

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 19-93

PROCEDURAL HISTORY

On December 3, 2019, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Ferndale School District (District). The Parent alleged the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On December 5, 2019, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District Superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On December 23, 2019, OSPI received the District's response to the complaint and forwarded it to the Parent on December 24, 2019. OSPI invited the Parent to reply with any information she had that was inconsistent with the District's information.

On December 31, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the Parent. OSPI received the requested information on December 31, 2019 and forwarded it to the District on January 2, 2020.

On December 31, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. OSPI received the requested information on January 6, 2020 and forwarded it to the Parent on January 7, 2020.

On January 6, 2020, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. OSPI received the requested information on January 14, 2020 and January 15, 2020 and forwarded it to the Parent on January 16, 2020.

On January 15 and January 16, 2020, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. OSPI received the requested information on January 21, 2020 and forwarded it to the Parent on January 23, 2020.

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

ISSUE

1. Did the District follow proper procedures for shortening the Student's school day beginning on or about September 2019?

LEGAL STANDARDS

Definition of a Free Appropriate Public Education (FAPE): A "free appropriate public education" (FAPE) consists of instruction that is specifically designed to meet the needs of the child with a

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

Provision of FAPE: For a district to meet its substantive obligation under IDEA, a school must "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." An IEP must "aim to enable the child to make progress", the educational program must be "appropriately ambitious in light of [the student's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom," and the student should have the opportunity to meet challenging objectives. *Endrew F. v. Douglas County School District RE-1* 137 S.Ct. 988, 69 IDELR 174 (2017).

Progress Reporting: IEPs must include a statement indicating how the student's progress toward the annual goals will be measured and when the district will provide periodic reports to the parents on the student's progress toward meeting those annual goals, such as through the use of quarterly or other periodic reports concurrent with the issuance of report cards. 34 CFR §300.320(a)(3); WAC 392-172A-03090(1)(c).

FINDINGS OF FACT

2019-2020 School Year

1. The District's first day of school for the 2019-2020 school year was September 4, 2019.
2. At the start of the 2019-2020 school year, the Student qualified for special education services under the category of intellectual disability, was in the sixth grade, and attended a District middle school.
3. At the start of the 2019-2020 school year, the Student's June 2019 Amended individualized education program (IEP) was in effect.¹ The June 2019 Amended IEP stated the Student was supposed to spend "1,790 minutes per week" in school. According to the District, that figure represented a "full school day."

¹ The June 2019 Amended IEP revised the Student's October 2018 IEP.

Additionally, the June 2019 Amended IEP: provided the Student with specially designed instruction in adaptive skills; and, included an adaptive goal that concerned the Student's ability to "independently use his communication strategies" (June 2019 adaptive goal).

4. In its response, the District asserted it "did not propose to shorten the Student's [school] day" at any point during the fall semester.
5. The District's response included a 'Daily Schedule' for the Student. According to this schedule, the Student's final instructional class of the day (Class Jobs) took place from 2:15 to 2:23 p.m.²
6. On September 6, 2019, the Parent emailed the school principal and the special education director (director), stating, in part:

Student's bus is dropping him off at our home before 2:27 p.m. which is the end [of the instructional] day [at] his middle school. I talked to transportation this morning and they said it's a school or administrative issue...I wonder if his IEP minutes reflect that he leaves school 15 minutes early 5 days a week, which is 1.25 hours a week he is missing. I think we need to talk soon.
7. On September 9, 2019, the director responded to the Parent's September 6, 2019 email, stating, in part:

Thank you for bringing this to my attention. I have been in contact with transportation...[The] afternoon school end time [is] 2:27 p.m.

[For the first three days of school, the Student was] picked up at school at 2:15 p.m. [and] dropped off at home at 2:30 p.m.

[Moving forward, the] adjusted pick up at school [will be] 2:23 p.m.³ [and the] adjusted drop off at home [will be] 2:38 p.m.

