a special education setting.

8. The District provided evidence that the Student's special education teacher attempted to implement the Student's reading services, but there were challenges getting the Student to engage with services remotely, particularly between October 20 and 30, 2021.
9. On October 28, 2020 the Student transferred from the language immersion school to her neighborhood elementary school.
10. On November 18, 2020, the Student's IEP team met again, remotely via Teams due to the ongoing impact of COVID-19. Since the last IEP meeting, the Student had changed schools and the purpose of the meeting was to discuss changing the Student's reading goals to

English, amending her social goals to fit her current remote learning setting, and to plan how to support her engagement in the provided services.

11. The PWN for the meeting, dated November 20, 2020, stated the IEP team amended two of the Student's reading goals and two of the Student's social emotional goals to match the services provided at her new school and the remote setting. Social goals for recess and lunch settings were removed, since they are not accessible during online instruction and were to be addressed again at a February 2021 IEP meeting to consider in-person learning. The IEP team also added three additional daily accommodations.

The November 20, 2020, PWN also stated:

It has been noted by both family and staff that staying engaged in online learning is very challenging for [the Student] and her current daycare setting is struggling to support her the way she needs to be successful. Both transportation to in person learning and [paraeducator] support at the childcare center were discussed as potential options to support this. Incentive charts have also been provided to staff at the childcare center to help in supporting [Student] in staying on task.

The PWN notice did not specify what determination was reached regarding transportation to in-person learning or paraeducator support, nor does it state if those were considered and rejected.

The PWN did address two other options that were considered and rejected: math goals and the use of a behavior technician to train staff members at the childcare center that the Student attends during the day. The IEP team agreed math was an area of concern, but math goals were rejected "because new goals can only be addressed through the evaluation process." The team was to follow up on getting the evaluation process going. The use of a behavior tech was rejected because the childcare center said their staffing was not sufficient to support the sorts of behavior interventions being suggested, even with additional training.

12. The resulting IEP amendment, dated November 18, 2020, was to be implemented on November 23, 2020. The November 2020 amended IEP included two annual goals for reading and two annual social-emotional goals, and twenty-one daily accommodations. The Student's IEP required the following specially designed instruction:
 - Reading: 180 minutes weekly (provided by a special education teacher in a special education setting)
 - Social emotional: 40 minutes weekly (provided by the special education and general education teacher in a general education setting)

It also required as supplementary aids and services: 20 minutes of speech and language consultation provided once a semester in general education by an SLP. The IEP did not include information about the provision of paraeducator services as a supplementary aid and service, nor how many minutes were to be provided.

13. On November 20, 2020, the District's director of special education (director) emailed the Parent to update them on the plan for the Student. The director's emails stated:

Starting Monday, we will send a paraeducator to [the Student's childcare center] to provide support for [the Student]. Right now, we have a para available Monday, Thursday, and Friday. We are working quickly to find coverage for Tuesday and Wednesday. We have a full-time paraeducator starting on 12/7 who will provide ongoing, daily support at [the Student's childcare center]. [The special education teacher] will be collaborating with the paraeducator to ensure she implements appropriate academic and behavioral strategies. We intend to execute the strategies noted by the [behavior tech].

14. On November 20, 2020, the Parent responded to the director, and stated, "We think [the Student] will benefit from the in-person help. I would like to wait to start until [November 30, 2020]." Because the Student was not attending the childcare center on Tuesdays and Wednesdays, the Parent also stated, "We would like to know what the plan will be on Tuesdays and Wednesdays for the location. Will [the Student] be at [the neighborhood school] for those days?"

The director replied to the Parent's email and stated the District has "secured a para to work from 9:00 a.m. to 2:30 p.m. with the Student, but they do not have a para for Tuesday and Wednesday yet."

The Parent followed up the same day to ask, "where would they be working together on those days once you have someone?" There is no evidence that the Parent received a response to that question, nor did the District ever provide paraeducator services to the Student at her childcare center on Tuesdays and Wednesdays, as the Student was at home those days.

