

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 21-73

PROCEDURAL HISTORY

On September 16, 2021, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Northshore 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.

On September 21, 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 October 11, 2021, OSPI received the District's response to the complaint and forwarded it to the Parent on the same day. OSPI invited the Parent to reply with any information she had that was inconsistent with the District's information. The Parent did not reply.

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

ISSUES

1. Did the District implement the Student's individualized education program (IEP), including accommodations for virtual learning, during the 2021–2022 school year?
2. Did the District follow procedures to respond to the Parent's concerns about the Student's IEP and request(s) for IEP meetings, beginning in May 2021?
3. Did the District follow procedures to develop an IEP for the Student for the 2021–2022 school year and appropriately document its offering of FAPE in the email sent to the Parent on September 10, 2021?

LEGAL STANDARDS

IEP Implementation: At the beginning of each school year, each district must have in effect an individualized education program (IEP) for every student within its jurisdiction served through enrollment who is eligible to receive special education services. A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. 34 CFR §§300.320 through 300.328; WAC 392-172A-03090 through 392-172A-03115. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. The initial IEP must be implemented as soon as possible after it is developed. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105.

The proper standard to determine whether a child with a disability has received a free appropriate public education (FAPE) is the "educational benefit" standard. *J.L. v. Mercer Island School District*

575 F.3d 1025, 52 IDELR 241 (9th Cir. 2009). "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).

Parent Request for IEP Meeting: When a parent or district believes that a required component of a student's IEP should be changed and requests an IEP meeting, the district must conduct an IEP meeting if it believes that the change may be necessary to ensure the provision of FAPE. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,475, 12,476 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 20). The District must schedule the meeting at a mutually agreeable time and place, and appropriately invite the parent to the meeting. 34 CFR §§300.322 and 300.328; WAC 392-172A-03100. If a parent requests an IEP meeting because the parent believes that a change is needed in the provision of FAPE to the student or the educational placement of the student, and the school district refuses to convene an IEP meeting because no change is necessary for the provision of FAPE, the district must provide written notice to the parents of the refusal, including an explanation of why the district has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student. IDEA (Appendix A to 34 CFR Part 300, Question 20).

IEP Development: When developing each child's IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child. 34 CFR §300.324(a). WAC 392-172A-03110.

Provision of FAPE: An IEP is required to be "reasonably calculated to enable the child to receive educational benefit." It does not require the absolute best or potential-maximizing education for that child. Rather, the district is obliged to provide a basic floor of opportunity through a program that is individually designed to provide educational benefit to a child with a disability. The basic floor of opportunity provided by the IDEA consists of access to specialized instruction and related services. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). School authorities should be able to offer a cogent and responsive explanation for their decisions that shows a child with a disability's IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017).

FINDINGS OF FACT

1. During the 2020–2021 school year, the Student attended a District elementary school (school 1) and was eligible for special education services under the category of autism.
2. The District's 2020–2021 school year began on September 2, 2020.
3. On May 2, 2021, the Student's special education teacher 1 sent an email to the Parent, general education teacher 1, and the assistant principal that stated:

Please find the DRAFT of Student's [individualized education program (IEP)]. Please read it over before our meeting this Wednesday...We will spend time on the highlighted areas. I hope at the meeting to see how Student does with recess and learn more about his journey lately. It looks like the first 2 goals are relevant still. As a team we will determine if those are the direction to be pursuing or others. Hope to see Student tomorrow and look forward to seeing all of you on Wednesday.

4. On May 6, 2021, special education teacher 1 sent another email to the Parent, general education teacher 1, and the assistant principal that stated:
Please find attached the present levels and new goals. I have highlighted revisions and the goals. Please let me know if the new first goal captures what the team expressed. Is he currently successful 50% of the time or is it higher or lower than that? The second goal is slightly revised. Goals 3 and 4 are approximately the same. Please let me know if you concur with the baseline percentage of the four goals and the "goal" percentages for each of them.
5. On May 10, 2021, the Student's school 1 IEP team met to develop his IEP. The Student's May 2021 IEP included four annual goals in the areas of social/emotional behavior. The Student's IEP provided the Student with the following specially designed instruction and related services:
 - Social/behavior: 60 minutes, weekly (to be provided by a special education teacher, in the general education setting)
 - Social/behavior: 30 minutes, weekly (to be provided by a special education teacher, in the special education setting)

The Student's IEP provided the Student with several accommodations and modifications, including:

