

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

PROCEDURAL HISTORY

On March 9, 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 [REDACTED] School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

The Parent submitted the complaint in [REDACTED] thus, all communications from OSPI were translated. The procedural dates indicate when the version of each communication in English was sent. The translated versions were sent several days to a week after each noted date, due to the time it took to translate documents.

On March 16, 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 April 2, 2021, the District requested an extension of time for its submission of the response, to translate the response. OSPI granted the extension and requested the District submit its response no later than April 12, 2021.

On April 13, 2021, OSPI received the District's response to the complaint and forwarded it to the Parent on April 15, 2021. OSPI invited the Parent to reply. The Parent did not provide a written reply.

On April 22, 2021, OSPI requested the District provide the exhibits to its response (the IEPs, evaluations, and progress reports) translated. On April 24, 2021, the District stated that none of the documents existed in a translated format.

On April 27, 2021, the OSPI complaint investigator conducted a phone interview, assisted by an interpreter, with the Parent.

On May 7, 2021, OSPI notified the Parent and District that due to exceptional circumstances, the 60-day timeline would be extended.

OSPI considered all information provided by the Parent and the District as part of its investigation. It also considered the information received and observations made by the complaint investigator during the interviews.

SCOPE

During the phone interview with the Parent, the Parent shared concerns about issues that are outside the scope of a special education complaint investigation. These concerns included allegations of discrimination, concerns about the Student being attacked on the school bus, and

concerns about staff acting unprofessionally. The Parent also shared concerns outside the scope of the issues alleged in this complaint, including allegations that the school nurse required the Student to take medication before he could attend school. These issues are not addressed in the complaint decision as OSPI does not have authority through the special education complaint process to address discrimination and staff professional practices.

ISSUE

1. Did the District follow procedures to implement the Student's individualized education program (IEP) from March 10, 2020 through September 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. 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 Implementation during Spring 2020 School Facility Closures for COVID-19: During the Spring 2020 COVID-19 school facility closures, as students received general education instruction and student support services, districts must provide students with disabilities with the special education services—related services and specially designed instruction—supporting a free appropriate public education (FAPE). The U.S. Department of Education Office for Civil Rights (OCR) and Office for Special Education and Rehabilitative Services (OSERS) indicated the "exceptional circumstances" presented during the school facility closures caused by COVID-19 "may affect how all educational and related services and supports are provided" to students with disabilities. There is not an expectation that IEP services would be delivered exactly as the IEP states. *Questions and Answers: Provision of Services to Students with Disabilities During School Facility Closures for COVID-19* (OSPI March 24, 2020); *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (OCR/OSERS March 21, 2020) ("It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities...during this national emergency, schools may not be able to provide all services in the same manner they are typically provided...The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency...FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students.")

While there was not an expectation that districts implemented a student's IEP as written during school closures caused by COVID-19 in spring 2020, districts must have had a plan for how

students with disabilities were to receive a FAPE, including the provision of special education. *Questions and Answers* (OSPI, March 24, 2020); *Questions and Answers* (OSPI, May 5, 2020). See also, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (U.S. Department of Education, March 13, 2020) (“SEAs, LEAs, and schools must ensure that to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under the IDEA”). All schools were expected to have begun providing educational services for all students by March 30, 2020, which OSPI termed “Continuous Learning 2020.” OSPI Bulletin 024-20 (March 23, 2020).

The individualized special education services being provided to a student during the school facility closures as part of continuous learning, were to be documented in writing using a student’s annual IEP, IEP amendment (particularly if services to be provided during the closure were significantly different from what the IEP indicated), prior written notice, or optional “Continuous Learning Plan” (CLP) or similar document. Districts had flexibility in how they chose to document decisions made in real-time. *Questions and Answers* (OSPI, April 13, 2020). Districts were encouraged to prioritize parent communication, including discussions of how special education services were to be provided during the closures. *Questions and Answers* (OSPI, May 5, 2020).