² The Student's June 2019 IEP had one adaptive goal that may have been worked on during the Student's last period, 'Class Jobs' course: "By October 15, 2019, when given school activities, Student will initiate and respond to staff and others improving his ability to independently use his communication strategies (high/low tech, vocalizations, functional sign, picture symbols, and body language) from prompted 40% to independently 90% as measured by staff observation and Student responses during tasks." The other three adaptive goals in the June 2019 IEP pertained to the Student's morning, lunch, and playtime routines, respectively.

³ As part of this investigation, OSPI's investigator asked why, if the "afternoon school end time [is] 2:27 p.m.," was the Student's afternoon pick up scheduled to take place at 2:23 p.m.—starting on September 9, 2019. The District stated: "the [special education] students' [school] day starts before the first bell for the general education population. This has been designed so they have access to the same, or more, instructional minutes in the school day." At least as far as the Student that is the subject of this complaint is concerned, the record supports this position. According to the District, the first academic period for general education students began at 7:58 a.m. But the Student's schedule has an "arrival calendar" period from 7:40 to 7:58 am. According to the District, during this time, the Student did receive specially designed instruction in both adaptive and communication: "Student comes into the room, hangs up his coat and back pack, puts his milk and cup in the kitchen, and turns in his home communication log. Student has transitioned to completing

[The transportation office is] working on fine tuning the routes. At the start of the school year we are enrolling and withdrawing students during the first two weeks of school. The shift in students always causes adjustments in routes. After transporting for three days, they are working to refine the transportation schedules.

Later that same day, September 9, 2019, the Parent responded, stating, in part: "Thanks...today the bus was more on that schedule."⁴

On September 10, 2019, the director responded, stating, in part: "I will continue to work with transportation to ensure that we are maximizing instructional minutes for all students. Again, thank you for reaching out to let me know the situation so we were aware and could work on a resolution."

8. On October 11, 2019, the Student's IEP team developed a new IEP for the Student. The October 2019 IEP stated the Student was supposed to continue spending "1,790 minutes per week" in school. Again, according to the District, this represented a "full school day."

Additionally, the October 2019 IEP: provided the Student with specially designed instruction in adaptive skills; and, included two adaptive goals that concerned the Student's ability to communicate with others in his environment and one adaptive goal that concerned the Student's time management ability (October 2019 adaptive goals).

9. According to the Parent's complaint, on November 18, 2019, a substitute bus driver drove the Student's afternoon bus, and on that date, the Student "was brought...home significantly before the scheduled drop off time." During the course of this investigation, the Parent clarified that, on November 18, 2019, the Student was dropped off "15 minutes before his usual drop off time."⁵

this modified form independently to share how his evening and morning have gone"; "During this morning calendar time Student is practicing, in an authentic environment, the adaptive communication skills and adaptive time management skills he is learning during one on one and small group [specially designed instruction] time on his schedule. The program has set this time up to provide a supportive environment to begin generalizing the skills Student is working on;" "Student participates in the morning routine which can include, calendar review (month, day of the week, and date), discussion of the weather, discussion of upcoming school schedules and events, and weekly schedule"; "Student and the other students take turns greeting each other and practicing conversation starters. Student also uses his iPad to practice his communication with peers and adults during the small group calendar/welcome time."

⁴ The District's response also stated that, on or about either September 6 or 9, 2019, the director called the Student's special education teacher and "informed her [that] the pick-up time change [was to] take effect immediately."

⁵ The Parent's complaint further read: the "driver exited Student from the bus onto a busy road in front of a locked gate without an adult present" and, because of the Student's needs resulting from the Student's disability, this presented a safety issue for the Student.

In its response, the District agreed the Student was picked up early from school on November 18, 2019.

10. On November 19, 2019, the principal provided the Parent with a letter that read, in part:

I first want to apologize for the transportation incident Student had yesterday coming home from school. I have spoken with the assistant superintendent, the special education director, and the transportation director. After reviewing with our team, I believe a number of circumstances came together in such a way that either protocols were not followed or we did not have the correct systems in place to prevent what happened.

