

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 21-35

PROCEDURAL HISTORY

On April 14, 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 Vancouver 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 April 15, 2021, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District Superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On May 5, 2021, OSPI received the District's response to the complaint and forwarded it to the Parent on May 6, 2021. OSPI invited the Parent to reply.

On May 6, 2021, OSPI received additional information from the District and forwarded it the Parent on May 7, 2021.

On May 19, 2021, OSPI received the Parent's reply. OSPI forwarded that reply to the District on May 20, 2021.

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 April 15, 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 follow procedures to implement the Student's individualized educational program (IEP) from mid-April 2020 through the present?
2. Did the District address the Parent's requests in spring and fall 2020 for additional or different supports, including, but not limited to, a full day of instruction and in-person instruction, and concerns related to the appropriateness of remote instruction?

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. Each school

district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

During the COVID-19 school facility closures, as students received general education instruction and student support services, districts were required to provide students with disabilities 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).

OSPI required school districts discontinue the use of CLPs at the commencement of the 2020-2021 school year, and that services be provided in conformity with a Student's IEP.

Recovery Services: Recovery services are additional services for students with disabilities designed to address lack of appropriate progress on IEP goals due to missed or limited services or for other reasons as a result of the pandemic. OSPI's expectation, consistent with the need to provide a free and appropriate public education (FAPE), is that schools consider the individualized need for recovery services for every student with a disability from PreK through age 21. *Questions and Answers* (OSPI, June 1, 2020); *Washington's Roadmap for Special Education Recovery Services: 2021 & Beyond* (OSPI, May 7, 2021).

FINDINGS OF FACT

2019–2020 School Year

1. During the 2019-2020 school year, the Student attended a District middle school, was in the seventh grade, and was eligible for special education services under the category multiple disabilities.¹
2. The District's 2019–2020 school year began on August 27, 2019.
3. The Student's February 2020 individualized education program (IEP) was in effect prior to the COVID-19 school facility closures and included measurable annual goals in the areas of social-emotional (self-advocacy – SLP supported, social engagement), adaptive (navigating school stairs), vision (tactile discrimination; compensatory – functional braille skills, writing; spelling), math (differentiating between large, medium and small shapes), reading (comprehension), and writing (spelling out loud). The Student's progress was to be measured every trimester. The Student's IEP provided the Student with the following specially designed instruction and related services, all to be provided in the *special education* setting:
 - Adaptive: 65 minutes, 5 times weekly, to be provided by a special education teacher,
 - Social-emotional: 60 minutes, 5 times weekly, to be provided by a special education teacher,
 - Math: 50 minutes, 5 times weekly, to be provided by a special education teacher,
 - Reading: 50 minutes, 5 times weekly, to be provided by a special education teacher,
 - Writing: 45 minutes, 5 times weekly, to be provided by a special education teacher,
 - Occupational therapy (related service): 30 minutes, 20 times annually, to be provided by an occupational therapist (OT),
 - Vision services (related service): 30 minutes, 3 times weekly, to be provided by a teacher of the visually impaired (TVI), and,

¹ The Student's individualized education program (IEP) documented multiple diagnosed disabilities, including, seizure disorder, visual impairment, and septo-optic dysplasia, panhypopituitarism.

- Speech-language pathology (related service): 30 minutes, 27 times annually, to be provided by a speech-language pathologist (SLP).

The Student's February 2020 IEP additionally provided the Student with 1:1 adult support at all times to monitor seizure activity, assist with navigation, to serve as a "visual interpreter for [Student] to access general education," and to "help [Student] access her specially designed instruction." The Student's IEP further included orientation and mobility consultation for 30 minutes, 2 times monthly, to be provided by an orientation and mobility (OM) specialist. The Student's IEP indicated the Student required special transportation and would attend the Washington State School for the Blind (WSSB) for therapeutic physical education (PE).

4. On March 13, 2020, the Washington Governor issued a proclamation, announcing the closures of all public and private K-12 school facilities in the state through April 24, 2020, due to the COVID-19 pandemic and resulting public health crisis.
5. During March 2020, the Student's teachers provided at home individualized asynchronous learning opportunities for the Student.² These included books and a battery-operated cassette player that the Student used in the classroom. The Student's special education teacher additionally provided daily online learning activities through "Epic" remote learning platform and provided weekly Zoom classes.³ During this time, the WSSB provided self-directed learning activities to support the Student's physical education.
6. On March 15, 2020, the District reported on the Student's progress. Because the Student's IEP had recently been developed, many of the Student's goals were new. The IEP included narrative information helping to capture the Student's baselines based on teacher observation and data regarding Student performance prior to the school closure. The Student's progress

² For example, on March 27, 2020, the Student's special education teacher emailed the Parent a PDF document of activities the Parent could do with the Student. The special education teacher added, "Do continue to insist that she complete sentences using 'I' statements," and provided the Parent with a list of spelling words. These corresponded with the Student's IEP goals. The special education teacher also provided the Parent her office hours and informed the Parent she would be checking her emails "constantly." That same day, the SLP also sent a list of activities for the Parent to do with the Student, including activities for learning braille, as well as activities that did not require a braille. She also included a document with instructional strategies for teaching "tactile demonstration and braille letter identification," which corresponded to the Student's IEP goals.