15. Beginning November 30, 2020, the District began providing a paraeducator at the Student's childcare center from 9 am to 2:30 pm on Mondays, Thursdays, and Fridays (990 minutes per week) to assist the Student with remote learning. No paraeducator was provided on Tuesdays and Wednesdays, which were days the Student had remote learning and was at home.
16. On December 1, 2020, according to a log of services provided by the District, the special education teacher began meeting with the Student to provide reading services on Tuesdays and Wednesdays and provided these services remotely/online until the Student returned to in-person schooling.
17. The Complainant and the Student's Parents dispute the District's position that the Student was provided special education reading services on any Tuesday prior to March 9, 2021, except December 15, 2020. In support of their position, the Parent provided a copy of the Student's Microsoft Teams calendar that indicated five Tuesdays that were listed in the special education teacher's reading services log in December 2020 and January 2021 and that were canceled by the District.
18. On December 15, 2020, an assessment revision meeting was held, and it was determined that the Student required specially designed instruction in math, as well as social/emotional skills and reading. Under supplementary aids and services, program modifications, and support for school personnel, the only item listed was "Consultation: Speech Language Pathologist."

19. On December 18, 2020, the Student's IEP team met again to review the current IEP. The IEP team amended the existing IEP by adding goals and 120 minutes of math problem solving services. The team also added provision of special education transportation services to the IEP. The amended IEP required the following specially designed instruction:
- Reading: 180 minutes weekly (provided by a special education teacher in a special education setting)
 - Math: 120 minutes weekly (provided by a paraprofessional in special education)
 - Social emotional: 40 minutes weekly (provided by the special education and general education teacher in a general education setting)

The IEP noted the Student would now spend 82.46% of her time in the general education setting. The IEP continued to include an SLP consultation.

The IEP did not include information about the provision of paraeducator services nor how many minutes were to be provided. The prior written notice, documenting the meeting, stated only that the IEP team added a math goal. It does not identify any other options considered or rejected. The new IEP was to be implemented on January 4, 2021, and the IEP was sent to the Parent on January 18, 2021.

20. Beginning on December 14, 2020, the Student was to begin receiving in-person instruction with three other students with IEPs at the District's elementary school on Mondays and Tuesdays, from 9:05 am to 3:35 pm. The Student received a full day of in-person services on December 14 and 15, 2020, and January 19, 2021. On those three in-person days, the Student worked with her special education teacher/IEP case manager and a paraeducator. On the other Mondays, Thursdays and Fridays, the Student attended school remotely from her childcare center and was provided with a paraeducator from 9 am to 3:30 pm.

21. The District went back to remote learning for the first two weeks of January.

22. According to the District's initial response, from December 14, 2020 to January 11, 2021, on Mondays and Tuesdays, the Student received the following at school:
- Specially designed instruction reading delivered in-person by a paraeducator from 1-1:45 pm (90 minutes)
 - Specially designed instruction math delivered in-person by a paraeducator from 2-2:45 pm (90 minutes)
 - Specially designed instruction social-emotional delivered in-person from 3-3:30 pm by Student's special education teacher (60 minutes)

On Thursdays and Fridays, at the Student's childcare center, the paraeducator provided:

- Specially designed instruction reading in-person from 1-1:45 pm (90 minutes)
- Math in-person from 2-2:45 pm (90 minutes)
- Social-emotional services were provided for 40 minutes during general education remote learning

Other information subsequently provided by the District contradicts this information. First, the District stated that no in-person instruction was provided in the first two weeks of January

2021. Second, the instructional plan provided by the District, dated December 18, 2020, and written by the special education teacher, indicated that the Student was to practice reading with the paraeducator at her childcare center on Mondays, Thursdays, and Fridays, and would practice daily with the special education teacher in-person at school. Third, the District also provided information that the Student's special education teacher delivered reading services to the Student online for 30 minutes on Tuesday and Wednesdays.

Additionally, the Student only attended school in-person three days Monday and Tuesday, December 14 and 15, 2020, and Tuesday, January 19, 2021, before beginning to attend in-person half-days beginning on January 22, 2021.

23. The Complainant stated that because the Student did not go to childcare center on Tuesdays, she did not receive any paraeducator services on Tuesdays. The Parent disputes information provided by the District in the reading service log that indicated the Student received online reading services from the special education teacher on Tuesdays, in December and January, except Tuesday, December 15, 2021. And, the special education teacher's log does not include any online reading services on any dates in February 2021.

The Parent does not dispute that the Student received online reading services on Wednesdays, nor that the Student began receiving reading services on Tuesdays on and after March 9, 2021.

