

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 21-44

PROCEDURAL HISTORY

On June 4, 2021, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Sumner-Bonney Lake 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 4, 2021, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District Superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On June 16, 2021, OSPI received a request for an extension to the District's response. OSPI requested the District submit its response no later than June 29, 2021.

On June 30, 2021, OSPI received the District's response to the complaint and forwarded it to the Parent on July 1, 2021. OSPI invited the Parent to reply.

On July 14, 2021, OSPI received the Parent's reply. OSPI forwarded it to the District the same day.

On July 7, 2021, the Parent submitted another special education complaint with information that overlapped with some of the dates and issues in this complaint. That same day, OSPI informed the Parent and District that it would consider that information as additional information in its investigation for this complaint. OSPI also opened a new complaint to investigate the additional allegations that occurred outside the timeframe for this complaint.

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

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on December 9, 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.

ISSUES

1. Did the District implement the Student's Individualized Education Program (IEP) in the least restrictive environment (LRE), including the Behavioral Intervention Plan (BIP) from December 9, 2020 through January 20, 2021?¹

¹ On July 7, 2021, the Parent submitted a new complaint that included an allegation that the District did not implement the Student's IEP on December 16, 2020. That allegation was included as additional information in this complaint, as it falls within the scope and timeframe of issue one.

2. Did the District follow procedures to develop the Student's IEP from December 9, 2020 through January 20, 2021, including considering the Student's LRE and concerns about in-person instruction?
3. Did the District follow procedures regarding prior written notice (PWN) in December 2020?

LEGAL STANDARDS

IEP Implementation: At the beginning of each school year, each district must have in effect an individualized education program (IEP) for every student within its jurisdiction served through enrollment who is eligible to receive special education services. A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. The initial IEP must be implemented as soon as possible after it is developed. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §§300.320 through 300.328; WAC 392-172A-03090 through 392-172A-03115. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (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.

IEP Development for a Student with Behavioral Needs: In developing, reviewing and revising each student's IEP, the team must consider the use of positive behavioral interventions and supports and other strategies to address the student's behavior. 34 CFR §300.324(a)(2); WAC 392-172A-03110(2). This means that in most cases in which a student's behavior impedes his or her learning or that of others, and can be readily anticipated to be repetitive, proper development of the student's IEP will include positive behavioral interventions, strategies, and supports to address that behavior. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,475, 12,479 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 38). If an IEP team determines that they would be appropriate for a child, a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) must be used proactively. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-1 and E-2).

Least Restrictive Environment & Placement: School districts shall ensure that the provision of services to each student eligible for special education, including preschool students and students in public or private institutions or other care facilities, shall be provided: 1) To the maximum extent appropriate in the general education environment with students who are nondisabled; and 2) Special classes, separate schooling or other removal of students eligible for special education from the general educational environment occurs only if the nature or severity of the disability is such

that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.114; WAC 392-172A-02050.

A student's IEP team has the responsibility to determine the student's least restrictive environment (LRE) and must consider the following factors when making the determination: the educational benefits to the student of a placement in a general education classroom; the nonacademic benefits of interaction with students who are not disabled; the effect of the student's presence on the teacher and other students in the classroom; and, the cost of mainstreaming the student in a general education classroom. *Sacramento City Unified School District, Board of Education v. Rachel Holland*, 14 F.3d 1398, 1400 (9th Cir. 1994).

Educational placement decisions must be determined annually, or sooner if appropriate, and be made by a group of persons, including the parents, and other persons knowledgeable about the student, the evaluation data, and the placement options that provide a reasonably high probability of assisting the student to attain his or her annual goals, and a consideration of any potential harmful effect on the student or on the quality of services the student needs, based on the student's IEP and LRE requirements. A student should not be removed from his or her age-appropriate general education classroom solely because of needed modifications in the general education curriculum. 34 CFR §300.116; WAC 392-172A-02060. Districts must ensure that students eligible for special education participate in nonacademic and extracurricular services and activities to the maximum extent appropriate to the needs of each student. 34 CFR §300.117; WAC 392-172A-02065.

Prior Written Notice: Written notice must be provided to the parents of a student eligible for special education, or referred for special education a reasonable time before the school district: (a) Proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student; or (b) Refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student. The notice must include: (a) a description of the action proposed or refused by the agency; (b) an explanation of why the agency proposes or refuses to take the action; (c) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (d) a statement that the parents of a student eligible or referred for special education have protection under the procedural safeguards and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; (e) sources for parents to contact to obtain assistance in understanding the procedural safeguards and the contents of the notice; (f) a description of other options that the IEP team considered and the reasons why those options were rejected; and (g) a description of other factors that are relevant to the agency's proposal or refusal. 34 CFR 300.503; WAC 392-172A-05010.

FINDINGS OF FACT

1. At the commencement of the 2020–2021 school year, the Student was eligible for special education services under the category of other health impairment, was in the first grade, and attended an elementary school in the District.