- Visual schedule and review of changes to reduce anxiety
- Access to a break spot with items like favorite books
- Dots and squeezes, stress balls, fidget toys
- Access to sensory/self-regulation supports
- Additional time for tests
- Allow breaks during testing
- Flexible seating options when completing work (e.g., at desk, with clipboard, in different area of room)
- Preferential seating – during carpet time close to teacher in the front row
- Preferential seating at desk/table – on edges or with space around him (like empty desk next to him)
- Regularly scheduled movement breaks (e.g., swimming, walking)
- Separate setting during testing
- Teacher proximity and/or private conversations when redirection is needed
- Visual supports for zones of regulation and problem solving solutions

The Student's IEP included consultation with occupational and physical therapy staff as a support for school personnel in the general education setting on an as needed basis and indicated the Student would spend 98.25% of his time in the general education setting.

6. On May 10, 2021, after the IEP meeting, special education teacher 1 emailed the school counselor, Parents, assistant principal, and general education teacher 1 regarding the IEP,

stating, "I want to make sure that the language matches what we discussed and that the current frequency of occurrence and our goals for [Student] are also agreed upon before I lock it. Please let me know if you have questions or if you are unsure of anything."

7. On May 12, 2021, the school counselor emailed special education teacher 1 and copied the Parents, assistant principal, and general education teacher 1 and stated:

Thank you for sending the revised IEP and a follow-up email. It looks good to me. I think 50% successful sounds right, however I would ask Mom and Dad to confirm this as needs and presentation are a bit different in each home.

Prompts/scripts to initiate self-regulation and problem-solving can include any of the following:

- What do you need?
- How can I help?
- How can we make this big deal into a little deal?
- We can be flexible, let's make a Plan B."

8. On May 17, 2021, special education teacher 1 emailed the Parents and stated, "Please find the final IEP and the paperwork that goes along with it. I am so excited [Student] is able to stay a half day. Let us know if you are ready for a longer day." The special education teacher sent a similar email to the counselor, assistant principal, and general education teacher.

The Parent responded the same day, stating:

...I think it looks good. I agree that 50% sounds about right for self-identifying his emotions...Only thing I would change is that his diet does not include meat and dairy. [Student] went from just trying recess 2 weeks ago, to staying for 2 hours last week, and this week he's increased to basically a half-day (noon-3:30)!! It sounds like he is much more able to participate and engage in person than he was over Zoom. I'm really glad that it sounds like he's been able to have some positive experiences in the classroom!!

9. On May 22, 2021, the Parent emailed the school counselor and copied special education teacher 1, the assistant principal, and general education teacher 1 and stated:

Student is feeling ready to try extending his school day a little bit more! He was hoping to come for lunch this week, and we were wondering if he could join a little before lunch and try practicing that transition? Let me know when would be a good time for him to join! I was also wondering if there was any more information about HiCap¹ testing dates yet...

That same day, the assistant principal responded, "I am so happy to hear he is enjoying school! I just had a meeting Friday with the HiCap department. Information should be emailed home Monday...I believe that Student's class would test on Tuesday, June 1st. We will know for sure next week."

10. On May 23, 2021, general education teacher 1 emailed the assistant principal, special education teacher 1, and the Parent and stated, "Yay! Lunch transition starts at 10:55, someone

¹ "HiCap" or "Highly Capable Program" is a District program for students who qualify by testing to engage in advanced-level work in their area(s) of strength.

is going to need to walk him up because I will be Zooming at that time. Looking forward to having him here for longer!" Special education teacher 1 responded, "Very exciting! I would be overjoyed to walk [Student] up. I will try to come down at that time but please have the office call me if he arrives and I am not there."

11. On June 15, 2021, the Parent emailed members of school 1 IEP team and stated:

It sounds like [Student] qualified for EAP² placement next year! I was hoping to get some more information about what happens if we accept the placement and he has to change schools. Would he get special education support to help with the transition? What sort of social support do they offer the kids transferring? How difficult would it be to transfer back if it isn't a good fit for him? The email I got pretty much only asked if we wanted to accept the placement or not, but I'm trying to gather some more info before making such a big decision. I'd really appreciate any input you can provide about the process!

That same day, the assistant principal responded, "Is there a good time tomorrow when I could give you a call to answer some of your questions?"