24. On January 15, 2021, with the Parent's permission, the District amended the Student's IEP to include special education transportation services from the Student's childcare center to the Student's school on Mondays, Thursdays, and Fridays, and then back to the childcare center.
25. On Thursday, January 21, 2021, the Student was to begin attending in-person school from 1:05 to 3:35 pm, four days a week (Monday, Tuesday, Thursday, and Friday). However, on that date, the bus did not pick up the Student because it was waiting on the street outside the childcare center, but the Student was waiting at the entrance to the childcare center. Therefore, the Student did not attend school on the hybrid schedule on January 21, 2021.
26. Beginning January 22, 2021 and continuing to April 23, 2021, the Student had the same hybrid schedule as a cohort of her grade level peers. Four days a week, Monday, Tuesday, Thursday and Friday, students have remote/online instruction in the morning from 9:05 am to noon, and in-person instruction at school from 1:05 to 3:35 pm. Wednesdays is a synchronous and asynchronous day of remote learning from 9:05 am to 1:20 pm, and no students or staff attend school in person.
27. Three days a week, Mondays, Thursdays, and Fridays, the Student was at her childcare center, and the District provided paraeducator services to her in the morning at the childcare center. On those three days, the District also provided special education transportation services from her childcare center to her school and then back to her childcare center. On Tuesdays and Wednesdays, the Student was not at childcare and she attended school remotely/online from home. The District did not provide a paraeducator at the Student's home.

28. According to the District, once the Student began attending the hybrid schedule on January 22, 2021, the Student's IEP services were implemented as follows:

- 180 minutes of weekly reading services (to be provided by a special education teacher) were provided:
 - By the paraeducator from 9:00 to 9:30 am at the childcare center on Mondays, Thursdays, and Fridays (90 minutes)
 - Online by the special education teacher on Wednesdays from (30 minutes), and,
 - In-person at school by the special education teacher from 2:45 to 3 pm three days a week¹ (45 minutes)
- 120 minutes of weekly math services (to be provided by a paraeducator) were provided
 - By a paraeducator from 9:40 to 10:15 am at the childcare center on Mondays, Thursdays, and Fridays, and online on Tuesdays (120 minutes)
 - In-person at school by the special education teacher on Mondays, Tuesdays, and Thursdays from 3:00 to 3:15 pm (45 minutes)²
- Specially designed instruction in social-emotional was delivered by a paraeducator in person in Student's general education class, along with SEL lessons in the general education setting and check-ins with Student's special education teacher

29. On February 12, 2021, the Student's IEP team met again to update the Student's annual IEP. The team added social emotional goals in the areas of self-advocacy and using coping strategies in unstructured settings, updated the reading goals, and added a math story problem goal. The resulting IEP, dated February 12, 2021, included two annual math problem solving goal, two annual goals for reading, and three annual social-emotional goals, and twenty-one daily accommodations. The IEP required the following specially designed instruction:

- Reading: 240 minutes total, including: 160 minutes weekly (provided by a paraeducator in a special education setting) and 80 minutes weekly (provided by the special education teacher in a special education setting)
- Math: 120 minutes weekly (provided by a paraeducator in a special education setting)
- Social emotional: 40 minutes weekly (provided by the special education and general education teacher in a general education setting)

The IEP continued to include an SLP consultation. The IEP did not include information about the provision of paraeducator services, nor how many minutes were to be provided. The Student's new IEP was to be implemented on February 26, 2021.

30. At the February 12, 2021 IEP meeting, the IEP team also discussed paraeducator coverage during the times the Student was not with her teachers in person and the importance of

¹ In one response, the District indicated this was provided on Mondays, Thursdays, and Fridays. In another, the District indicated this was provided on Mondays, Tuesdays, Thursdays, and Fridays. But, in the Student's schedule provided by the District, which OSPI finds most credible and consistent with other information, it is listed as occurring on Mondays, Tuesdays, and Thursdays.

² In one response, the District indicated these math services were provided on Mondays, Thursdays, and Fridays. But, in the Student's schedule provided by the District, which OSPI finds most credible and consistent with other information, it is listed as occurring on Mondays, Tuesdays, and Thursdays.

finding adults that are a good match for her to minimize escalations. The team decided the Student is most successful in structured settings with familiar adults, "so it was decided that she would have para[educator] support during times she is not able to be with her teachers (when at [the child care center])."