³ The documentation showed the Student attended two Zoom meetings during spring 2020 and did not participate in most of the activities provided through the online remote learning platform. In frequent email correspondences between the District and Parent during this time, the Parent expressed the Student was unable to access activities provided on Zoom due to her disabilities. She also often expressed being overwhelmed by her many obligations, including a job and supporting other children in the home, which made it difficult to provide the Student with the significant support required to access activities provided through the remote learning platform.

was reported as "slow progress," in areas of social-emotional,⁴ adaptive,⁵ and math.⁶ The Student was making sufficient progress on her IEP goals in the areas of writing⁷ and vision.⁸

7. According to the District's response, in March 2020, the District developed a continuous learning plan (CLP)⁹ for the Student. According to the District's response, while the "purpose of this plan was to guide the District's delivery of special education and related services during the statewide school closure...because the District could not provide in-person support during the spring, and the Parents indicated that they too were unable to provide 1:1 support for the Student's school activities, the school team instead provided [asynchronous] home learning activities..."

In the Parent's reply to the District's response, the Parent relayed that the District's "claim that it provided a Continuous Learning Plan at the outset of the closure is false; things that I requested were accomplished belatedly in the school year only because I asked."¹⁰

⁴ The SLP added a narrative comment, describing how the Student had spent "a significant time modeling correct word order/pronoun use," and providing an example from a recent session with the Student. The SLP added that the Student needed to be "exposed to correct word order throughout her day," and "is more likely to use it when she is asking for help.," noting, "[Student] requires additional opportunities hearing staff and students ask for help appropriately."

⁵ The progress reported stated: "this goal [navigating school stairs] was written with our new school in mind, where there is an upstairs and downstairs and our Library is upstairs. [Student] was able to practice doing two steps down from her bus and up to her bus."

⁶ Regarding the skill of "differentiating between Large, Medium and Small Shapes," the IEP stated that [Student] is only able to differentiate between 'big' and 'small.' Medium does not make sense to her yet. We will continue to work with her on this goal."

⁷ For the skill "spelling out loud," it was noted that the Student "has been doing fairly well with this goal. She has difficulties with single letter words (e. 'l' and 'a'). She also has difficulties with compound words (ex. Airplane). She can now spell 10 out of 40 words when asked."

⁸ Progress report stated that "compensatory – functional braille skills, writing...is an emerging skill and [Student] is still very inconsistent writing m's. One day, in one line of braille, she did 8 m's independently, and another time only 2."

⁹ The CLP stated the Student's Parent "will receive packets of information weekly when such items become available, as well as access to weekly emails with communiques and further instructions for [Student]. [Student's] mom requested items be delivered to her during the Spring break period. Materials were taken to her home. She requested 10 minute lessons and materials to work for the Summer break, the lessons and materials were also delivered to her home. SLP will contact [Parent] every two weeks to check in. SLP will send recommendations for interaction strategies and activities via email. O&M [Orientation and Mobility] specialist will email [Parent] with activities and resources."

¹⁰ In her reply, the Parent added that she was "unable to implement the suggestions of a team of experts on [her] own while encountering resistance from [the Student] and simultaneously attending to three other

8. On March 23, 2020, OSPI issued guidance, instructing districts that while school facilities were 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.
9. The District was on spring break from March 30 through April 3, 2020.
10. On April 6, 2020, the Governor extended the March 13, 2020 school facility closure directive through the remainder of the 2019-2020 school year.
11. On April 6, 2020, the special education teacher emailed the Parent, "checking in to see how things are going with [the Student] and her schedule." The special education teacher also provided information about a "new app" that would enable the Student to listen to stories on her school-issued iPad. The Parent responded that she was overwhelmed with other obligations, including her work and caring for other siblings, and had not been able to pick up the iPad or figure out how to work the programs provided. The Parent later confirmed that the family had a computer the Student could use instead of the laptop.¹¹
12. Around April 10, 2020, the school principal delivered materials to the Student at home, including a braille.

The time period for this complaint begins on April 15, 2020

13. On May 1, 2020, the special education teacher and Parent exchanged multiple emails. The special education teacher asked if the family had a chance to work on the activities provided or had questions. The Parent responded that she had been doing other activities with the Student, including exercising outside, talking, singing, and spelling. The Parent also expressed that she had been "more swamped than ever with work."
14. On May 15, 2020, the OT provided the Parent with self-regulation activities the Parent could work on with the Student at home.

children, working from home, and managing a household while under extreme stress." She added that her "inability to carry this load does not constitute refusal to implement a plan, but a sheer capacity overload."