12. On June 16, 2021, the Parent responded to the assistant principal and stated, "Sure! I should be available tomorrow afternoon. Thank you!" The assistant principal emailed the Parent again, "I just tried calling you, but it went to voicemail. Let me know if I should try you again or if tomorrow would be better. Thanks!" The Parent responded the same day, "Sorry I missed your call...I'm available tomorrow as well." The assistant principal stated she would try to reach the Parent again the following day.³

13. On June 18, 2021, the 2020–2021 school year ended.

Summer 2021

14. On June 21, 2021, special education teacher 1 emailed the Parent and stated:

As indicated in a prior email, I said I would be sending you the paperwork documenting the current plan for Recovery Services and [Student]. Please find attached the Prior Written Notice (PWN) showing that plan. If you have questions, please contact me. I will be checking my email intermittently throughout the summer. [Principal] and [assistant principal] can also assist you if a more immediate response is needed...It was a joy being [Student]'s teacher again this year!!! If he is at [school 1] next year I look forward to the continued journey.

The attached June 21, 2021 prior written notice refused to initiate recovery services for the Student because during the COVID-19 pandemic, the Student received appropriate IEP services and made sufficient progress in all goal areas via remote learning. Additionally, the

² "EAP" or "Elementary Advanced Program" in the District provides dual-qualified (qualified in both Reading and Math) highly capable students in grades 2-5 the opportunity to engage in rigorous, challenging, and enriched curriculum in a self-contained classroom with a cohort of highly capable peers.

³ Neither the Parent nor the District provided any documentation in response to this complaint, indicating if they connected on this topic, and if so, what was discussed.

notice indicated goal expectations were not reduced when compared with pre-COVID expectations. The notice stated the team reviewed multiple data sources, including services offered, services accessed, rate of progress made during remote learning in the spring of 2020 and the 2020–2021 school year, rate of expected progress during remote learning compared with pre-COVID expectations, progress made once school resumed in person, and Parent and team input. The notice stated an additional factor for consideration: “Student did a gradual reentry into in-person instruction and he has not attended enough to determine if his skills have recouped. Student should be reassessed when he has 6 full weeks of school completed to determine if recovery services are needed.”

15. On July 25, 2021, the Parent emailed the office manager at district elementary school 2 (school 2) and stated (in relevant part), “My student was previously at [school 1], and was offered placement for the 2nd grade EAP program starting in the fall. He also has an IEP, and I was just looking for more information about how to get in touch with his new special education team before the school year starts.”

The same day, the office manager responded (in relevant part), “Our teachers are not back to school until the end of August...If you can give me a bit more information (special education program/placement) I can do a little more research and find out where he will be placed.”

16. On August 10, 2021, the Parent responded to the office manager’s July 25 email and stated, “He’ll be in 2nd grade, coming from [school 1]. His IEP is for social/emotional support (autism), and he’s in the general education classroom with learning center pull-out minutes and some in-class accommodations and supports.”

The office manager responded, “[Student] hasn’t been transferred from [school 1] to...[school 2] yet. Our secretary will be back next week and will finalize all student transfers. We are in the process of hiring a new learning center teacher - so unfortunately, I don’t have a name for you yet.” The office manager added, “Please feel free to check back with us the week of the 23rd. We should (hopefully) have some answers for you! Final classroom placements and back-to-school info will also be coming out to parents in the next couple of weeks.”

17. On or around August 21, 2021, the Parent enrolled the Student in the District virtual program for families who wanted their students to remain fully remote for the 2021–2022 school year.
18. On August 24, 2021, the District virtual program emailed all parents an orientation reminder, wherein it provided links for orientation sessions on August 25, 2021. The email also stated, “The first day of school is Wednesday, Sept. 1. Zoom links for your student to attend school will be sent before the first day of school.”
19. In response to this complaint, the District provided its August 26, 2021 District virtual program special education considerations. The document stated in relevant part:

IEP Case Management NEW INFO

- All IEPs will be case managed by the virtual special education teacher.

- If a student has a 1:1 support (paraeducator/behavior tech/ interpreter) they will continue to support the student virtually. One to one staff will work from the school site they are assigned.

Related Services NEW INFO

- All services will be provided virtually.
- Speech therapy will be provided by the therapist assigned to the virtual program unless an alternate plan is approved by district administration.
- [Occupational/physical therapy] staff will serve all students on their caseload regardless of whether they are virtual or in-person.

20. On August 31, 2021, the District virtual program emailed all parents (in relevant part), "We are in the process of sending out homeroom teacher information and Zoom links for tomorrow morning. Due to challenges with our mass communication system we are having to send this information out manually, which has slowed down the process."