The Student's December 2019 individualized education program (IEP)² was in effect at the start of the school year, which provided the Student with the following specially designed instruction, to be delivered by a paraeducator/special education staff in the *special education setting*:

- Social skills, 20 minutes 4 times weekly
- Social skills, 20 minutes, 1 time weekly³
- Behavior, 20 minutes, 5 times weekly

The Student was supported by a functional behavioral assessment (FBA) and behavioral intervention plan (BIP)⁴. The BIP addressed target behaviors of disruptive behaviors and noncompliance, including elopement. In the distance learning environment, the Student's BIP provided the following:

- Block Student's ability to change her name.
- Allowance of co-host into Zoom settings with the Student to permit adult to redirect Student's behavior using private chat.
- Clearly communicated expectations for behavior on Zoom using visual supports in advance of classes.
- Expectations for taking a break in the distance learning environment taught in a 1:1 setting when the Student is not escalated.
- Positive reinforcement frequently provided when the Student is demonstrating behavior expectations.

The BIP included several other setting and antecedent strategies, including consistent structure, expectations and rules, pre-teaching, and providing opportunities for the Student to practice her break plans as proscribed in the BIP in a 1:1 setting, as well as opportunities to practice other functional communication skills provided in the BIP in a 1:1 setting, and providing other visual interventions and tools during transitions and when giving reminders and warnings about changes in the schedule.

The Student's IEP additionally indicated the Student received 1:1 paraeducator support for 356 minutes, five times weekly in the general education setting to support the Student's academics and implementation of the BIP. The Student spent approximately 89% of her time in the general education setting.

2. On October 15, 2020, an IEP meeting was held to discuss the Parent's request that the Student receive in-person services for five full days. According to a prior written notice (PWN) issued by the District on October 23, 2020, the IEP team decided to begin providing the Student in-

² The Student's IEP was amended on May 13, 2020.

³ Social skills appeared twice on the Student's service matrix for the same time period. While it is unclear why, this did not appear to be a material issue in the Parent's complaint.

⁴ The FBA was completed on December 3, 2019. The BIP was completed on December 17, 2019 and reviewed on December 14, 2020.

person learning four days a week for 2.5 hours each day,⁵ Tuesday through Friday, with a 1:1 paraeducator at the District elementary school due to the impact of the distance learning model on the Student's behaviors. The remainder of the Student's general education instruction would be provided during asynchronous and synchronous opportunities remotely with 1:1 paraeducator support.

3. In support of the Student's IEP and BIP, the District stated in its response that it implemented the following:
 - Set-up for the Student's in-person work center to include workspace, physical boundaries, taped off areas to show student area/teacher area, plexiglass placed between student & teacher area, break area, purchased break items and timer, extra masks;
 - Visuals created for in-person learning;
 - Visual training for the Parent on 11/2/20 via Zoom;
 - Behavior and data training on 11/2/20 for paraeducator, conducted in-person with the District behavior specialist;
 - Desk visuals of behavior expectations;
 - Break space and visual "break plan";
 - Laminated visual tools for paraeducators to use with the Student for behaviors and breaks;
 - Laminated desk visuals to indicate the Student's area and teacher's area;
 - Laminated reflection process;
 - Additional training for both paraeducators on supporting the Student in person (including elopement/mask compliance);
 - New social stories created on social distancing, wearing a mask, COVID procedures at school;
 - Paraeducators and administrators provided with new lanyard visuals with social distancing and mask compliance included; and,
 - New token board created to include social distancing and mask compliance.
4. On November 3, 2020, the Student began receiving in-person services for somewhere between two and 2.5 hours per day⁶ per day at school, Tuesdays through Fridays, as decided by the Student's IEP team in October 2020.
5. During November, the Student's general education classes occurred during synchronous Zoom calls and asynchronous learning. During non in-person synchronous learning, the Student reportedly had difficulty self-regulating during Zoom classes that lasted longer than 30 minutes. The Parent regularly communicated with the District regarding her concerns about the Student's schedule.

⁵ In her reply, the Parent noted that although the IEP team determined the Student would attend school in person for 2.5 hours per day, four days a week, that she was asked to bring the Student from 8:15-10:00 am, which resulted in the Student attending in-person instruction 2.25 hours per day, or nine hours per week. The Parent stated she asked about this at the December 14, 2020 IEP meeting and was told that because any difference did not impact minutes of delivery of specially designed instruction, that the time would not be made up.

⁶ Again, in her reply, the Parent stated that in December, she was asked to bring the Student in 15 minutes later than when the class was supposed to start, which resulted in the Student receiving an hour less of in-person time than agreed upon by the IEP team.

6. On November 30, 2020, the District sent the Parent an invitation for an IEP meeting scheduled for the first week of December 2020 to discuss her concerns. The District also sent the Parents an IEP parent input form to fill out.
7. On December 4, 2020, the Parents returned their IEP input form. The District also notified the Parents it needed to reschedule the IEP meeting and the meeting accordingly was rescheduled for December 14, 2020.