31. According to the PWN documenting the February 12, 2021 meeting, the IEP team considered designating paraeducator time in the Student's IEP. But the IEP team rejected that option and listed the reason as the Student "has not shown a need for this so far when with [the Student's] teachers. [The Student] will continue to receive this support at [the childcare center] and we will revisit support when school resumes on a full-day schedule." The PWN also stated, under other factors relevant to the action:

It was discussed that minutes and supports would be revisited should school resume a full-day schedule...The district acknowledges that [the Student] needs para support to access online instruction daily. They offered to provide services 5 days a week from 9-12 with a paraeducator at [the Student's childcare center.] This was decided to be too much of a financial burden for the family at this time. Paraeducator services will continue to be provided from 9-12 on Mondays, Thursdays and Fridays when [the Student] is at [the childcare center] and online options will be made available for the other two days.

The PWN also noted that recovery services were brought up at the meeting, the Student had previously been determined to qualify, and the District would keep the family updated as it works on its plan to provide these services.

32. According to the District, effective February 24, 2021, in addition to the services already on the schedule, the Student received an additional 30 minutes of reading services delivered online by a paraeducator from 9:45 to 10:15 am on Tuesdays, and 45 minutes (from 1:05 to 1:50 pm) in person on Fridays.
33. On February 14, 2021, the Parents emailed the director and thanked them for offering to pay for a paraeducator two more days a week. But, the Parents explained, they would need to pay for additional childcare in order to receive paraeducator services on those days. The Parents asked, "Is there a district location they can meet at so [the Student] can get these needed services?" The Parents did not receive a response, and wrote again on February 22, 2021, stating that they would like to be able to send the Student to the childcare center on Tuesday and Wednesday mornings, but they are unable to do so. The Parents asked again, "Are there any options for this to take place at a district location?"
34. On February 23, 2021, the director replied and said, "At this time, school-based staffing is only available during the in-school hours of operation. Thus, we can only accommodate students at the schoolhouse at the student's scheduled time."
35. On February 28, 2021, the Parent replied to the director via email and stated that the Student's school is open during the hours that the paraeducator is available and works with the Student.
36. On March 4, 2021, the principal, who had been copied on the previous email exchange, replied:

[A]t this point adding a student on Wednesdays is not consistent with the safety and staffing protocols we currently have in place. Additionally, the paraeducator's role is educational support and the para cannot take responsibility as a childcare provider, which would be required for support to happen at [the school] outside of her currently scheduled hybrid day.

37. On March 4, 2021, the Parent emailed the director and stated:

Our understanding of the situation regarding para support on Tuesdays and Wednesdays is as follows:

It will be provided if we send [the Student] to [the childcare center] these days if we pay to have her at [the childcare center] extra days.

It cannot be provided on Tuesdays and Wednesdays on school/district property.

It cannot be provided in home on Tuesdays and Wednesdays.

To sum up, [District] will provide [the Student] with more support via a para but only if the family pays out of pocket for daycare.

38. On March 25, 2021, the Parents emailed their understanding regarding paraeducator support, as outlined in their March 4, 2021 email, a second time and asked the principal and director to state whether they correctly understand the District's position. The District did not respond, and the Complainant subsequently filed this complaint, which OSPI received on April 13, 2021.

39. The District had spring break from April 12 to 16, 2021.

40. On April 26, 2021, the Student began attending school full-time on Mondays, Tuesdays, Thursdays, and Fridays, from 9:05 am to 3:35 pm, and continued to be remote/online on Wednesdays from 9:05 am–1:20 pm.

41. The District's response to this complaint stated that, since April 26, 2021, the Student continued to receive all of the specially designed instruction in her IEP, as well as access to all in-person general education opportunities. "These services include delivery of [specially designed instruction] in reading and math in a special education setting in the morning, and afternoons with her general education class, including delivery of [specially designed instruction] in social-emotional in the general education setting." When asked how those services had changed from the services in the hybrid model, the District stated they had not changed.

42. The Complainant stated that the IEP team determined the Student required a paraeducator to sit with her one-on-one during virtual instruction. The paraeducator was delivering specially designed instruction and providing support to help the Student access the remote instruction and general education instruction.

The District stated a paraeducator was available five days a week and they would provide the paraeducator five days a week if the Student was at the childcare center. But because the Student was not at the childcare center on Tuesdays or Wednesdays, the District did not provide the paraeducator on these days.