21. Also, on August 31, 2021, the District virtual program sent an email to all parents regarding the District virtual program's special education update and introductions. The email stated:

We are writing to introduce you to our Special Education staff for the [District virtual program], and to share some initial information with you. We are writing on their behalf since many of them are still being onboarded to the district and do not have a district email address yet.

Since our Family Orientations on Wednesday, August 25, there have been some changes to how we will be supporting students who receive special education services. To summarize:

- All Individualized Education Programs (IEPs) will be case managed by the [District virtual program] special education teacher. If a student has a 1:1 support (paraeducator/behavior tech/ interpreter) they will continue to support the student virtually.
- One to one staff will work from the school site they are assigned. Should a re-evaluation be necessary, students in the virtual school will be evaluated by the evaluation team at their school of attendance.
- If families do not feel safe accessing in-person evaluations, the team will follow the remote evaluation protocols that were in place during the 20-21 school year (file review, remote observations, checklists, etc.).
- Speech therapy will be provided virtually by a therapist assigned to the virtual program unless an alternate plan is approved by district administration.
- [Occupational/physical therapy] staff will serve all students on their caseload regardless of whether they are virtual or in-person.

Our Learning Center teachers are [teacher], [special education teacher 2], [teacher], and [teacher]. Students who are typically served within the Learning Center model should plan to attend their general education classes the first week.

The Learning Center staff will work within the general education classes to meet with students and work out schedules. Students in grade K-3 should attend with their general education teachers for learning block two 10:40-11:40 am and their special education teacher for learning block three 12:55-1:55 p.m. Students in elementary and secondary will receive Zoom links later today so they know where to log in tomorrow morning. Please be

assured that our special education staff is working to create schedules and implement supports for students. We appreciate your patience as our staff join the [District virtual program]. You should expect to hear from your child's special education case manager by the end of the week. Please know, changes may be necessary as we start the year.

22. On August 31, 2021, the Parent received the Student's teacher assignment and the Zoom link to login for the first day of school.

2021–2022 School Year

23. The District's 2021–2022 school year began on September 1, 2021.
24. During the 2021–2022 school year, the Student attended the District virtual program and continued to be eligible for special education services under the category of autism.
25. On September 1, 2021, the Parent emailed the office manager, principal, and the District virtual program administrator and stated:

My son is a new student at District virtual program this year. He transferred from [school 1] for 2nd grade EAP placement, but will be online with [District virtual program] until he can be vaccinated. He is autistic and has had an IEP since preschool. I have reached out several times during August, and still not been able to get in touch with anyone about how to address his support needs this year. I have been given no names or email addresses for his new IEP caseworker, or even heard definitively if his IEP will be handled by staff at [District virtual program] or [school 2].

His IEP specifies that he requires visual schedules and advance review of changes in order to cope with transitions, however, we didn't receive his teacher assignment until late last night. Aside from the fact that this felt abrupt to him, during class this morning I don't believe his teacher had had enough time to be made aware that he was a [special education] student, let alone become familiar with the specifics of his IEP. I'm reaching out to you...as well as [district superintendent], because my son spent his first day of school alternating between hiding under his desk and crying. I would like to request an IEP meeting with his new team ASAP to make a plan for him for this year, especially for virtual school, which has been a significant struggle for him already. Please help me get in contact with whoever can make that happen.

26. Also, on September 1, 2021, the principal responded to Parent's email and stated:
- I'm sorry to hear about this experience, and I appreciate you reaching out to us. Can you please share with me the name of the teacher that you were given last night? We have been told that [District virtual program] will case manage the IEPs for the virtual learners. I'm adding [director of special education (director)] to see if she can help ASAP.

The Parent responded with the name of special education teacher 2.

27. Later, on September 1, 2021, the director emailed the associate and assistant principals and the District virtual program administrator regarding the Student and stated, "I see a student on our virtual special education list...He gets 90 min of social skills per week and is probably on the learning center list." The director asked whether the Student was with special education

teacher 2, and asked, "Do you have class lists that I can reference when I get parent emails like this and are you okay with me reaching out to the teachers directly?"

28. Also, on September 1, 2021, the director emailed the Parent:

I see that [Student] is enrolled and listed on our special education service roster. We have reviewed his IEP and assigned him to a learning center case manager. However, we have more than one virtual learning center case manager for elementary so I need to track down who he was assigned to. I'll get you that information by tomorrow. I'm sorry you have not yet been contacted by the special education teacher. They will reach out soon.

29. On September 2, 2021, the District virtual program emailed all parents regarding "Elementary Zoom Links and Technology Support." The email stated (in relevant part):

Welcome to the second day of the school year! We appreciate your flexibility as we continue to work out technical difficulties. Elementary students will log in to their teacher's Zoom classroom today.