The timeline for this complaint began on December 9, 2020

8. On December 10, 2020, the Parent emailed the District's learning and behavior specialists, expressing concerns regarding the Student's 60-minute general education Zoom classes, noting the Student appeared to do better with the smaller Zoom classes that were not back to back. In response to the Parent concerns, the behavior specialist scheduled a meeting with the Parent.
9. On December 11, 2020, the behavior specialist met with the Parent in person, and according to the District's response,
suggested...that the team temporarily remove the student from the 60 minute 8:30-9:30 a.m. general education class Zoom...and provide the student's general education work in person with special education staff while implementing the behavior plan and while student is completing general education work to reset the student's behavior and ensure her physical safety in the in-person environment⁷ as a temporary intervention.

The District's response explained that, "The Student would remain in all other general education Zoom sessions...that were 30 minute Zoom sessions", and added that, "The parent verbally agreed to the trial intervention in person when the District Behavior Specialist and Parent met at the pick-up after school." In her reply to the District's response, the Parent stated that she did not "verbally agree" to the trial intervention, but instead relayed that she was informed of the trial interventions only after they had already begun. The Parent expressed that an "exit strategy" was not shared with her and that she believed the proper strategy to address the Student's difficulty with Zoom sessions was to provide in-person services by trained providers.

10. On December 14, 2020, the Student began being removed from her general education Zoom to work in person with special education staff who implemented the BIP while the Student was completing general education curriculum. According to the District, during this time, staff worked to help "reset" behaviors and on establishing safety routines around COVID-19 procedures.

⁷ On December 8, 2020, the Student removed her mask for the third time in close proximity to staff and eloped. This behavior was documented as "unsafe", which was necessary to address to ensure the safety of the Student and others during in-person learning.

11. Also, on December 14, 2020, the Student's IEP team met to discuss the Parent's concerns about in-person learning and to conduct the beginning of the Student's annual IEP review. All required team members attended, including the Parents. The IEP team noted the Student had made some progress on some goals in the area of social skills and behavior via Zoom, but concerns were raised about the rate of progress and possible regression on some skills. Due to the number of topics covered during the meeting, the IEP team agreed to continue the meeting and follow up on all questions, including those related to the BIP, at a follow up IEP meeting in January 2021. Meeting notes kept during the meeting captured some of the concerns raised, including:

- **Return to in-person:** The Parents requested the Student return for five full days of in-person services, including 1:1 behavior support by a paraeducator and all accommodations. It was noted that the Parents had stated the District had agreed to 2.5 hours of in-person services Tuesday through Friday, but the Parents believed this to be one hour less per week than the amount of instruction they felt the Student was scheduled to receive, and asked how the Student would receive the remaining amount of instruction time if not in person.
- **Structure of Zoom Classes:** The Parents requested the team confirm the duration of the afternoon Zoom session (20 or 30 minutes), the purpose of the Zoom session, and what options the 1:1 paraeducator has other than to end the Zoom prematurely when the Student was struggling according to the Student's BIP (Parent relayed that the Student saw this as "quitting on her."). The Parents additionally requested the agreed upon structure for responding to the Student's behaviors be communicated to the 1:1 paraeducator.
- **Asynchronous work:** The Parents expressed confusion over what asynchronous work needed to be done during in-person services and what the expectations were for completion of work at home during daily Zoom. The Parents noted the Student continued to struggle in her Zooms, saying that "Trying to sit through them exhaust [Student] to the point that we struggle to get her asynchronous work complete..." They asked, "Are there any other methods of helping her sit through her Zooms? While in distance learning, what should we prioritize for her?" The Parents asked for confirmation regarding where and with whom asynchronous work was to occur, as well as what was to be completed during that time.
- **General education:** The Parent wrote that "Starting Wednesday, December 9, 2020, [Student] has not attended her 60 minutes General Education Zoom 8:30 AM to 9:30 AM on Tuesdays to Fridays at in-person services. This would mean in a week she has five potential hours of General Education Zooms with her General Education Teacher and is only attending 20%. If it is appropriate to add in the two 30 minute Specialist Zooms, then she is at 33%. Adding the 45 minute WIN Zooms led by her 1:1 brings her to 55%, though not with her entire class. Regardless of how it is counted, it does not add up to the 73.03% in a general education setting as stated in her [draft] IEP that we discussed on December 14, 2020, nor the 88.76% in her previous IEP. Now, several of us have discussed how [Student] struggles in Zooms longer than 30 minutes and in Zooms longer than 30 minutes and in Zooms with large groups. Back to back Zooms might as well be counted as one long Zoom, like the 90 minutes expected of her on Mondays. How can we meet what is written in her IEP but also meet her needs?"
- **Extended School Year (ESY) services:** The Parents requested to discuss ESY based on regression documented in recent IEP goal progress reports, and to discuss available options.
- **Least Restrictive Environment:** The Parents requested to review the percentage of time the Student was spending in the general education setting to determine if it was accurately stated in the Student's IEP.