FINDINGS OF FACT

Background: 2019–2020 School Year

1. During the 2019–2020 school year, the Student attended a District elementary school and was eligible for special education services under the category autism.
2. The Student’s March 9, 2020 individualized education program (IEP) was in effect prior to the COVID-19 school facility closures. The Student’s March 2020 IEP included annual goals in the areas of social, adaptive, math, reading, writing, and communication. Progress toward the annual goals was to be measured at the semester. The Student’s IEP provided the Student with the following specially designed instruction:
 - Reading (Concurrent): 120 minutes per week (provided by a special education teacher in the special education setting)
 - Writing: 120 minutes per week (provided by a special education teacher in the special education setting)
 - Math: 140 minutes per week (provided by a special education teacher in the special education setting)
 - Adaptive: 80 minutes per week (provided by a paraeducator in the general education setting)
 - Social: 30 minutes per week (provided by a special education teacher in the special education setting)
 - Communication: 30 minutes per week (provided by a speech language pathologist (SLP) in the special education setting)
 - Social (Concurrent): 80 minutes per week (provided by a paraeducator in the general education setting)

The IEP included 1,125 minutes per week of additional adult support provided by a paraeducator in the general education setting.

Complaint Investigation Timeline Begins: March 10, 2020

3. In March 2020, according to the Parent's complaint, the Student was not provided any special education services.
4. On March 13, 2020, the Washington Governor announced 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 school facility closures were subsequently extended through the rest of the 2019–2020 school year.
5. The District was closed for all students from March 13 through 27, 2020.
6. On March 23, 2020, OSPI issued guidance, instructing districts that while school facilities are closed and not providing traditional in-person instruction, education must continue. OSPI's guidance outlined the expectation that "continuous learning" would begin for all students by March 30, 2020.
7. On March 30, 2020, continuous learning began in the District.
8. The District was on spring break from April 13 to 17, 2020.
9. In April 2020, according to the Parent's complaint, the Student received 60 minutes of special education via a 60-minute writing session with the special education teacher on April 28, 2020.
10. On May 13, 2020, the District communicated with the Parent regarding the Student's continuous learning plan (CLP). The CLP included the following special education and related services: 240 minutes monthly of reading, writing, math, and adaptive, provided concurrently by a special education teacher, and 30 minutes monthly of communication, provided by an SLP.

The CLP further stated:

Remote learning opportunities during these times can possibly include, but are not limited to, Teams meetings, practice activities, small group work, video messages, question and answer sessions, or other methods as appropriate.

A Special Education Teacher meets with [Student] one-on-one weekly to work on academic skills.

Communication Services may include: Live Teams check-in, speech-language activities and/or resources provided through either Microsoft Teams class notebook, and/or email to parents. Email support and live check-ins have been offered to answer any specific questions.

The CLP noted the Student's "Social: Self-Regulation/Transitions" goal would not be worked on during the school facility closures, because: "Due to the goal's setting being in the general education classroom with peers, this goal cannot be addressed."

11. In May 2020, according to the Parent's complaint, the Student attended the following special education sessions, with a special education teacher or SLP for speech:
- May 5: 55-minute special education session
 - May 14: 30-minute special education session; 30-minute speech therapy session
 - May 19: 40-minute special education session
 - May 26: 30-minute special education session

The Parent noted the special education teacher was late for the sessions on May 19 and 26, in part due to internet connection issues.

12. Sometime in May 2020, according to the Parent, she went to the school to pick up a computer for the Student to use for remote learning.