If your student receives Special Education services, their Special Education teacher and their Zoom link will also be listed. For the first week, students who are typically served within Elementary Mid-Level models, which include Mid-Level Blended, Sensory and Social-Emotional, should plan to attend with their general education teachers for learning block one 9:05-10:25 am and learning block four 2:05-3:35 pm.

The remainder of the day will be divided as follows: Students in grade K-3 should attend with their general education teachers for learning block two 10:40-11:40 am, and their special education teacher for learning block three 12:55-1:55 pm. Special education teachers will reach out by the end of the week with more specific schedules.

30. On September 3, 2021, the District virtual program emailed all parents and stated:

On the first day of school, we welcomed more than 1,300 K-12 students to our District virtual program. In the last two weeks prior to the start of school, we saw enrollment more than double. Staffing up and planning was a monumental assignment. Program leaders worked with staff across the District to launch this program designed to provide an online education experience for students who are not yet able to be back in the classroom for in-person learning.

31. On September 5, 2021, the director emailed the Parent, general education teacher 2, special education teacher 2, and the K-4 district virtual academy special education teacher and stated:

I wanted to connect all of you in one email. [Parent], [general education teacher 2] is the general education teacher assigned to [Student]. [K-4 special education teacher] and [special education teacher 2] are splitting up the elementary learning center caseload so I have included them both. Special education team, please be sure to share the IEP with [general education teacher 2].

32. On September 6, 2021, the school was closed in observance of Labor Day.

33. On September 7, 2021, the K-4 special education teacher emailed the director, special education teacher 2, and the Parent and stated, "I believe [special education teacher 2] will be

working with [Student] this year, but we will definitely touch base with you this week once we have finalized our caseloads.”

34. On September 7, 2021, special education teacher 2 emailed the Parent (in relevant part), “I will be your child’s learning center teacher in the District virtual program. I am ‘at’ District virtual program Th-F.” The teacher further shared that “I will be visiting my student’s virtual classrooms this week to meet them and their classmates and see how things are going in that setting. I will begin my learning center schedule the following week and will have that information out to families later this week.”

35. Also, on September 7, 2021, the Parent responded to special education teacher 2, stating:
I had emailed the principal at [school 1] (our “in-person” school) about requesting an IEP meeting, but it sounds like maybe district virtual school will handle that? [Student] just transferred from [school 1], so would like to meet his new team and also work on some supports/accommodations for virtual learning this year. Last year was a significant struggle for him, and I want to make sure we are doing what we can to help this year go more smoothly for him.

36. Later, on September 7, 2021, general education teacher 2 sent a message to families, introducing herself and stating she received her “Schoology” access that morning. She attached students’ daily schedules and instructions on using their usernames and passwords, as well as attached a questionnaire for parents to complete with information about their students.

That same day, the Parent responded (in relevant part):

I’ve been really hoping to get in touch with you to tell you a little bit about [Student]! He is autistic - he has an IEP and receives pull out special education services. He transferred elementary schools for EAP, and also shifted to District virtual program, so there has been a lot of confusion about who had access to his files up to this point...wanted to make sure you were aware. Last year, virtual learning was very difficult for him. I have requested an IEP meeting ASAP to evaluate his accommodations for being virtual again this year, but in the meantime, I just wanted to let you know that he gets overwhelmed easily. It helps him to keep his camera off, and he may or may not feel comfortable sharing out loud (he often prefers to type in chat). He is a perfectionist and gets easily frustrated with himself, especially with writing and drawing. He also struggles to sit still during zoom meetings, so if he does have his camera on, you may see him walking around, or using the sensory toys we have at home. I usually need to sit next to him during zoom, and basically act as his paraeducator. Student feels more comfortable with people he has established a 1:1 connection with, so I’d love to find a time that you could talk to him privately for even a few minutes so he can get to know you better! I’m hoping we can find some ways to help virtual learning go smoothly for him until he is able to be in a classroom again.

General education teacher 2 responded:

Thank you so much for reaching out. Every day I intended to ask [Student] to stay after Zoom so that we can talk a bit but that never happened. I am glad to hear from you about [Student]. While I was a paraeducator, I worked with students with Autism and ADHD, and I am willing to accommodate [Student] to the best of my abilities! I will also make 1:1 time

during recess or after the end of the day to connect with him. I will also reach out to the special education teacher 2 about your IEP meeting request.