- **BIP:** The Parent raised several questions related to the Student's BIP regarding what the Student's intervention, including de-escalation plan, looked like in the remote setting.
12. On December 16, 2020, the District sent the Parent a draft copy of the revised BIP that was drafted by the behavior specialist. After receiving the draft copy of the BIP, the Parents responded with questions about how the revised BIP would be used in the remote setting. It was agreed the questions would be discussed at the upcoming IEP meeting.
 13. On December 18, 2020, the Student's case manager went on leave for the remainder of the school year.
 14. The District was on winter break from December 21, 2020 through January 1, 2021.
 15. On January 7, 2021, the Student's IEP team reconvened to complete the Student's annual review. The IEP team decided to change some of the Student's goals in social and behavior, added minutes of specially designed instruction in social skills and behavior to address concerns about the Student's rate of progress and regression,⁸ and agreed to the Parent's request for ESY services. The IEP team rejected the Parent's request to return the Student to full time in-person learning and to change the LRE statement, confirming that it believed it accurately described the Student's LRE. The IEP team agreed to meet again in February to determine if the Student required additional in-person services based on data. The Parents did not agree with the IEP team's decision.

At the meeting, the behavior specialist confirmed the removal from the 8:30-9:30 am Zoom session was a temporary intervention to work on reinforcing the Student's BIP agreed to by the Student's educational team, and that the team would begin reintroducing the Student to Zoom the following week, unless the Student's schedule changed due to the District's reopening plan to include more in-person time for all students. The Parent asked if the intervention needed to be included in the IEP matrix page. The director, who was present at the meeting, shared with the Parent that it would not need to be included on the IEP matrix because it was a short-term intervention, but added that if the intervention became long-term, it would need to be decided on by the IEP team members and at that point, if agreed upon, would be included in the IEP.

The behavior specialist shared a document with the IEP team members that, in addition to answering the question about the temporary behavior intervention, provided written

⁸ The IEP team increased the Student's service minutes to 45 minutes, four times weekly in behavior, and 60 minutes, five times weekly in social skills, to be provided by a paraeducator. The IEP specified that specially designed instruction in behavior would be provided daily in a 45-minute block, and that social skills could be broken into 10 to 15 minute segments provided throughout the day. The IEP provided that all specially designed instruction would be provided in the special education setting. The IEP continued to provide the Student with full time 1:1 paraeducator support in the general education setting. The increase in service minutes changed the Student's LRE so that she would spend approximately 73% of her day in the general education setting.

questions asked by the Parents and responses prepared by the behavior specialist regarding implementation of the Student's BIP. These included:

Parent: Adult Proximity is the third highest antecedent [on Student's BIP]. Would this be so high on the list because [Student] has more than one adult attending to her at in-person services, and then sometimes up to three and four? I understand training takes time, but what is the plan to reduce this number to one adult to one student?

District: In the in-person learning environment there is only one person working with [Student] at a time. The other two adults are out of her line of sight until needed. A fade plan will begin on 1/11. The two paras will be in the classroom alone with the District Behavior Specialist on site.

Parent: What does the predesignated area look like in the distance learning/Zoom environment?

District: Currently [Student] is receiving in person services while attending her general education class using Zoom (with the exception of specialist). Her predesignated area is a break table with a bin of break items, timer, and a break visual. In Zoom the break area can be a breakout room with her 1:1 paraeducator.

Parent: What is proximity supervision [on Student's BIP] and what does it look like in both in-person and distance learning/Zoom environments?

District: The wording for this strategy has been changed to 'Provide support during small groups to assist with peer cooperation.' Both in person and Zoom this strategy will be supported by the 1:1 [paraeducator].

Parent: Antecedent strategies...How is [Student] to be moved into a Zoom breakout room with her 1:1 when her 1:1 is teaching the WIN group? [Student] has not had access to her 1:1 in WIN starting Tuesday, November 17, 2020 because [paraeducator] is teaching a group, which greatly impacts her ability to focus on [Student] when she struggles...My concern is that the role of [Student's] 1:1 is not being 100% filled during this 45 minute WIN Zoom Tuesdays-Fridays.

District: Per administrator: At least two adults will be present when there are additional students in WIN. Either adult can support [Student's] 1:1 when needed.

Parent: What is the district approved curriculum for teaching appropriate physical boundaries?

District: The case manager will decide the appropriate strategy to address appropriate physical boundaries. More than one curriculum may be used. Circles has been one of the curriculums used.

Parent: There are several instances of pre teaching and practicing in a 1:1 setting. When is this planned to occur?

District: Teaching strategies are provided by special education staff. Strategies are practiced in the general education and special education setting with the support of the 1:1 paraeducator.

Parent: What are the supervised opportunities for practicing pro-social skills and appropriate decision-making strategies with peers in a small group setting planned to occur?

District: Opportunities to practice new skills are practiced throughout the school day in multiple environments with support of the 1:1 [paraeducator]. During distance learning they are currently practiced in WIN.

Parent: What do [consequence strategies listed in BIP] look like in distance learning? For example, how is the visual reflection sheet that [Student] is supposed to write on used on chat or in a breakout room? Can [Student] see it? Does [Student] type into it or does the adult scribe to avoid [Student] becoming frustrated with her rudimentary typing skills?

District Currently [Student] is asked the questions on the reflection sheet either in person or in Zoom and the adult scribes her answers. In person, she can see the sheet.

Parent: Chat logs – Can/do you view exiting chat logs and discuss other ways of responding to [Student’s] chats?