¹¹ In her reply, the Parent wrote that the Student was unable to access remote learning because the Student's iPad was not provided, and that while she was present on video in late May/early June subsequent to receiving an invitation on May 19, 2020, that this was "more than 2 months into the closure." The Parent provided examples in her reply to the District's response of exchanges she had with the special education teacher during which the special education teacher explained that it had taken her "months to learn Zoom." The Parent also noted that the meeting invitations the Student had received were for "social hangouts only," and not to receive specially designed instruction in academic areas. The Parent added that she was unable to support the Student in remote instruction and that the special education teacher also "did not have the technological training or expertise to provide remote instruction."

15. On May 27, 2020, the OT provided the Parent additional fine motor activities for the Parent to work on with the Student at home.
16. On June 5, 2020, the SLP emailed the Parent to inquire if she would like to connect before the end of the school year. The Parent responded that she had not had the opportunity to support the Student with her school activities.
17. On June 9, 2020, WSSB emailed the Parent, asking whether the family had been accessing the "multiple short videos with activity suggestions in regard to increasing [the Student's] O&M [orientation and mobility] skills" and the "podcast link that I update every week with new podcast episodes," and providing additional ideas for OM activities.
18. Also, on June 9, 2020, the Parent emailed the SLP, requesting activities the family could do with the Student over the summer. The SLP responded that she would "compile all the recommendations we've made during the school closure in [a] document and then email it to you." In a follow up email, WSSB additionally offered to provide braille materials.
19. On June 10, 2020, the SLP emailed the Parent a compilation of "10-15 minute activities"¹² the Parent could do with the Student, and indicating that she would be "dropping off the materials that go with these lessons..."¹³
20. On June 18 and 27, 2020, the special education teacher invited the Parent to a Zoom meeting to check in. It is unclear if the Parent attended.
21. June 19, 2020 was the last day of remote learning in the District for the 2019-2020 school year.
22. Around June 20, 2020, the District issued a progress report for the Student. The progress report documented that the Student made "no progress" on IEP goals in the areas of social

¹² The CLP documented the Parent had requested activity lessons that could be completed in 10-15 minute segments.

¹³ In her reply, the Parent wrote that she was "most appreciative to the team for their effort to give me something to do with [Student] over the summer," and that "We were able to try a few things, but nothing consistently." She added that she did not believe this made up for what the Student was unable to access during spring 2020.

emotional,¹⁴ math,¹⁵ and vision.¹⁶ In the area of adaptive (navigating stairs), the progress report noted the Student was making “sufficient progress,” documenting that “Mom reports that [Student] is able to do the stairs at her home.” The progress report also showed the Student also made “sufficient progress” in spelling and that the “Family reports this is a goal [Student] is able to work on during daily walks. Unsure of exactly how many words he has memorized).”

Summer 2020

23. On July 27, 2020, the Parent emailed the District superintendent that she was “alarmed by the lack of information/reassurance about plans for our special needs children” and that a recent survey sent to parents to obtain information about their concerns did not mention students with disabilities or their unique needs.
24. On July 29, 2020, the Parent emailed the District regarding her concerns after learning the District plan to reopen in a full remote learning model for the fall, stating she did not believe it would provide the Student a free appropriate public education (FAPE).
25. On July 30, 2020, the executive director of special services (executive director) emailed the superintendent, and copied the deputy superintendent, documenting that during the conversation, the Parent “was informed that she would be contacted by her students’ case managers to schedule IEP meetings as soon as possible once teachers return, and that recovery services would be discussed as well as the possibility of in-person services this fall, as outlined in OSPI’s June 2020 guidance.” He added that the Parent “agreed to hold off contacting an attorney until after the IEP meeting is held.”
26. On August 14, 2020, the director of special education (director) emailed the parents of students with IEPs information about the District’s reopening plan and procedures for determining in-person special education services for fall 2020. The email indicated that the District understood some students would require additional support, and that while support would be provided remotely if possible, “Based on specific criteria, some in-school educational

¹⁴ In the area of social-emotional (supported by SLP), the SLP wrote that “During the mandated school closure due to Covid-19, [school] is providing remote learning options for all IEP goals to families. IEP teams work in collaboration with parents to get updated data for each goal on a student’s IEP. The SLP created a PDF document of recommendations for supporting communication in the home during the school closure and shared it with the family on 4/7/20. She contacted the family to get IEP data on 4/14/20, 4/28/20, 5/19/20. Parents did not return data for this goal after multiple contact attempts. Family requested additional information about supporting [the Student] at home on 6/9/20 and reported that they would be working on goal areas over the summer. The SLP emailed her a PDF of recommendations from the team on 6/10/20. Baseline data will be collected by the IEP team once school resumes.”

¹⁵ Progress report stated there was, “No report from home on this goal.”

¹⁶ Progress report included following narrative from teacher: “During school closure, I am not sure if [Student’s] family was able to get a brailler to practice this goal. No data from home.”

services will be considered with safety requirements if that is the only service delivery method available.”