The Complainant stated the District refused to provide paraeducator support at any other location. Thus, the District made paraeducator support contingent on the Parents paying for the Student to attend the childcare center. The Complainant stated the paraeducator services could have been provided at the Student's home or at an alternative site at no-cost to the Parents. The Complainant provided as an example, a childcare program at the school site that is run by the District and provides supervision for K-5 student during hours the students were not in the in-person portion of hybrid school, including Tuesday mornings and all day Wednesdays.³

43. It is the District's position that it did not make provision of paraeducator services for the Student on Tuesdays and Wednesdays contingent on the Parent enrolling the Student in the childcare center on those days. The District responded:

The District offered to provide in-person paraeducator services to support Student's engagement in remote learning. Those services were educational in nature and cannot replace child care or supervision of the student, and health and safety constraints due to COVID-19 prevented their delivery in a home setting due to the lack of control the District would have over health and safety measures. In the absence of an appropriate setting to deliver these services, they were not provided.

44. It is also the District's position that paraeducator services could not be provided at the Student's school on Wednesdays because on that day, the school undergoes cleaning and sanitizing to comply with COVID-19 health and safety protocols. According to the District:

Educational staff are not present at [elementary school], nor are any students. Because the school is not staffed for student supervision on Wednesdays, it is not feasible to deliver in-person instruction or paraeducator support at [the school]. General education instruction on Wednesdays is entirely asynchronous, so Student is not missing any general education peer interactions on that day of the week.

45. The District also stated in its response that any failure to provide paraeducator support does not warrant the remedy requested by the Parents, as the Student has been successful in general education. The District's response stated the Student's present levels of performance in the February 2021 IEP show that the implementation of the previous annual IEP, as amended, was sufficient for the Student to make progress toward her IEP goals. The District noted, "Student did not meet either of the IEP's reading goals, but [Student's] rate of progress increased following the return to in-person instruction."

The District argued that since the IEP team determined in February 2021 that the Student qualifies for recovery services, OSPI should allow the IEP team to complete that individualized process, rather than make a general assumption about recovery services based on minutes of paraeducator support, particularly when the Student has already been offered all of the minutes of specially designed instruction in her IEP.

46. The District's last day of school for the 2020-2021 school year is June 22, 2021.

³ <https://bsd405.org/programs/boost/>

CONCLUSIONS

Issue One: IEP Implementation – The Complainant alleged that the District failed to follow procedures to implement the Student’s individualized education program (IEP) during the 2020–2021 school year, including considering the Student’s need for in-person services and the location of in-person services (i.e., at school, at childcare, or at home). Upon investigation, OSPI determined that the specific concern was the Student’s need for in-person supplemental services, specifically paraeducator support, to assist the Student in accessing remote instruction. The Complainant also raised a specific concern regarding the District’s cancellation of several days of reading services specified in the Student’s IEP.

Paraeducator Services: The Student attends a private, childcare center three days a week (Monday, Thursday, and Friday), and the other two weekdays (Tuesday and Wednesday), the Student does not attend childcare and is at home.

Since November 30, 2020, the District has provided one-on-one paraeducator support to assist the Student with online/remote instruction and asynchronous learning at her childcare center three days a week; the paraeducator also delivered some specially designed instruction while the Student accessed instruction at the childcare center. The provision of paraeducator support was discussed at a November 18, 2020 IEP meeting. OSPI finds that there is documentation that supports that the IEP team determined these services were necessary for the Student to access remote/online instruction. And, on November 20, 2020, the District’s director of special education (director) indicated that the District would provide the Student with paraeducator support five days a week. Later, during the February 12, 2021 IEP meeting, the IEP team also acknowledged that the Student was unable to effectively access remote instruction without paraeducator support and needed such services five days a week. Overall, the documentation indicates agreement that the Student required paraeducator support to access instruction and that the intent was to provide this support five days a week.

Despite these determinations, the District only provided paraeducator support during the Student’s remote learning on Monday, Thursdays, and Fridays when the Student was at a private, childcare center paid for by the Parents. The Student does not attend the childcare center on Tuesdays and Wednesdays, and the District and IEP team never identified a location for providing paraeducator services on those days. On Tuesdays and Wednesdays, the Parents supported the Student in accessing her remote instruction, and the documentation provided in the complaint indicated the Student generally accessed her remote reading services (except as discussed below) and math instruction. It is less clear how much of the Student’s general education class and social emotional instruction the Student was able to access, given the lack of paraeducator support. Thus, the Student did not have adequate access to remote/online instruction on Tuesdays and Wednesdays, given the lack of paraeducator support; however, it is difficult to determine the specific impact this lack of support had on the Student’s progress.