District: Staff does not have the ability to save chats. Escalations in Zoom are debriefed by the team each day to ensure the interventions provided are meeting the student’s needs.

Parent: How does space work in a distance learning/Zoom environment?

District: [Student] has asked for space in the Zoom environment and staff has provided her space by giving her the opportunity to think about the request or academic demand without providing additional demands. At times [Student] has also asked to turn off her camera. When she makes the request appropriately, staff honors her communication.

Parent: Please explain when and how is appropriate to perform the following strategies, which have been used this school year in distance learning:

Mute [Student] so that she cannot unmute herself:

District: All students in the general education class are muted when the adult is speaking/teaching.

Turn off [Student’s] ability to chat with anyone, most importantly, her 1:1:

District: [Student’s] ability to chat with her 1:1 is available now. Initially there was some technology issues that have been resolved. No students in the general education classroom are permitted to message one another.

Do not reply to [Student’s] chat messages:

District: Adults respond to [Student] when she uses the chat feature appropriately. They do not respond to attention seeking behaviors.

Move [Student] into a breakout room without an adult:

District: [Student] has not been moved to a breakout room without an adult. She has been moved to the waiting room in the past. This is not part of her BIP and additional training has been provided to staff to ensure she is provided support by an adult.

Move [Student] into a breakout room with an adult:

District: This strategy is appropriate when [Student] requests a break or demonstrates the target behavior and staff are working with her to support her replacement behavior.

Prematurely end the Zoom for [Student] (i.e., kick her out of the class or group Zoom or end the 1:1 Zoom early):

District expressed it would need more information to answer this question.

Regarding the Parent’s concerns that the Student had been receiving 15 minutes less of in-person support than agreed to at the October 2020 IEP meeting and in response to the Parent’s request that the District “make up” the time, the District explained its position that it

was only required to ensure it delivered agreed upon special education minutes in person and that those minutes had been provided "in person, synchronously, and asynchronously."

16. On January 11, 2021, the Parents emailed the director their notes from the IEP meeting, along with their list of concerns. They asked that the concerns be added to the PWN. The Parents additionally highlighted their dissent of the team's rejection of their request that the Student attend school in-person for five days a week. They added that they did not understand how "all 480 service minutes of behavior and social skills services/[specially designed instruction] will be delivered in just two days of in-person school per week" and that, "The Parents do not understand how reducing in-person time with the Student's 1:1 paraeducator will strengthen their rocky relationship." The Parents added that, "Parents were informed at pick up on Friday, January 8, 2021 that the Student does not trust her 1:1 paraeducator and runs away/elopes when left alone in the room with her," and that they had spoken to the Student about how she felt about her paraeducator and said that the Student answered the paraeducator "does not talk very much or at all when they are left alone together at school, which leads her to being afraid [paraeducator] will take her away from her at school and bring her home, tie her up, and take all our things." The Parents wrote that they did not know if what the Student expressed was a "six-year-old's imaginative way to keep [paraeducator] at arm's length because she actually fears [paraeducator] will leave just like her previous 1:1 paraeducators...but if it is, then spending more time together than apart sounds like what is needed to strengthen their relationship and increase trust."

17. Also, on January 11, 2021, the principal responded to the Parent that regarding her first concerns about only attending two days per week by stating:

We would like to start with the A/B [two day] schedule since [Student] will be attending full school days and this is a transition to in-person learning with peers. At the meeting, we discussed we would like to give her time to adjust to this transition prior to adding time on her asynchronous days...We can look at scheduling a meeting after the A/B schedule starts to look at adding in-person time on her asynchronous days. My suggestion would be that we meet after two weeks of in-person learning, which would be the week of February 1. Please let me know your availability Monday-Wednesday that week.

The principal additionally thanked the Parent for raising concerns regarding the paraeducator and noted she would continue to work on building the Student's relationship with the paraeducator. The Parent responded with her availability and a meeting was scheduled for February 1, 2021.

18. On January 11, 2021, the District began fading the temporary behavior intervention support of having the Student receive general education curriculum in the special education setting and began to return her to her general education class with the 1:1 paraeducator.

19. On January 12, 2021, the behavior specialist responded to the Parent's concerns regarding the paraeducator to confirm that the paraeducator was never left alone with the Student. She added that,

when the two of them are alone, [special education teacher] and I are outside the door and the door is open (or cracked) and she can see us. Also, [paraeducator] talks with [Student]

as much as [general education teacher] and I do. They have some really great conversations! As I said in our check in the other day, [Student] said it was because she didn't trust [paraeducator] but I believe she may have been attempting to manipulate us. I do agree that having consistency with [paraeducator] and spending more time with her 1:1 will be helpful moving forward.