In its response, the District added that the District had also adopted COVID-19 safety measures for in-person instruction and that the District would offer no in-person services on Wednesdays to any student, but that remote instruction would be available to students on this day. Parents were notified that case managers would be contacting them in early September to discuss back-to-school plans and priorities. That same day, the Parent emailed the director and indicated that she did not want to wait to mid-September to develop a plan for the Student and requested an IEP meeting. She added that she believed the Student required “one on one in-person modified curriculum” and had three months of school needing to be made up. The District also noted in its response that the Parent rejected all remote instruction offered, including remote instruction offered on Wednesdays.

27. On August 25, 2020, the Parent again emailed the director and requested an IEP meeting to discuss in-person services for the Student. In her email, the Parent wrote that on March 13, 2020, she called to ask for materials to be sent home with the Student, but was told nothing was available because the classroom “was packed up in anticipation of the move to the new building,” and that she “received no items, and the school disappeared off the grid for several weeks.” She added that once school reopened for remote learning on April 6, 2020, that the “school remained inaccessible.” Overtime, the Parent wrote that individual members of the Student’s team offered email suggestions, but no one-on-one time was provided and “no Zoom time was offered,” and that even it was, “it would not have mattered to [Student].”). The Parent wrote that the office of special services did not communicate with her, and that ultimately, all she received was a “box of books on tape (that’s it)” dropped off by the principal in mid-April. The Parent expressed difficulties she had balancing her other obligations with trying to assist the Student in accessing services, noting that she felt “An email to a parent does NOT constitute instruction or perform services required by an IEP...I was expected to provide the services and it was physically/humanely impossible...I’m not a professional.” The Parent stated that she felt the recent August 14th communication about early September contact to schedule an IEP meeting “should be considered the first official communication the district has had regarding special education services since the pandemic began in March.”
28. On August 28, 2020, the Parent received an email from the principal, reiterating the school year would be beginning in a remote model and stating that it would be important for parents and students to know how to use the following: their iPad and internet access, Canvas (a program that would serve as an “online home base for all classes),” skyward (a student information system used to hold student schedules, grading and to track student attendance), Zoom, and an online page containing the school schedule. The Parent responded that the information was not helpful to her Student and that she was “greatly horrified” that for students receiving special education services, parents had to wait until the end of September to develop a plan.
29. On September 1, 2020, an IEP meeting was scheduled for September 9, 2021.

2020–2021 School Year

30. September 4, 2020 was the first day of the 2020–2021 school year in the District.
31. At the commencement of the 2021–2022 school year, the Student continued to be eligible for special education services under the category multiple disabilities.
32. On September 9, 2020, the Student’s IEP team met to consider the Parent’s request for in-person learning, including that the Student “needs to be in school to fully access her learning,” and that “[Student’s] inability to see impairs her ability to use an iPad or computer for remote services.” The Student’s IEP team agreed the Student required in-person instruction and decided the Student would begin attending school in-person four days per week for three hours a day.¹⁷ Following the IEP meeting, the District issued prior written notice (PWN) that stated in-person instruction would begin on September 14, 2020.¹⁸
33. From September 14 through 17, 2020, District buildings were closed due to poor air quality caused by wildfires.¹⁹
34. On September 18, 2020, the Student began receiving in-person special education services.
35. Around November 20, 2020, the District issued the Student’s fall 2020 progress report.²⁰ According to the progress report, the Student was making “slow progress” in the areas of

¹⁷ In its response, the District noted that this was the maximum amount of in-person services that could be provided to a student while adhering to the District’s group size limitations established by the District in order to meet health and safety requirements. In her reply to the District’s response, the Parent expressed disagreement with the District’s policy of only permitting five students in a room at the time. OSPI notes that while districts were required to consider each student’s need for in-person services on an individualized basis, district policies specifying how they wanted to implement policies for bringing students back to school were building level decisions and a matter of local control, which are accordingly not addressed in this complaint. The Parent additionally raised allegations that the District discriminated against the Student. OSPI reminds the Parent that it is unable to investigate allegations of discrimination during the citizen complaint process. If the Parent believes the District discriminated against the Student, the Parent may file a complaint with the Office of Civil Rights.

¹⁸ In its response, the District noted that all District buildings are closed on Wednesdays as part of the District’s COVID-19 safety protocols—a protocol which was still in place at the time this complaint was filed. The District further noted that WSSB had not yet opened to itinerant students for in-person instruction.

¹⁹ In her reply, the Parent added that in addition to closures for the wildfires, the Student’s attendance record, which indicated the Student was present on school days from September 1–17, 2021 is inaccurate. The Parent wrote that while she was in touch with the District during these dates, the Student was not receiving educational services from the District during this time.

²⁰ In its response, the District noted that at the time the Student’s November 2020 progress report was issued, “[t]he Student had been attending school in-person for four half days a week since mid-September.”

social-emotional,²¹ math,²² writing,²³ and vision.²⁴ The Student's adaptive goal of navigating school stairs was discontinued due to safety concerns at the Student's new school as identified by the OM specialist (it was determined that the Student would take the elevator up flight of stairs to library and continue to work on navigating two steps up to a platform).