The Student’s schedule was confusing as there were several schedule changes that occurred during the period investigated. Based on the documentation, OSPI finds that between November 30, 2020 and January 15, 2021, except for the three days the Student attended school in-person

(December 13 and 14, 2020, and January 19, 2021), the District provided paraeducator support services to the Student. These paraeducator services were provided at the Student's childcare center on Mondays, Thursdays, and Fridays, from 9 am to 3:30 pm. Thus, OSPI concludes that during this period, the Student received 990 minutes per week of paraeducator support services to enable the Student to access her remote/online education. Beginning on January 22, 2021, the Student began attending in-person instruction at the school four days a week in the afternoons. During this time, the Student continued to receive paraeducator support in the mornings at her childcare center on Mondays, Thursdays, and Fridays, from 9 am to noon. Thus, OSPI concludes that, during this period, the Student received 540 minutes per week of paraeducator support services to enable the Student to access her remote/online education.

At the Student's February 12, 2021 IEP meeting, the team considered including the paraeducator minutes provided during the Student's remote instruction in the Student's IEP. But the team rejected that idea because the Student did not demonstrate a need for those services when she participated in in-person instruction with her teachers. At the same time, OSPI finds that from that date through April 23, 2021, the Student received 540 minutes per week of paraeducator support on Mondays, Thursdays and Fridays. On April 26, 2021, the Student began receiving full day instruction at school on Mondays, Tuesdays, Thursdays, and Fridays, and so no longer needed support to access a remote/online program those days. But the Student continued to have remote/online instruction on Wednesdays. And, as discussed above, the District never provided paraeducator support on Tuesdays or Wednesdays.

Because the Student's IEP team determined that paraeducator services were necessary for the Student to access remote/online instruction, these services and the amount provided should have been documented in the Student's IEP. However, the Student's IEP does not include any information about these paraeducator services. OSPI finds that the District failed to properly develop and implement an IEP for the Student with respect to paraeducator services, because the Student's December 18, 2020, February 12, 2021, and April 26, 2021 IEPs failed to include the paraeducator's service minutes in the Student's IEP, while at the same time, the District was providing some paraeducator support.

Further, OSPI found no evidence that the District attempted to identify and provide a District location or an alternative location where the paraeducator support services would be provided at no cost to the Parent on Tuesdays and Wednesdays. Stating that the services could only be provided at the childcare location, which the Parents had to pay for, is contrary to the IDEA and requirement to provide a *free* appropriate public education (FAPE). Therefore, OSPI concludes that the District inappropriately denied the Student a FAPE, because it conditioned provision of a needed supplemental service (two days of paraeducator support to enable the Student to access remote/online instruction) on the Parent enrolling the Student in private childcare on Tuesdays and Wednesdays, and the District failed to have the IEP team meaningfully consider whether there were other alternatives that could be provided at no cost that would enable the Student to receive that supplemental service.

Based on the above, OSPI concludes that the District failed to properly develop and implement an adequate IEP for the Student with respect to paraeducator support. OSPI finds a violation. The

District will be required to reevaluate the Student to assess the impact of the lack of paraeducator support and determine the Student's need for future paraeducator support. The District will also provide training regarding IEP development and implementation.

Reading Services

The Complainant also raised concerns about the District's provision of reading services while she was in online/remote instruction for all and part of her school day and alleged that the Student was not provided with all of the reading services indicated in her IEP. Beginning on October 2, 2020 through February 26, 2021, the IEPs in effect for the Student had two goals related to reading and the IEPs required the provision of 180 minutes per week of reading services to be provided by a special education teacher in a special education setting.

OSPI finds that after the Student transferred to her neighborhood elementary school on October 28 and until November 30, 2020, the Student did not receive any special education reading services.