13. In June 2020, according to the Parent's complaint, the Student attended the following special education sessions, with a special education teacher or SLP for speech:
- June 4: 30-minute speech therapy session
 - June 9: 60-minute special education session
 - June 11: 45-minute special education session
 - June 16: 55-minute special education session
 - June 23: 60-minute special education session
 - June 30: 45-minute special education session

14. On June 18, 2020, the District entered progress reporting on the Student's IEP goals. The progress report noted the following:
- Communication (critical thinking questions): "If maintained, current rate of progress is sufficient to achieve annual goal" and "June 2020: [Student] is currently able to answer inferencing questions with 40% accuracy independently, increasing to 80% with moderate verbal and visual cues...SLP."
 - Communication (relate experiences): "June 2020: The school building was closed on 3/13/20. SLP has offered continuous learning opportunities to the student/family since 4/20 on a weekly basis through Teams video calls during school building closure. Due to limitations of remote learning, SLP data will be taken upon return to school building to track progress."
 - Adaptive (work completion checklist): "[Student] is continually working hard to stay on task and complete his work. As of now, he is able to score 12 on the Work Completion Rubric."
 - Social (self-regulation/transitions): "June 2020: Due to the COVID-19 pandemic [District] schools closed on 3/13/2020. Special Education support was provided via Microsoft Teams."
 - Writing (correct writing sequences): "If maintained, current rate of progress is sufficient to achieve annual goal" and "06/09/2020: [Student] has filled out and can complete a graphic organizer for brainstorming topic ideas. He has, with adult support, completed three paragraph essays using the writing process (organize, draft, write, edit, revise and reread)."
 - Reading (comprehension): "June 2020: Due to the COVID-19 pandemic [District] schools closed on 3/13/2020. Special Education support was provided via Microsoft Teams."

- Math (subtraction): "June 2020: Due to the COVID-19 pandemic [District] schools closed on 3/13/2020. Special Education support was provided via Microsoft Teams."
- Math (multiplication): "If maintained, current rate of progress is sufficient to achieve annual goal" and "06/09/2020: [Student] scored 25 out of 30 problems correct. He has done a great job practicing and learning his multiplication facts."

15. In the District's response, the District stated:

The special education teacher who worked with Student during the time period at issue in the complaint is currently on leave, and it has been challenging to gather the information requested...The District will continue to work with staff for this purpose when they return from the District's spring break next week, and will provide additional information if it can be obtained before the deadline for OSPI's decision.

16. June 19, 2020 was the last day of the 2019-2020 school year for the District.

2020-2021 School Year

17. During the 2020-2021 school year, the Student attended a District elementary school and continued to be eligible for special education services under the category autism.

18. The District's 2020-2021 school year began on September 3, 2020.

19. In September 2020, according to the Parent's complaint, the Student attended a 30-minute speech session on September 21 and September 30.

20. According to the District's response, the Student unenrolled from the District in September 2020. The Parent stated the Student began attending a new school in October 2020.

21. On March 9, 2021, OSPI received the Parent's complaint and opened this investigation. The Parent alleged the District failed to implement the Student's IEP between March and September 2020. The Parent stated in her complaint that the,

Total minutes of special education services that the school ought to have provided in March, April, May, June, and September 2020 are 6,400 min. However, total minutes of special education services provided by the school in March, April, May, June, and September 2020 were 600 min. Therefore, the missing minutes of special education services total 5,800 min.

22. On April 27, 2021, the OSPI investigator interviewed the Parent who shared the following:

- The Student was not provided speech therapy and services he was supposed to receive.
- The Student's teacher was late to sessions several times and did not offer to reschedule or make up the missed time. The Parent stated this impacted the Student's private services.
- In September 2020, the Parent stated the Student struggled in his general education class because the general education teacher would not answer his questions or provide assistance.

CONCLUSIONS

Issue One: IEP Implementation – The Parent alleged the District failed to implement the Student's individualized education program (IEP) between March and September 2020.

Specifically, the Parent stated the Student should have received 6,400 minutes of special education services in March, April, May, June, and September 2020, and instead only received 600 minutes, meaning he missed 5,800 minutes.