36. On November 23, 2020, the District increased the Student's in-person services from four half days a week to four full days per week. This was made possible because a related service provider who used a small room adjacent to the Student's classroom "took leave and her substitute worked remotely. Thus, the District made this extra room available for the Student, while still observing its five person group size limit."
37. From November 23, 2020 through February 2021, the District provided the Student four full days per week of in-person instruction. Per District health and safety policy, Wednesdays remained a remote learning day.
38. On February 17, 2021, the Student's IEP team met and developed her annual IEP. The team developed two new adaptive goals (self-care and independent living skills). The IEP team continued the other IEP goals, but updated the baseline data and mastery criteria.²⁵ The IEP team additionally modified the Student's special education services to increase the amount of

²¹ Regarding the Student's "Self-Advocacy" goal, the SLP reported that "[Student] has used the following statements during therapy: 'my turn; 'I need some help; 'My birthday is November 14; 'I can; 'tell me; 'this is your hand; and 'yours.'" She added that the Student "needs consistent models and prompts to 'use your words' to express requests and 'advocates when she needs help.' [SLP] provided an instructional video to paraeducator and teacher on ways to facilitate [Student's] communication in different activities and contexts. [Student] is getting to know [substitute SLP] covering during [SLP's] leave and has said '[substitute SLP's name]' and 'See you later' with verbal prompts and model. [SLP 2] discussed additional ways to facilitate use of 'I' statements with tactile cue of hand on chest as well as using modeling and expectant pause (waiting before prompting to allow [Student] the chance to formulate and express a thought."

²² The progress report documented that the Student was at a 33% accuracy with goal regarding differentiating between large, medium, and small shapes, and was still having difficulty understanding the concept of "medium" size.

²³ Progress report documented the Student was able to consistently spell 15 out of 40 words.

²⁴ Progress report included the following note: "We're back! Out of 3 lines of braille, [Student] has done 3 m's independently."

²⁵ A review of the February 17, 2021 progress report included with the February IEP showed the IEP team included narrative information for most of the goals, along with descriptions of whether the goal had been met. The narrative statements included information about efforts to collect progress data during the school closures and what progress was made or not made during the spring and fall of 2020. For the goals that were discontinued or modified to include new goals, or where new goals were added, the progress report generally explained these changes, including how they related to the Student's post-secondary goals, where appropriate.

specially designed instruction the Student received weekly in the areas of adaptive and social-behavior.

39. Also, in February 2021, the District began providing hybrid instruction for middle school students. According to the District's response, this Student "has received more in-person instruction than any other student in the District."²⁶
40. Around March 15, 2021, the District assessed the Student's progress. According to the progress report, the Student was making "slow progress" on social emotional,²⁷ and was showing "emerging skills" in the areas of adaptive,²⁸ math,²⁹ and vision. The Student was making "sufficient progress" in writing.
41. On March 29, 2021, the District assessed the Student's progress on an independent living skill (making a simple snack) as an emerging skill, noting that the Student "is not enjoying making a snack yet. [Student] has been working on making toast and will now touch the toaster and press the button."
42. On April 13, 2021, the District assessed the Student's progress. According to the progress report, the Student was making "slow progress" in the areas of "social-emotional³⁰ and math and "emerging skills" in adaptive.³¹ No progress data was reported for April 2021 in writing or vision.

²⁶ In her reply, the Parent acknowledges this is true, but also notes the Student has still not accessed a significant amount of services on her IEP and does not believe the proposed compensatory services is sufficient to remedy what the Student did not access.

²⁷ The SLP wrote, "[Student] is slowly starting to independently state 'I don't know it' when she doesn't have an answer to a question, but that is with verbal models and prompting. She is using other 'I' statements and social etiquette statements (such as 'Thank you') independently. We'll continue to work on this. This is a fairly new goal, as her IEP was just held 2/17/2021."

²⁸ The progress report noted on 3/12/21 that the IEP had just started, and little progress had been made on this goal.

²⁹ Progress report documented the Student was answering at 66% accuracy.

³⁰ The SLP wrote, "[Student] is using 'I' statements without reminders in 75% of observable opportunities. We still prompt her when she forgets to do this. We also model how to state it."

³¹ Regarding new adaptive goal 1 ("body relative directions") the progress report stated, "[Student] is not very interested in this goal at this time. We are trying different ideas to help her recognize her 'right' hand. We were saying to her use the hand you eat with. But [Student] uses both hands when she eat. We will continue to work on this goal with her." Regarding new adaptive goal two ("keeping her face clean"), the progress report noted, "[Student] is capable of cleaning her face. She often does not want to. We will help her if she doesn't clean her face. She would rather hug you and wipe her face on you. She is wiping her face in 1 of 5 observable opportunities."