Because the District's information was contradictory or unclear, OSPI finds the Parents' statements that the Student did not receive any reading services from the special education teacher on any Tuesday in December, January, or February, except for December 15, 2020, plus the documentation of canceled remote sessions, to be persuasive. Thus, OSPI concludes that five of the six school weeks from December 1, 2020 through January 22, 2021, the Student only received 165 minutes of reading services, not the 180 minutes required by the Student's IEP. Those five weeks the Student received: 30 minutes with the special education teacher online on Wednesdays and 135 minutes a week from a paraeducator in-person at the Student's childcare center (45 minutes every Monday, Thursday, and Friday). However, one week in that six-week period, the Student received 30 minutes of services online with the special education teacher on both Tuesday and Wednesday, December 15 and 16, 2021; thus, the Student receive 195 minutes of reading services.

Beginning on January 22, 2021, the Student's schedule changed to a hybrid model and the Student received remote instruction in the morning and attended school in-person in the afternoons. When in this hybrid program, between January 22 and February 23, 2021, the Student did not receive 180 minutes of reading services from a special education teacher. During that time period, the Student received 165 minutes of weekly reading services as follows:

- 30 minutes online with the special education teacher every Wednesday
- 45 minutes in-person with the special education teacher in person at school (15 minutes every Monday, Tuesday, and Thursday)
- 90 minutes with a paraprofessional in-person at the Student's childcare center (30 minutes every Monday, Thursday, and Friday)

The Student's new IEP developed on February 12, 2021 required 240 minutes of reading special education services to be implemented on and after February 26, 2021. Those services are to be provided 160 minutes a week with a paraeducator in special education and another 80 minutes per week with the special education teacher in special education. OSPI concludes that between

February 24, 2021 and April 26, 2021, the District's program to the Student provided for 240 minutes of reading services (165 minutes with a paraprofessional and 75 minutes with a special education teacher) as follows:

- 90 minutes with a paraeducator in-person at the Student's childcare center (30 minutes every Monday, Thursday, and Friday morning)
- 45 minutes in-person with the paraeducator every Friday afternoon
- 30 minutes online with a paraeducator every Tuesday
- 30 minutes online with the special education teacher every Wednesday
- 45 minutes in-person with the special education teacher in-person at school (15 minutes every Monday, Tuesday, and Thursday)

The District indicated that the special education services provided to the Student have not changed since the Student began attending school full days, in person on Mondays, Tuesdays, Thursdays, and Fridays on April 26, 2021. However, OSPI does not find that information to be credible since prior to that date, the Student had been receiving 90 minutes of reading services by a paraeducator at the Student's childcare center. The District did not provide any information to clarify how those services are currently being provided.

Based on the above, OSPI concludes that the District failed to implement the Student's reading services for four weeks after the October 2020 IEP was to be implemented, which resulted in the Student missing 720 minutes of special education reading services. And, between December 1, 2020 and February 23, 2021, the District failed to provide 15 minutes of the Student's 180 reading service minutes each week for ten weeks, but provided 15 minutes of extra reading services one week (resulting in 135 missed minutes). In all, she missed 855 (14.25 hours) minutes of reading services. Additionally, OSPI finds that some of the services that were delivered by a paraeducator, not by a special education teacher as indicated in the IEP. Considering all factors, OSPI concludes that these were not minor discrepancies, and the District materially failed to implement the Student's IEP with respect to reading services.

The District will be required to provide compensatory reading services. Because the Student was provided some reading services and because the documentation, including the Student's updated annual IEP, indicated she was making progress on her IEP goals, the District will be required to provide approximately one half of the missed time or 7 hours, in addition to any recovery services deemed necessary by the IEP team.

CORRECTIVE ACTIONS

By or before **June 30, 2021, August 30, 2021, September 10, 2021, November 5, 2021, and December 3, 2021**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Compensatory Services

By or before **June 30, 2021**, the Parent and District will develop a schedule and plan for **seven hours of compensatory reading services**.

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

Unless otherwise agreed to by the District and Parent, services will be provided by a certified special education teacher or related service provider. Services may be provided in a 1:1 setting or a group setting, if appropriate. The District will provide OSPI with documentation of the schedule for services by or before **June 30, 2021**.

If the District's provider is unable to attend a scheduled session, the session must be rescheduled. If the Student is absent, or otherwise does not attend a session without providing the District or provider with at least 24 hours' notice of the absence, the session does not need to be rescheduled. The services must be completed no later than **October 30, 2021**.

By or before **November 5, 2021**, the District must provide OSPI with documentation that it has completed compensatory services for the Student.