March 2020

During the Spring 2020 COVID-19 school facility closures, as students received general education instruction and student support services, districts must provide students with disabilities with the special education services—related services and specially designed instruction—supporting a free appropriate public education (FAPE). If a district was not providing services to any student, then there was no expectation that services be provided to students eligible for special education.

Here, the District was closed for all students through Friday, March 27, 2020. The District began continuous learning on Monday, March 30, 2020. While the Student may not have been provided any special education services during these weeks, the District was not required to provide special education services, as the District was closed to all students. OSPI finds no violation related to March 2020.

April–June 2020

Given the exceptional circumstances of the COVID-19 pandemic, the federal Department of Education and OSPI recognized IEPs could not be implemented as written as school facilities closed and transitioned to distance learning. Here, the Student's March 2020 IEP was in place prior to the school facility closures and included the following specially designed instruction, for a total of 400 minutes of specially designed instruction per week:

- Reading & Writing (Concurrent): 120 minutes per week
- Math: 140 minutes per week
- Adaptive & Social (Concurrent): 80 minutes per week
- Social: 30 minutes per week
- Communication: 30 minutes per week

During spring 2020, the Student's IEP was not implemented as written, which during this time alone does not represent a violation of the IDEA. However, the District still had an obligation to provide students with special education services during the school facility closures to the maximum extent possible. On March 23, 2020, OSPI communicated the expectation that districts would begin providing educational services to all students by March 30, 2020; and, as instruction was being provided to all students, districts must have a plan for how students eligible for special education services would receive a FAPE, which consists generally of specially designed instruction and related services.

The Parent maintained and submitted with the complaint a log of when the Student received instruction. As the Student was accessing remote instruction, the Parent had firsthand knowledge of the Student's access to instruction. Based on the Parent's complaint, the Student received 60 minutes of instruction in April 2020; 155 minutes of instruction and 30 minutes of speech in May 2020; and 265 minutes of instruction and 30 minutes of speech in June 2020. Further, the Parent

noted that several times, the Student's special education teacher was late to sessions and did not reschedule the missed time.

Sometime in the first half of May 2020, the District created a continuous learning plan (CLP) for the Student, which indicated he was to receive 240 minutes per month of reading, writing, math, and adaptive; 30 minutes per month of speech; and no instruction in social skills, as these goals could not be addressed during the school facility closures given the need to be in the general education classroom with peers. The District provided progress reporting in June 2020 that indicated the Student made sufficient progress on one communication goal, his writing goal, and one math goal. The progress report indicated instruction was provided but did not include information about progress on the other communication goal, reading goal, and the other math goal. The adaptive goal included comments, indicating the Student was working hard to stay on task and complete work, but did not clearly indicate the rate of progress.

Beyond the CLP and progress reporting, the District did not provide any documentation related to the provision of special education services for the Student. The District stated the Student's special education teacher was on leave, that it had been challenging to gather information, and stated it would submit additional information if it could be obtained. Despite the overall timeline in this complaint being extended due to exceptional circumstances, the District did not provide additional information.

Overall, the District did provide the Student some special education services during spring 2020. However, the District did not provide the amount outlined in the Student's CLP, which was already reduced from what was called for in the Student's IEP. Based on the CLP, the Student missed 180 minutes of instruction and 30 minutes of speech in April 2020; 85 minutes of instruction in May 2020; and received the CLP amount in June 2020 (the Student received 15 extra minutes of instruction in June). Given that the District failed to provide special education services in accordance with the CLP, OSPI finds the District did not sufficiently offer and provide special education during the school facility closures. OSPI finds the District in violation.

It is also not clear that the District's CLP offered special education services to the maximum extent possible, as it drastically reduced the amount of special education services the Student was to receive from approximately 1,600 minutes per month to 270 minutes per month. While IEPs were not expected to be implemented as written during the school facility closures, this is a significant reduction in services, on top of the fact that services were not provided as outlined in the CLP. Given these factors, OSPI will require the District to provide the full amount missed based on the CLP or 265 minutes of instruction, split between reading/writing, math, and adaptive/social; and, 30 minutes of speech.