20. On January 13, 2021, the District experienced a power outage that impacted the delivery of services, including to the Student. The Student did not receive any in-person special education services or remote Zoom general education instruction.
21. On January 14 and 15, 2021, only asynchronous learning opportunities were provided to all students to enable teachers to prepare and transition for in-person learning for all students that was scheduled to begin on January 20, 2021.
22. On January 15, 2021, the director emailed the Parent to inform the Parent the PWN would be emailed to her the following week. In its response, the District acknowledged this did not occur, and that following this delay, the director "spoke with the new case manager to discuss that moving forward the case manager will complete all PWN and can send them to the Director for review if the Director was present at the meeting."
23. On January 18, 2021, the District was closed in observance of Martin Luther King Day.
24. On January 20, 2021, the District moved into stage three of its reopening plan, whereby all students at the elementary school returned to in-person learning on a hybrid schedule for two full days a week. When the District's schedule changed, the District changed the Student's schedule so that the Student was attending school in-person for a full day on Wednesdays and Fridays instead of for two hours every Tuesday through Friday. According to the District's response, the change in schedule increased the Student's in-person time from 10 hours a week to 13 hours a week. However, in her reply to the District's response, the Parent expressed concern that the new schedule resulted in the Student receiving more general education support during in-person service but receiving less in-person support for her minutes of specially designed instruction, which per the October IEP meeting, was one of the reasons of receiving in-person instruction four days per week.
25. On January 25, 2021, the District sent the Parent PWN, documenting the IEP meetings held on December 14, 2020 and January 7, 2021. The PWN documented the IEP team's observation that the Student "has demonstrated some progress in some of her IEP goals via Zoom in Social and Behavior Skills," and the team's decisions to (1) change IEP goals in the areas of social and behavior skills, (2) add service minutes in social and behavior, and (3) add ESY services to the Student's IEP. The PWN explained that the change in IEP goals was needed to "better reflect [Student's] present levels and current needs as determined by the IEP team as [Student] returns for hybrid learning," (defined in the PWN as "some in person services, synchronous and asynchronous learning"), that the increase in service minutes was needed because despite the Student having made some progress, the Student "has not made the progress the team would like her to make," and that ESY services were added because regression had been

observed in one or more goals and in others where some progress had been made, it was not at the rate desired by the IEP team.

The PWN additionally noted the IEP team rejected the Parent's request to return the Student to full time in-person learning and to change the LRE service matrix and description in the current IEP to match the previous IEP. The reason provided on the PWN for rejecting the Parent's request for full time in-person learning was that "there is a global pandemic due to COVID. [Student] has been attending four days a week for approximately two hours per day to work with her 1:1 para. Students have returned to hybrid learning on 1/19/2021 and [Student] is attending." The PWN stated "the team will meet again in February to determine if additional in-person time will be added based on individual data." Regarding the Parent's request to change the matrix and LRE statement, the PWN stated the team felt the current matrix and statement accurately reflected current information.

To inform its decision, the PWN stated the team considered the following information: "evaluation, functional behavior assessment followed by a behavior intervention plan, classroom observations and in person services, Teacher and Learning Specialist input and collaboration, Parent input and collaboration." The PWN added that the Parent had requested a copy of notes from the IEP meeting and a copy of responses to questions raised about the BIP, which were provided to the Parent, and that the Parent had requested general education time be made up but that it was explained that "special education minutes are what special education is required to occur in person, synchronously, and, asynchronously, and that they have been met."

In her reply, the Parent relayed concerns with the timeliness of the PWN (provided January 24, 2021) and highlighted the implementation date listed (December 17, 2020).

26. In its response, the District stated that during the transition to hybrid learning that occurred from January 20 to February 23, 2021, the Student was provided 30 minutes of specially designed instruction in social skills and 45 minutes of specially designed instruction in behavior via Zoom, delivered by the Student's 1:1 paraeducator. The Student received an additional 30 minutes of specially designed instruction during asynchronous time. The District added that it also "provided 60 minutes of social skills [specially designed instruction] using Second Step and supplemental lessons" and provided "45 minutes of behavior [specially designed instruction] using Zones of regulation or supported documentation to reteach skills around the use of [Student's] behavior supports (i.e., break plan)."
27. According to the District's response, the total amount of time the Student was removed from the 8:30–9:30 general education Zoom sessions as a trial intervention was 10 hours. In her reply to the District's response, the Parent stated that she felt the District's calculation of hours missed was incorrect and did not account for a Zoom session the Student did not attend because the Parent picked up the Student from in-person services early.⁹ The Parent also

⁹ In her reply to the District's response, the Parent stated that documentation she maintained showed that she picked up the Student early on December 9, 2020 Zoom.

provided two examples where she had documented the Student attended her general education Zoom sessions at home (December 14, 2020 and January 11, 2021). In her reply, the Parent added that she felt the Student was not in her LRE due to being unable to access her general education classes: the Parent wrote that she believed the Student was only in her LRE 33% of the time, and that even if the District's calculations of the amount of time of general education hours were accurate, this "still only leaves the Student at 33% in the LRE of her general education setting and not 88% as prescribed by her IEP."

CONCLUSIONS

Issue One – IEP Implementation: The Parent alleged the District did not implement the Student's individualized education program (IEP) in the least restrictive environment (LRE), including the Student's behavioral intervention plan (BIP), from December 9, 2020 through January 20, 2021.

At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. School districts shall ensure that the provision of services to each student eligible for special education shall be provided to the maximum extent appropriate in the general education environment with students without disabilities and that special classes and removal of students eligible for special education from the general educational environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily. 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 student's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a student with a disability and those required by the IEP.