The District either must provide the transportation necessary for the Student to access these services or reimburse the Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must provide reimbursement for round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **November 5, 2021**.

Evaluation

By **September 3, 2021**, the District will identify an evaluator (the evaluator may be an employee of the District), who is qualified to conduct an **educational** evaluation of the Student. Also, by **September 3, 2021**, the District will obtain any necessary, written informed consent from the Parents to conduct the evaluation.

By **September 10, 2021**, the District shall provide OSPI with the name and qualifications of the evaluator. At minimum, the evaluation should include the following:

- An assessment of the Student's present levels of performance,
- An evaluation of progress made by the Student on her IEP goals during any summer 2021 recovery services and the above compensatory reading services,
- A review of data or assessments to determine the impact the lack of paraeducator support in accessing remote learning during the 2020-2021 school year,
- A review of data or assessments to determine the Student's need for ongoing paraeducator support, if any,
- Recommendations to the IEP team regarding ongoing paraeducator support, and,
- Recommendations to the IEP team regarding whether the Student requires additional compensatory education.

The evaluator may also make recommendations regarding modifications to the Student's IEP, if appropriate. The evaluation should be completed no later than **October 25, 2021**.⁴ By **November 25, 2021**, the District must hold an IEP team meeting, which includes the Parents, to review the results of the evaluation and make any recommendations regarding compensatory services or modifications to the Student's IEP.

By **December 3, 2021**, the District must provide OSPI with a copy of: 1) the evaluation; 2) prior written notice; 3) revised IEP, if applicable; and, 4) any recommended compensatory services by the IEP team.

By December 10, 2021, OSPI will review the documentation provided by the District and determine if any additional compensatory education services are required to remedy the violations identified in this complaint in light of the data obtained on the Student regarding progress made.

DISTRICT SPECIFIC:

Training

By **October 30, 2021**, the District will conduct training for District special education administrators and special education certificated staff, including special education teachers and paraeducators, and principals/assistant principals at the Student's elementary school. The training will include the following topics:

- **Prior Written Notice – Required Elements:** Documentation of options considered and rejected, documenting reasons, and examples. Note: The District may use the prior written notice training module developed by OSPI special education division and eLearning for Educators in Canvas, an online learning management system, for the prior written notice component of the training. The free module can be found at <https://www.evergreen.edu/elearningforeducators/elearning-educators>.
- **IEP Services:** Documenting all services and supplemental services, including service providers and setting, and examples of supplementary aids and services, such as paraeducators provided to access general education, nonacademic services, or online/remote instruction. Training should include when IEPs should be amended to include services that are being provided.
- **IEP Implementation:** Providing supplemental services, supports, and accommodations; providing services as written in the IEP and including best practices for remote or hybrid setting (if remote settings are available in the 2021-2022 school year).

OSPI encourages the District to work with ESD 121 to develop the training materials.

By **August 30, 2021**, the District will submit a draft of the training materials to OSPI for review. The training materials will include examples. OSPI will approve the materials or provide comments by September 10, 2021 and additional dates for review, if needed.

⁴ Note, OSPI has given the District 35 school days to complete the evaluation, although OSPI encourages the District to complete the evaluation in fewer days if possible. OSPI has factored in the two no school days on the District's 2021-2022 calendar (September 6, 2021 and October 8, 2021).

By **November 5, 2021**, the District will submit documentation that staff participated in the training. This will include: 1) a sign-in sheet or screenshot of zoom attendees; and, 2) a roster of who should have attended so OSPI can verify that staff participated.

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 June, 2021

Glenna Gallo, M.S., M.B.A.
Assistant Superintendent
Special Education
PO BOX 47200
Olympia, WA 98504-7200

THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

IDEA provides mechanisms for resolution of disputes affecting the rights of special education students. This decision may not be appealed. However, parents (or adult students) and school districts may raise any matter addressed in this decision that pertains to the identification, evaluation, placement, or provision of FAPE to a student in a due process hearing. Decisions issued in due process hearings may be appealed. Statutes of limitations apply to due process hearings. Parties should consult legal counsel for more information about filing a due process hearing. Parents (or adult students) and districts may also use the mediation process to resolve disputes. The state regulations addressing mediation and due process hearings are found at WAC 392-172A-05060 through 05075 (mediation) and WAC 392-172A-05080 through 05125 (due process hearings.)