Here is a quick review of some of the issues we discussed this morning.

Timing

2:18:05 – Bus arrives at school and Students load the bus

2:18:32 – Bus departs school

2:27:40 – Bus arrives at Student’s home

2:28:11 – Student steps off the bus

2:28:27 – Bus departs Student’s home

After discussing this issue, we realized that the regular route the driver followed is a slightly different route getting to your home. This allowed a bit more time for Student’s caregiver to arrive. We also understood the students were ready to load at school a bit earlier than they should be.

Corrections [Already Completed]

- Retrain our school staff to load students at the appropriate time.
- Retrain our transportation staff to load students at the appropriate time.
- Update Student’s written transportation route plan and include directions for a visual acknowledgement from a caregiver before drop-off.

Corrections to be Completed

- Amend Student’s IEP to include transportation instructions.

11. The Parent filed the instant request for a special education citizen complaint on December 3, 2019.⁶

⁶ Both in her complaint, and throughout OSPI’s investigation, the Parent articulated that the Student needed either a 1:1 paraeducator on his afternoon bus, or, if there was a substitute bus driver on a particular afternoon, then the District needed to establish a process that required, on such days, that a paraeducator inform the substitute bus driver of the proper route, and timing of that route, for the Student. This was not an IEP implementation issue that OSPI could investigate because neither of these provisions were included in the Student’s June 2019 or October 2019 IEP. Similarly, it was not an IEP development issue that OSPI could investigate, in that, prior to the instant investigation, there was no indication the Parent had previously informed the District of her belief that the Student’s IEP required one or both of these transportation-related provisions.

12. On January 13, 2020, the Student's IEP team met to amend the Student's October 2019 IEP. Specifically, the Student's IEP team added "transportation drop off procedures into the [October 2019] IEP."⁷

The following language was added to the Student's January 2020 Amended IEP:

Per OSPI guidance and parent notification, Student is to only be dropped off by District transportation or District staff with Parent or approved caregiver (family has provided a list of approved caregivers). If the contracted bus driver is not available to provide transportation to and from school on Student's bus, the family will be notified via a phone call from the transportation department, and family will provide transportation to and from school instead.

13. On January 13, 2020, the District provided OSPI's investigator with the following report from the Student's 'Class Jobs' teacher:

At the end of the day, Student: completes his home-school communication log (gathers new form; enters the date; checks off what tasks he completes; puts in [the] home binder); puts away his materials (laptop, tablet, academic binder); wipes down tables; gathers his milk from fridge and drinking cup; and packs up (milk, binder, and tablet—if taking home). He is learning to do these tasks independently but still requires prompting for some tasks.

14. During the course of this investigation, the District was able to give some information on the Student's progress on the following adaptive-time management goal in his October 2019 IEP:

By 10/13/20, when given his personal school schedule with analog time Student will identify the time and go to his next activity independently improving his adaptive self-help skills from being prompted to check his schedule to go to classes to independently checking his schedule, checking his time and going to scheduled activity or class as measured by curriculum based measurements.

- Objective: by 12/31/19 Student will when given the time on an analog clock, Student will match the time with 80% accuracy on 3 consecutive opportunities.

The District reported the following progress:

Student is progressing nicely on the matching of analog time with his schedule during his Time/Money SDI time during the 11:29-11:56 period. At the end of the morning calendar time, Student is checking his schedule when calendar time is over, checking the schedule, making sure he has his materials and going to his next class with minimal prompting. His is not yet independent but is on track to meet his goal.