37. On September 8, 2021, general education teacher 2 and the Parent exchanged several emails. The general education teacher told the Parent "Yes we can definitely meet soon for an IEP meeting. I will connect with the virtual program team and get some potential meeting times to you."

In another email, the Parent stated, "Thank you for taking the time to meet 1:1 with [Student] this afternoon! He was feeling shy, but I think it helped him. I'm attaching a copy of his IEP for you to read in case you haven't seen it yet." General education teacher 2 later stated:

I just was reading his IEP, [special education teacher 2] sent it to me this evening. We have a change in the schedule tomorrow...Please let him know that he may not be meeting his special education teacher tomorrow. I asked [special education teacher 2] if he can stop by during our Zoom session...I will keep you posted when the special education teacher plans to come by our Zoom classroom. One more time, I am so sorry for any inconvenience.

38. Also, on September 8, 2021, general education teacher 2 emailed special education teacher 2 and asked if he would be visiting the classroom on Thursday, September 9, 2021. Special education teacher 2 responded that he could visit on September 9, 2021.

Special education teacher 2 emailed the K-4 special education teacher and general education teacher 2 and stated, "Here is the copy of [Student's] IEP - I have contacted families to let them know I will be visiting classrooms Th/F and have my schedule for services out to them by the end of the week. I have not heard directly from his family yet but can reach out again."

39. On September 10, 2021, the District virtual program sent an email to all the parents in the program, thanking them for enrolling in the virtual program and explaining some of the issues with the expansion of the program and ongoing onboarding of newly hired teachers. The letter stated:

We are working hard to provide a virtual school setting for families who choose this option due to the COVID-19 pandemic. Planning for the virtual program has evolved very quickly to accommodate an increase of over 1,000 students in recent weeks.

We've been tasked with opening a 1,300 student school in the span of a month and as a result of the late summer enrollments, we had to hire a number of teachers during the last week of August. These teachers are still being onboarded. We are currently finalizing their class lists and providing professional development. We understand that parents have a lot of questions about their student's special education services. Please know that we have received more than a thousand emails and that our system is currently being managed by two staff members while we work to hire more support.

We expect case managers will be assigned and reach out to families within the week. In the meantime, we appreciate your continued patience.

Additionally, please see the attached Prior Written Notice which outlines our offering of [a free appropriate public education] FAPE to your student. Per OSPI guidance for the 2021-22 school year, parents have the option to select remote school options available from local

school districts. As reflected in your student's Prior Written Notice, the District believes FAPE is safe and available through in-person services this year, but will honor parents' selection of remote school at this time. Although some students thrived in the virtual setting last year, we acknowledge that virtual instruction creates challenges for some of our students. Full IEP services minutes from your student's IEP are available in person from the district. Families are able to return to in-person services at any time during the school year and their full IEP will be resumed at their school of attendance.

40. On September 12, 2021, special education teacher 2 emailed the Parent and stated:
I had a wonderful time meeting [Student] last week and observing some of his class, it was great to see his participation, offering facts about bears. This week I will start learning center times with students. [Student's] schedule with me is:
- Thursdays and Fridays 12:00-12:30. [Zoom link provided]

My plan is to do a "lunch bunch" time on Thursdays and Fridays with [Student] and another [student], focusing on social interactions. I will also join his class on Fridays, 10:45-11:15, to observe and support him in the larger group.

I am in the process of finalizing a Schoology page for my virtual program students, which will include a private folder with [Student's] schedule, my Zoom link, and other materials as needed. I'm looking forward to a fun year with [Student]! I will be in touch this week with times to meet and review his IEP together as you requested.

41. On September 14, 2021, the Parent responded to special education teacher 2:
Thank you for the update. The lunch break is very important to [Student], especially since we haven't been able to set up a modified schedule for him yet. We will try it this week and see how he feels about it, but we may need a back up plan in case that doesn't work out. I like the idea of him getting to talk with a friend though!

Special education teacher 2 responded, "Thank you for being up for giving it a try. Hopefully, it goes well, but if there are challenges, we can make adjustments."

42. On September 16, 2021, the Parent emailed special education teacher 2 and stated, "So sorry! [Student] was doing a great job getting caught up on his language arts...and we forgot to log in to the lunch meeting! I'll make sure he's logged in to try it tomorrow." Special education teacher 2 responded, "Thanks for letting me know, see him tomorrow!"