September 2020

Despite the ongoing impact of the COVID-19 pandemic, districts were expected to implement IEPs during the 2020-2021 school year. 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.

The Student's March 2020 IEP remained in place, meaning the Student should have received four weeks of services before he unenrolled from the District at the end of September. Based on the IEP, the Student should have received:

- Reading/Writing (Concurrent): 480 minutes
- Math: 560 minutes
- Adaptive/Social (Concurrent): 320 minutes
- Social: 120 minutes
- Communication: 120 minutes

The Parent stated in her complaint that the Student, in September 2020, received 60 minutes of speech therapy. The Parent noted in her interview that the Student struggled in his general education class because he was not receiving assistance, which implies further that no special education services were being provided as the Student was supposed to receive some specially designed instruction in the general education setting. The District did not provide any information about the Student's services, aside from noting the Student unenrolled in September. Thus, OSPI concludes the Student's IEP was not materially implemented in September 2020. OSPI finds a violation.

Given the Student was only enrolled in the District for the month of September, there was no progress reporting information available for this period, so it is difficult to tell the impact of the missed instruction. Because there is no evidence that any services besides speech were provided in September, OSPI determines that it is equitable for the Student to receive the full amount of missed time in reading/writing, math, adaptive, social, and communication as compensatory education. Some of the compensatory services are combined as those services were provided concurrently on the IEP. This equates to 8 hours of reading/writing; 9.3 hours of math; 7.3 hours of adaptive/social; and, one hour of communication (the Student received an hour of speech, so he only missed an hour of speech in September).

CORRECTIVE ACTIONS

By or before **July 23, 2021, September 15, 2021, and January 7, 2022**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

By or before **July 9, 2021**, the District (aided by an interpreter) and Parent will develop a schedule for the following hours of compensatory education:

- Reading/Writing: 9 hours and 28 minutes
- Math: 10 hours and 48 minutes
- Adaptive/Social: 8 hours and 49 minutes
- Speech/Communication: 1 hour and 30 minutes

Unless otherwise agreed to by the District and Parent, services will be provided by a certified special education teacher or related service provider and will be provided in-person. Services must be provided outside the school day and can be provided on weekends or District breaks. Services may be provided in a 1:1 or small group setting, if appropriate.

After reaching agreement with the Parent, the District will provide the Parent with the schedule for services, in writing and translated, by **July 23, 2021** and will provide OSPI with documentation of the schedule for services by or before **July 23, 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 **December 21, 2021**.

The District must provide OSPI with an update on the amount of compensatory services provided to the Student by providing documentation on **September 15, 2021** of the compensatory services provided to the Student at that point. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled or missed by the Student. By or before **January 7, 2022**, 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 **January 7, 2022**.

DISTRICT SPECIFIC:

None.

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

RECOMMENDATIONS

The District stated it did not have any of the documentation requested in this complaint in a translated version. WAC 3921-172A-05010(3) requires that prior written notice be "provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so." OSPI expected the District, at minimum, to provide translated prior written notices when requested. Per state special education regulations, Districts are also required to provide the procedural safeguards in a parent's native language; ensure a parent is fully informed of all information relevant to an activity for which consent is sought in their native language; and, ensure a parent understands the proceedings of the IEP team meeting, including arranging for an interpreter, if needed. WAC 392-172A-05015; WAC 392-172A-01040; WAC 392-172A-03100. While there is no requirement to translate IEPs, a district could provide translated IEPs and other documents, or summaries of those documents, in order to ensure parent participation. OSPI recommends that the District review its policies, processes, and practices around language access and parent participation.

Dated this ____ day of June, 2021

Glenna Gallo, M.S., M.B.A.
Assistant Superintendent
Special Education
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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.)