43. On April 14, 2021, the Parent filed a complaint with OSPI. In her complaint, she stated the Student, "cannot use an iPad, desktop computer, or other device to access schoolwork. She cannot read Braille or write. She cannot see large print. Despite these asserted challenges, the Student's most recent progress report, in April 2021, shows that she has made progress on eleven of her twelve IEP goals."
44. In its response, the District acknowledged the challenges the pandemic presented for the Student's education, including regarding the Parent's inability to support the Student during remote instruction due to concurrent responsibilities. In response to these challenges raised by the Parent in the complaint, the District proposed providing recovery services through its District special education summer program that runs from July 12 through August 19, 2021, Monday through Thursday, from 8:30 through 11:30 am. The District indicated the Student's special education teacher would be supervising the program and that it was in the process of hiring a 1:1 paraeducator to support the Student, who is already slotted to attend the program. The District further agreed that the Student would likely benefit from attending a recovery services summer program in the summer of 2022, and that the District agreed to provide a qualified special education teacher to supervise the Student's instructional program, and to provide 1:1 support to the Student during these programs (District noted it would begin the process to hire this person during Summer 2022).

In the complaint, the Parent requested the District additionally provide in-person instruction on Wednesdays, a day the District does not provide in-person instruction due to its COVID-19 safety protocols. In lieu of providing in-person instruction on Wednesdays, the District offered to provide 30 hours of additional in-person instruction to the Student, to be provided on a mutually agreeable schedule.

45. On May 20, 2021, the Parent submitted her reply to the District's response. In her reply, the Parent stated that she agreed the Student made progress and accepted the District's offer to provide recovery services during the summers of 2021 and 2022. However, she alleged that the Student would have made more progress had the Student received all of the hours of school the Student had missed during the pandemic and stated that she felt the District's proposed amount was not sufficient to make up for what the Student did not access. She relayed that according to her calculations, the District had proposed a combined 144 hours of services over two summers, when the Student did not access 288 hours in the spring of 2020 and 186 from the commencement of the 2021 school year to the time the complaint was filed. The Parent further requested the hours of recovery services be provided in an environment where the Student felt safe and was familiar with so that the time receiving services was spent on attending to IEP goals relating to self-care and areas of academic study, and "not trying to figure out where she is and who she's with." The Parent added that, "Currently the District has offered the time, but not with whom, where, or with what materials, criteria critical to a blind child with a seizure disorder. When you walk into a room, you grasp the spatial parameters, layout of furniture, exits, inhabitants, and materials in seconds. My child needs days to figure this out, and her safety is easily compromise without established parameters."

CONCLUSIONS

Issue One: IEP Implementation from Mid–April 2020 through April 14, 2021: The Parent alleged the District failed to implement the Student’s individualized education program (IEP) from mid–April 2020 through the date this complaint was filed, April 14, 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. 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 disabled child and those required by the IEP.

During the COVID-19 school facility closures, as students received general education instruction and student support services, districts were required to provide students with disabilities special education services—related services and specially designed instruction—supporting a free appropriate public education (FAPE). As a result of the ongoing pandemic, OSPI has acknowledged the need for FAPE to 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 the students. During the spring of 2020, OSPI also acknowledged that there was flexibility in determining how to meet the individual needs of students with disabilities and that schools may not have been able to provide all services in the same manner they were typically provided for in an IEP. However, while there was not an expectation that districts implement a student’s IEP as written during school closures caused by COVID-19 in spring 2020, districts were required to have a documented plan for how students with disabilities were to receive a FAPE, which may have included use of a “Continuous Learning Plan” (CLP) or similar document. OSPI required school districts discontinue the use of CLPs or similar documents at the commencement of the 2020-2021 school year and required that all special education services be provided in conformity with a student’s IEP.

In its response to the Parent’s complaint, the District acknowledged that the Student was unable to access any of the special education services provided from mid–April to the end of the school year in June 2020. Accordingly, OSPI finds the District to be in violation because although it was not the District’s fault that it was unable to implement the Student’s IEP from mid–April through the end of the 2019-2020 school year, it remained obligated to provide a FAPE to the Student. Although the Student’s special education teacher and service providers maintained contact with the Student’s Parent and attempted to provide activities individualized to the Student’s needs, the Student’s disability-related needs meant she required 1:1 assistance and highly-specialized therapies that the Parent was unable to provide remotely. At the end of the 2019-2020 school year, the District attempted to collect information on the Student’s progress on her IEP goals by gathering information from the Parent and in some situations, providing the Parent alternative ways to collect data on the Student’s progress. Despite its efforts, the District was either unable to obtain useful information from the Parent or obtained data that showed the Student did not make progress on IEP goals. In acknowledgment that the Student had not made progress, the

Parent requested activities to do with the Student during summer 2020, to try and help the Student recoup lost skills. In response to the Parent's request, the special education teacher and SLP provided the Parent with targeted, individualized activities to do with the Student based on activities the Student was unable to access during the spring. While the Parent reported she was able to do some of the provided activities with the Student, she relayed that she was unable to do all of the activities and that her work with the Student was inconsistent based, in part, on the Student's refusal to engage. During the 2020 summer, the Parent continued to express concerns that the Student was unable to make progress in the remote environment and requested that the Student required in-person, one on one instruction full-time.