43. Also, on September 16, 2021, the Parent emailed special education teacher 2 and stated:
I just wanted to share that it was really helpful for [Student] to have a moment in the breakout room with you this morning, telling him exactly what he should be working on for the day. Having a concrete plan like that is very helpful for him, and he was able to do his language arts assignments...much more easily afterwards! He also told me that he felt special to be able to have a private conversation with his teacher. I was thinking that it might be helpful to try that on a regular basis and see if it helps him stay engaged in his assignments?

The special education teacher responded, "I will definitely try to pull [Student] out for a few minutes whenever I get a chance (at least twice a week). I am glad it helped, I am looking to post the day's schedule somewhere, so that students can refer to and work."

44. Also, on September 16, 2021, the Parent filed this complaint.
45. On September 18, 2021, the Parent emailed special education teacher 2, the director, and general education teacher 2 and stated:

I am reaching out again because I have been trying to request and schedule an IEP meeting since August and have still not heard back. [Student] is continuing to struggle with accessing his general education class and classwork. He needs additional accommodations in his IEP in order to access and attend virtual schooling. I am requesting an IEP meeting for him as soon as possible. Please let me know what your availability is.
46. On September 19, special education teacher 2 responded to the Parent via email and stated:

...I had not heard a response from the other team members about times to meet, so I have sent another message and will lock down a time tomorrow. I could tell [Student] was having a hard time with the time we have scheduled, and I am open to shifting things around to a better time to support him. What do you think is a good time of day?
47. On September 20, 2021, special education teacher 2 emailed the Parent and asked if the Parent could meet for the IEP meeting, either September 23 or 24, 2021. The Parent responded that same day, "[September 23] at 4 works for me. I think we should discuss a modified schedule for him during the meeting, and we can come up with a better time for his [learning center] minutes then."
48. On September 22, 2021, general education teacher 2 emailed the Parent and stated, "Tried to have a conversation with [Student]. He is in the meeting, but choosing not to respond. How is he doing?"
49. On September 23, 2021, the Parent responded to general education teacher 2 as follow:

Thanks for checking in. [Student] is really struggling to engage in school right now, and I think he needs a modified schedule. We have an IEP meeting with his new case manager this afternoon to get some more [special education] supports in place for him. I'm hoping that will help him get back on track with school and assignments.
50. Also, on September 23, 2021, special education teacher 2 emailed the Parent, general education teacher 2, the director, and the District virtual academy program administrator a copy of the Student's IEP for the meeting scheduled that same day.
51. On September 23, 2021, the Student's IEP team met to amend the Student's IEP to provide additional remote accommodations.
52. Later, on September 23, 2021, special education teacher 2 emailed the Parent, attaching two prior written notices. The notices provided the following information:
 - **Notice One:** Proposed to initiate the Parent's choice for the Student to attend virtual school. The notice stated that during the 2021-2022 school year, the Parent is choosing to participate

in the [District virtual program]. Full service minutes from the IEP, dated May 5, 2021, are available in person. The notice stated the team rejected requiring [Student] to attend in person because the Parent is choosing [District virtual program]. The notice further stated "Per OSPI guidance for the 2021-22 school year, parents have the option to select remote school options available from local school districts. The District believes FAPE is safe and available through in-person services this year, but will honor Parents' selection of remote school at this time," and that "An all day in person full service minutes model is available based on the last IEP. Parent is choosing [District virtual program]. Parent can choose to return to in person learning at anytime."

- **Notice Two:** Proposed to implement the Student's IEP as written, with added accommodations. The notice stated based on the challenges the Student was facing in remote learning, the team added accommodations for support when he is attending school virtually. The notice considered and rejected a reevaluation because the Parent would like to wait for a reevaluation until "closer to a decision when Student may be returning to in-person instruction." The notice further stated, "Parent agreed not to reconvene the IEP team for the purposes of making changes to Student's current IEP as per video conference on 9/23/21. Members of the team affected by the changes to the IEP were informed of these changes on 9/23/21 during a video conference." The notice stated the action would initiate on September 28, 2021.

53. On September 24, 2021, special education teacher 2 emailed the Parent, general education teacher 2, the District virtual program administrator, and the director and stated:

I have summarized what we discussed when we met yesterday below. Before that though, here are the accommodations to add to Student's IEP:

- Allow breaks from remote instruction as needed
- Access modified Zoom schedule as needed during remote learning
- Allow Student to choose whether he has his camera on during remote instruction
- Access to Zoom chat feature to communicate with teacher during remote instruction

If these look good, I will complete the IEP amendment to add these.