15. During the course of this investigation, the Student's speech language pathologist (SLP) provided the following report:

From September 2019 to October 11, 2019, his speech and language therapy continued to focus on developing his functional communication skills (Adaptive-Functional Communication goal). Student's progress on his functional communication goal was limited during that time period...it took several weeks to build rapport and a working relationship with Student. His 2019 progress summary states, "Establishing new routines

⁷ This comes from a January 14, 2019 prior written notice issued to the Parent.

and relationships will be important for him". Student requires time to respond to new people and new routines.

Data collection (from September 2019 to October 11, 2019) indicates Student required prompting, on average, 40% of the time during a 'school activity'. The overall need for prompting steadily decreased in a short amount of time...Student's IEP was reviewed on October 11, 2019; goals were updated to reflect present levels of functioning in the area of communication and took into consideration his new environment and new "school activities"...On October 14, 2019, we began to work on Student's new communication goals. His readiness and willingness to participate in communication activities has improved significantly. Student walks to a work area, turns his body toward the activity and is ready to work.

His Adaptive Skills-Functional Communication goal is addressed in a variety of ways, in order to teach different purposes/functions for communication. Although making requests may seem like a very early skill, Student struggles to communicate his requests independently.... Data indicates Student required prompting, on average, 45% of the time in October and November. In December, he required prompting, on average, 43% of the time when given opportunities to practice various purposes of communication. In January thus far, Student required prompting, on average, 35% of the time...

CONCLUSIONS

Here, the Parent alleged the District improperly shortened the Student's school day. The facts, though, do not establish this to be the case. Rather, due to various logistical challenges—the transportation office adjusting new routes at the beginning of the school year and a substitute bus driver on November 18, 2019—the Student appears to have been picked up a couple minutes early on four different occasions. In total, it appears the Student missed 29 minutes of instruction in his 'Class Jobs' course.⁸

The question, then, is: was the Student deprived of a free appropriate public education (FAPE) by missing these 29 minutes? An eligible student receives FAPE when he receives, at public expense, an educational program that meets state educational standards, is provided in conformance with an individualized education program (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. One way to determine whether the student's access to FAPE was implicated is whether the student was able to make progress on his measurable annual goals despite missing some time at school: for a district to meet its substantive obligation under IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

Here, based on both the Student's schedule, and the Student's two IEPs, adaptive is the only goal area that would have been worked on during the Student's 'Class Jobs' course. In the course of

⁸ During the first three days of school, the Student was picked up 8 minutes early each day, for a total of 24 minutes. On November 18, 2019, the Student was picked up 5 minutes early. Combined, then, the Student missed 29 minutes of instruction in his 'Class Jobs' course over the course of the fall 2019 semester.

this investigation, the District was unable to produce data on the Student's progress on his June 2019 adaptive goal that related to the fall of 2019.⁹

The District was, though, able to produce some data on the Student's progress on his three October 2019 adaptive goals that related to the fall of 2019.¹⁰ For example, the District provided OSPI a report from the Student's 'Class Jobs' teacher, which noted the Student was able to complete a multi-step "communication log," as well as manage multiple end-of-the-day responsibilities, with occasional prompting. The District also reported that the Student was making progress on his adaptive-time management goal and was on progress to complete said goal by October 13, 2020. The Student's SLP further reported that the Student made progress on his adaptive-communication goals. Given this information, and the relatively few number of minutes missed in the fall of 2019, OSPI does not find that the Student's right to FAPE was implicated by missing 29 minutes of instruction in his 'Class Jobs' course. Therefore, there has been no violation of the IDEA.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this ___ day of January, 2020.

Glenna Gallo, M.S., M.B.A.
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⁹ The District was able to produce some progress reporting on the June 2019 adaptive goal, which originally appeared in the Student's October 2018 IEP, but that data all related to the spring 2019 semester. Additionally, the 'Present Levels' section of the October 2019 IEP did not include data specific to the Student's June 2019 adaptive goal—though it did include general data on the Student's adaptive abilities.

¹⁰ According to the District, the first progress reporting document for the three October 2019 adaptive goals will not be created until the first week of February, when semester report cards are sent out.

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.)