As a result of the Parent's concerns and with information that the Student had still not made progress during the spring and summer of 2020, the Student's IEP team met at the end of September 2020 and determined the Student required in-person services to receive FAPE. As the Parent pointed out in her complaint and reply to the District's response, this was after the commencement of the school year and after the Student experienced a delayed start as a result. The Student began to receive four half-days a week on September 18, 2020. The District acknowledged that the amount of in-person services during the first few months of school was limited by health and safety requirements that placed restrictions on the number of students who could be in a classroom at the same time. While the Student attended half-days of in-person instruction, she remained unable to access additional remote instruction. On November 23, 2020, the Student began receiving special education services in-person, four full-days a week. Although OSPI acknowledges the District's efforts to begin in-person learning for the Student as quickly as possible upon commencement of the 2020-2021 school year, due to the shortened school days and shortened school weeks experienced by the Student given her inability to access instruction and services remotely, OSPI finds the difference between the amount of special education services provided for in the Student's IEP and the amount of services the Student received to be a material difference.³² OSPI accordingly finds the District to be in violation for not implementing the Student's IEP for the 2020-2021 school year for the time period under review in this complaint.

³² The District included with its response a schedule of the services offered remotely to the Student during spring of 2020 and during the 2020-2021 school year for the time period where the Student was receiving services in-person full day for four days a week. As previously discussed in this decision, the Student was unable to access most of the remote services offered during the spring of 2020. When the Student began receiving services for four full days per week on November 23, 2020, the schedule provided to OSPI documented that the Student was provided approximately the same number of minutes of special education services (approximately 1440, according to OSPI's calculations, taking into consideration the Student's toileting goal was unable to be addressed during the school day because the Student reportedly was not having bowel movements at school). The specially designed instruction and related services provided during this period of time corresponded to the areas of need identified in the Student's IEP, even though the exact number of minutes in each area did not exactly mirror the service matrix in the Student's IEP. However, from the commencement of the school year to November 23, 2020 (approximately nine weeks), because the Student was only attending half-days for four days per week, the Student was receiving at most, half this amount, which was half of what was provided for on the Student's IEP. This resulted in the Student not accessing approximately 6,480 minutes (108 hours) of special education services, in addition to not being able to access most of the special education services provided in spring 2020. While OSPI

OSPI agrees with the Parent that compensatory services are an appropriate remedy, but disagrees that the number of hours awarded must equal the number of hours of specially designed instruction and related services the Student missed in order for the Student to receive a FAPE. There is no requirement that compensatory services must be ordered hour for hour. Compensatory services are an equitable remedy designed to place the Student in the position the Student would have been in had the violation not occurred in the first place, and therefore should be informed by progress data and information about the Student's individual needs. The Parent acknowledged that since beginning to receive in-person instruction, the Student has begun making progress again on her IEP goals, which was reflected in the most recent progress report. However, because the IEP team has delayed meeting to review the Student's progress and has not discussed the Student's needs for recovery services in light of her IEP goals, and also because some of the Student's goals and benchmarks have been changed since mid-April 2020 prior to a discussion about recovery services, it also is not clear from the current available documentation what the Student's current need for recovery services are.

In response to this complaint, the District proposed the Student attend its District-wide summer program, which offers 72 hours of services. The District indicated the program would be run by a certificated special education teacher and that the Student would be provided a 1:1 paraeducator. The District additionally offered 30 hours of in-person instruction to address the Parent's allegation that the District did not offer services to the Student on Wednesdays. The District accordingly proposed 102 hours of recovery services. The District also suggested that the Student would likely benefit from attending a summer program in the summer of 2022, which it relayed would also be run by a special education teacher, and during which the Student would also receive 1:1 support. The District did not propose an amount of services for the 2022 summer. OSPI agrees with the District's proposal to use the 2021 summer to provide recovery services to the Student and to support the Student with a 1:1 paraeducator. However, considering the amount of services the Student was unable to access and in light of her unique needs, OSPI additionally orders the District to complete an evaluation of the Student by an outside provider within two months following completion of the summer program to assess the Student's potential need for additional recovery services. The evaluator must be a qualified individual with expertise in evaluating children with visual impairments and be able to provide recommendations on recovery services. The Student's IEP team will be required to then meet and consider the Student's need for recovery services, including the recommendations included in the evaluation and any other data or information presented by team members. OSPI will review the evaluation and the IEP team's determination regarding recovery services and determine if any additional compensatory education is required at that time to remedy the violations identified in this complaint.