BIP and Temporary Behavior Intervention

On December 9, 2020, the Student's December 2019 IEP was in effect and provided the Student with 200 minutes (3.3 hours) weekly of specially designed instruction in behavior and social skills (100 minutes in each area), which were to be delivered in the special education setting. The December 2019 IEP additionally provided the Student with full time 1:1 paraeducator support in the general education setting as a related service. In October 2020, to address the impact of distance learning on the Student's behavior, the Student's IEP team decided the Student needed in-person instruction for 2.5 hours a day, four days a week (10 hours). When not receiving in-person instruction, the Student was to receive instruction remotely through synchronous (including a 60-minute morning general education Zoom class and specials) and asynchronous activities (both to supported by a 1:1 paraeducator).

During the beginning of December, the Student showed signs that she was struggling with her general education Zoom classes, specifically her 8:30–9:30 am 60-minute Zoom and she began exhibiting disruptive behaviors identified on her BIP. The Student also exhibited behaviors that put the safety of herself and others in proximity to her at risk during in-person learning, including

removing her mask and eloping. Around December 11, 2020, to address these behaviors, the District's behavior specialist recommended a temporary intervention, whereby special education staff would help deliver the Student's morning 60-minute general education Zoom in a special education setting so special education staff could focus on implementing the Student's BIP and "resetting" behaviors. The Student continued to attend other 30-minute general education Zoom classes, including specials in the general education setting. The intervention remained in place from December 14, 2020 through January 11, 2021, when the District began to transition the Student back to her general education class. However, during the Student's annual IEP meeting that occurred on December 14, 2020 and January 7, 2021, the IEP team also increased the amount of specially designed instruction the Student received in social skills and behavior support, in part as a response to the Student's response to the behavior intervention.

The Parent and District disagree on whether the Parent consented to the intervention. However, behavior interventions that temporarily impact a student's LRE do not require parent consent and do not need to go through the IEP process for approval if they do not impact a free appropriate public education (FAPE). Further, educators have discretion to try different instructional strategies and supports to determine how to best support a student. Here, the intervention was reasonable to help implement the Student's BIP, which was required for IEP implementation. The intervention was provided over the course of approximately 10 school days and resulted in the Student spending approximately 10 hours more in the special education setting than indicated in her IEP. During this time, the change to the IEP as a result of the temporary intervention was minimal. Further, when it was decided that an increase in the amount of specially designed instruction was appropriate, this occurred through the IEP process. Although the Parents expressed that they would have preferred a different strategy be used, there was no documentation to show the District violated procedures or that the temporary removal from general education denied the Student a FAPE. OSPI did not find any violations in IEP implementation regarding the temporary behavior intervention.

The Parent additionally raised concerns that the Student's paraeducator during her general education class was also sometimes providing instruction to a group of students, which made it so the paraeducator could not fully support the Student as her 1:1. However, during the annual review, the District clarified that when this occurred, another adult was available to provide adult support to the Student. The Student's IEP did not require the same paraeducator to provide support throughout the Student's day, only that 1:1 support be available. The Parent described additional incidents where she felt the Student's IEP was not implemented, including an incident where the Student was left in a Zoom waiting room by herself and one where the paraeducator may have left a Zoom early in response to behaviors listed in the Student's BIP. Documentation showed that while there were individual incidents where the Student's BIP may not have been implemented perfectly, when these incidents arose, the District was prompt in responding and provided training to staff and the Parents as needed. Incidents where the BIP may not have been implemented perfectly were not material, as there were no significant discrepancies from what was provided for in the BIP and what was provided to the Student. OSPI finds no violation.

In-Person Time

The Parent also alleged the District did not implement the Student's IEP per the October 2020 prior written notice (PWN), which provided the Student 10 hours (2.5 hours per day for four days) of in-person instruction, noting that she was asked to bring the Student to school from 8:15–10:30, which resulted in one less hour of in-person instruction per week than provided for in the October 2020 PWN. The Parent raised this concern at the December 14, 2020 IEP meeting and requested the District provide additional general education hours to make up what was not provided. The District denied the Parent's request because all minutes of specially designed instruction had been provided, and the Student's total number of instructional minutes had been provided either in-person, synchronously, or asynchronously.

Although the Student's IEP only provided for 3.3 hours of specially designed instruction per week (in the special education setting), it also provided the Student with a 1:1 paraeducator as a related service to ensure access to the general education setting by providing necessary behavior and academic support. According to the October 2020 PWN, the IEP team had determined the Student required in-person delivery for 2.5 hours per day for four days (10 hours per week). The PWN did not specify how the minutes were to be provided, and accordingly, the District could have used them to provide in-person specially designed instruction and/or in-person paraeducator support during general education synchronous and asynchronous time. However, because the Student's IEP team determined the Student required a specific method of delivery (in-person) for a certain amount of time (10 hours) to receive a FAPE, the District was required to implement the Student's IEP according to that determination, as recorded in the October 2020 PWN, including in-person general education time with 1:1 paraeducator support. Because the District did not do this, OSPI finds the District to be in violation.