Issue Two: District Response to Parent's Requests in Spring and Fall 2020 – The Parent alleged the District did not follow procedures to respond to her requests during the spring and fall 2020

acknowledges there may not currently be a material difference in what the Student is currently receiving and the what is provided for in the Student's IEP and that the Student has demonstrated she is again making slow progress on her goals, OSPI finds the difference between what the Student has received since mid-April through the date the complaint was filed, including during spring 2020 and beginning of the 2020-2021 school year, to be material.

for a full day of in-person instruction, and regarding the appropriateness of remote instruction.³³ While a district may make district-wide policies relating to the health and safety of students and safety due to the ongoing COVID-19 pandemic, it must make individualized determinations on a case-by-case basis regarding a student's need for in-person services and make changes to his or her IEP when necessary for a student to receive a FAPE. Districts should also be making individualized determinations regarding each student's need for recovery services when a student has not made expected progress on IEP goals.

Following the school closures in spring 2020, the Parent raised several concerns during the summer of 2020 regarding the Student's unique needs, including that the Student was unable to make progress in the remote learning environment—advocating that the Student required in-person instruction with 1:1 support to receive a FAPE. In response to the Parent's concerns, the Student's IEP team met on September 9, 2020 and made an individualized determination documented in a prior written notice that the Student required in-person services for four days a week. Due to delays caused by wildfires in the state, the Student's in-person services began on September 18, 2020.

OSPI agrees with the District that the IEP process was the appropriate place to address the Parent's concerns and that the District followed appropriate procedures by commencing an IEP team meeting in September 2020 to determine the Student's individual need for in-person services, despite the District as a whole returning to a remote learning environment. Accordingly, OSPI finds no violation.

CORRECTIVE ACTIONS

By or before **June 28, 2021, September 10, 2021, September 17, 2021, and December 10, 2021**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

IEP Meeting to Discuss Compensatory Education for Summer 2021

By or before **June 25, 2021**, the Student's IEP team will meet to determine how it will deliver **102 hours** of compensatory education to the Student during summer 2021. At the IEP meeting, the IEP team will discuss and document in a prior written notice the following:

- Out of the total 102 hours offered, how many hours in each IEP goal area will the Student receive services. The IEP team should document what data and information was used as the basis for its decision;
- The Student's schedule during summer programming;
- Student's schedule for receiving the additional 30 hours of compensatory education,

³³ As a preliminary matter, as noted previously in this complaint, the policies adopted by a district pertaining to the reopening of schools in fall 2020 (e.g. remote, hybrid, or in-person) were decisions made at the district level and outside the scope of what OSPI is able to address in a citizen complaint process, which can only address allegations of noncompliance under part B of the IDEA.

- Activities/responsibilities of the 1:1 paraeducator; and,
- Plan for implementing the Student's accommodations and other supports during summer programming and while providing the additional 30 hours of compensatory education.

By **June 28, 2021**, the District will provide OSPI with the following documentation: a) any relevant meeting invitations, b) a prior written notice (PWN), summarizing the IEP team's discussion and decisions concerning each of the above bullet points and the data and information used as the basis for the decision; c) the Student's schedule for receiving services; d) a list of people, including their roles, who attended the meeting; and, e) any other relevant documentation.

Compensatory Education for Summer 2021

The District will deliver 102 hours of compensatory education to the Student. The compensatory education will occur in-person either during the District's summer programming with 1:1 support, or in a one-on-one setting. It will be provided by a certificated special education teacher or related service provider. 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 with at least 24 hours' notice of the absence, the District does not need to reschedule. *The services must be completed no later than **September 3, 2021**, including those needing to be rescheduled.*

No later than **September 10, 2021**, the District shall provide OSPI with documentation that all of the compensatory education has been completed. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled by the District or missed by 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 **September 10, 2021**.

Evaluation

By **September 10, 2021**, the District will identify an evaluator (**not employed by the District**) who is qualified to conduct an **educational** evaluation of the Student. By **September 17, 2021**, the District shall provide OSPI with the name and qualifications of the evaluator. The evaluator should have expertise in conducting evaluations on students with visual impairments. The District must include the Parent(s) in the evaluator selection process. At a minimum, this evaluation should include the following:

- Assessment of Student's present levels of performance.
- Evaluation of progress made by Student during summer 2021 on IEP goals.
- Recommendations to IEP team regarding the Student's need for additional recovery services.
 - The evaluator should consider both the Student's lack of access to special education services dating back to mid-April 2021, as well as the recovery services provided to the Student since then.

The evaluator may also make recommendations regarding modifications to the Student's IEP, if appropriate. The evaluation should be completed no later than **November 29, 2021**. By **December 3, 2021**, the District must hold an IEP team meeting, which includes the Parents, to review the results of the evaluation and make any recommendations regarding recovery services or modifications to the Student's IEP. It is recommended that the evaluator also be invited to the IEP team meeting. By **December 10, 2021**, the District must provide OSPI with a copy of: a) the evaluation; b) prior written notice, if any recovery services were recommended; and, c) revised IEP, if applicable.

By December 17, 2021, OSPI will review the documentation provided by the District and determine if any additional compensatory education services are required to remedy the violations identified in this complaint in light of the data obtained on the Student regarding progress made.

DISTRICT SPECIFIC:

None.

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

Dated this ____ day of June, 2021

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

THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

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