The District provided 15 minutes less per day of in-person time than indicated on the October 2020 PWN from December 9 through 18, 2020 and January 7-20, 2021,¹⁰ which equals approximately four hours of missed in-person services. At the Student's IEP meetings held on December 14, 2020 and January 7, 2021, the Student's IEP team confirmed that it had provided the Student with all specially designed instruction provided on her IEP during this in-person time and that these four hours were general education minutes. At the IEP meeting, the IEP team recognized the Student had not been progressing on IEP goals as expected and in response to the Student's present levels and data collected during the temporary behavior intervention, increased the amount of specially designed instruction the Student received in the special education setting. The IEP team additionally agreed to add extended school year services for the Student.

The IEP team addressed the Student-specific needs related to lack of progress or regression that may have been affected by the additional loss of in-person instruction time; however, the District is required to develop written guidance that IEPs must be implemented and that schedules should

¹⁰ There was no school on January 18, 2021 in observance of Martin Luther King, Jr. Day. No in-person instruction was held for any student on January 13, 2021 due to a power outage.

align to ensure IEP implementation, including in-person time in the general education setting for students with disabilities where the IEP team has determined it is required for FAPE.

Issue Two – IEP Development: The Parent alleged the District did not follow procedures for developing the Student's IEP, including considering concerns about the Student's least restrictive environment (LRE) and requests for in-person instruction.

When developing each student's IEP, the IEP team must consider the strengths of the student, the concerns of the parents for enhancing the education of their student, the results of the initial or most recent evaluation of the student, and the academic, developmental, and functional needs of the student. A student's IEP team has the responsibility to determine the student's LRE and must consider the following factors when making the determination: the educational benefits to the student of a placement in a general education classroom; the nonacademic benefits of interaction with students without disabilities, the effect of the student's presence on the teacher and other students in the classroom; and the cost of mainstreaming the student in a general education classroom. Educational placement decisions must be made by a group of persons, including the parents, and other persons knowledgeable about the student, the evaluation data, and the placement options that provide a reasonably high probability of assisting the student to attain his or her annual goals, and a consideration of any potential harmful effect on the student or on the quality of services the student needs, based on the student's IEP and LRE requirements. A student should not be removed from her age-appropriate general education classroom solely because of needed modifications in the general education curriculum.

The IEP team met for the Student's annual review on December 14, 2020 and January 7, 2021. The IEP team reviewed the Student's present levels and considered the Student's need for additional specially designed instruction in light of data showing the Student had not made expected progress on some IEP goals and had regressed in others. The IEP team additionally discussed the Student's needs in light of information that the District would be transitioning to a hybrid instructional model in the spring. It also considered the Parent's request to provide in-person instruction to the Student full time instead of increasing specially designed instruction in the special education setting. The IEP team determined the Student required an increase in specially designed instruction, even though it decreased the amount of time the Student would spend in the general education setting, and agreed to revisit the Parent's request to increase general education time with paraeducator support in one month. The decision was made with input from multiple team members, including the Parent. Following the meeting, the District provided the Parent with PWN of its decisions. Although the Parent expressed her belief that the reason the increase in specially designed instruction and thus decrease in time in the general education setting was in response to the District's failure to implement the Student's IEP and BIP, there was not sufficient evidence to support the BIP was not implemented, and no finding that the District violated IEP development procedures. OSPI finds no violation.

Issue Three – Prior Written Notice: The Parent alleged the District did not follow procedures to provide PWN in December 2020.

PWN must be provided to the parents of a student eligible for special education or referred for special education a reasonable time before the school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student. The notice must include a description of the action proposed or refused by the agency; an explanation of why the agency proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; a description of other options that the IEP team considered and the reasons why those options were rejected; a description of other factors that are relevant to the agency's proposal or refusal, and certain statements relating to procedural safeguards and rights of the parent.

The District provided the Parent with PWN following completion of the Student's annual review, which was held over two days: December 14, 2020 and January 7, 2021. A review of the PWN showed it contained all required elements; however, it was not provided to the Parent until January 25, 2021, which did not follow the District's own procedures to provide PWN within five days of a decision and was not timely. Accordingly, OSPI finds the District to be in violation. However, the District acknowledged it was out of compliance prior to the filing of this complaint and remedied the error by meeting with a new case manager and reviewing the process for sending PWN. OSPI finds the District's actions following its violation to be a sufficient corrective action to address the violation and did not find evidence that the violation otherwise impacted the Student's receipt of a FAPE. No further corrective actions are ordered.

CORRECTIVE ACTION

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

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

Written Guidance

The District will develop written guidance to be provided to all District certificated special education staff, principals, and District special education administration staff at the Student's school, which will address that IEPs must be implemented and that schedules should align to ensure IEP implementation, including in-person time in the general education setting for students with disabilities where the IEP team has determined it is required for FAPE.

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

By **August 27, 2021**, the District will provide OSPI with documentation showing that it provided all District certificated special education staff, principals, and District special education

administration staff with the written guidance. This documentation will include a roster of all staff members who were required to receive the written guidance, so OSPI can cross reference the list with the actual recipients.

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

Dated this ____ day of July, 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.)