[Summary of IEP meeting notes]: Present: [Parent]; [special education teacher 2]; [general education teacher 2]; [virtual program administrator]; [director].

Student's mom shared that the transition between schools over the past few months has been challenging and she is wanting to make sure everyone is on the same page in supporting Student. He struggled greatly last year in remote learning, having to pull out of school for a month. Right now, [Parent] feels that Student is back to the level social/emotional he was in kindergarten. He struggles to stay engaged in remote learning and connecting with learning during Zoom meetings.

[Parent] shared that she knows Student can do it all academically, but he isn't engaging. 4 hours/day of live Zoom time is too much for him and seeing all the students on screen is overwhelming to him. She feels he would have more success with more 1:1 instruction for shorter times. [Parent] shared that what has been successful is less Zoom time, and more individual support from her in Seesaw activities.

I offered to increase my time with Student on Thursdays and Fridays and will explore the options for support [Monday - Wednesday] when I am in-person at [alternate District location].

[Parent] expressed concern about Student's fine motor development. He does have [occupational/physical therapy] consult on his IEP so I will connect with the motor therapist at his school (District elementary school 2) for support.

We also discussed reevaluation, and agreed to revisit this in a month as we do not know when Student may be returning in person. We discussed accommodations more appropriate for Student in the remote setting and agreed to add [accommodations] by amendment. [Parent] and the team agreed that we did not have to reconvene the team to complete the amendment.

We also agreed that we do not need to formally change the service minutes on his IEP at this time, and I will work on a potential schedule with more 1:1 support for Student.

54. The Student's September 28, 2021 amended IEP included the Student's present levels:

- Medical Physical – About a month ago, at the end of March, the Student started to engage in self harming behaviors daily, like hitting himself in the head and one time he slammed his head into the stone fireplace. At that time, his mother decided to give him a break from Zoom sessions because they were triggers. Since that break from Zoom, the Student's self-harming has decreased and almost stopped. He was not exhibiting those behaviors at his father's house. He is more comfortable letting out his emotions in his mother's house.
- General Education Teacher Report – [Student] is currently attending the District virtual program. He has continued to struggle with this learning environment, especially engaging in live remote learning times.
- Social/Emotional – The Student has had a couple of Learning Center group opportunities, and some small breakout groups in class so far this year. He usually has his camera off, which is allowed, but make it hard to judge his level of engagement. He will participate in smaller groups more easily than in the large class setting.

The September 2021 IEP included four annual goals in social/emotional behavior. The Student's IEP provided the Student with the following specially designed instruction and related services:

- Social/behavior: 60 minutes, weekly (to be provided by a special education teacher, in the general education setting)
- Social/behavior: 30 minutes, weekly (to be provided by a special education teacher, in the special education setting)

The Student's IEP provided the Student with several accommodations and modifications, including:

- Visual schedule and review of changes to reduce anxiety
- Access modified Zoom schedule as needed during remote learning
- Access to a break spot with items like favorite books
- Dots and squeezes, stress balls, fidget toys
- Access to sensory/self regulation supports
- Access to Zoom chat feature to communicate with teacher during remote instruction
- Additional time for tests

- Allow breaks during testing
- Allow breaks from remote instruction as needed
- Allow Student to choose whether he has his camera on during remote instruction
- Flexible seating options when completing work (e.g. at desk, with clipboard, in different area of room)
- Preferential seating – during carpet time close to teacher in the front row
- Preferential seating at desk/table – on edges or with space around him (like empty desk next to him)
- Regularly scheduled movement breaks (e.g. swimming, walking)
- Separate setting during testing
- Teacher proximity and/or private conversations when redirection is needed
- Visual supports for zones of regulation and problem solving solutions

The Student's IEP indicated the Student would spend 98.25% of his time in the general education setting.

55. In response to this complaint, the District provided the following description of the Student's specially designed instruction:

Student is receiving specially designed instruction in social emotional development. Services are provided in the general and special education setting. This takes place individually and in small groups with peers. Because Student is challenged by participating in large Zoom groups, we are offering several 1:1 sessions during his school day so that he can have school experiences in an environment that is not as overwhelming for him. Student has the option to leave his camera off and is not forced to participate verbally nor required to have his camera on during school. He can ask his mom or teacher to write for him (scribe) on assignments. If needed, Student can choose to participate asynchronously in school tasks. His mom does have him logged in to the Zoom classroom so that he can access it when he is ready. Special education services to begin the school year have included teacher led social games such as "Would You Rather?", "Yes or No", "My Favorite (food, game, book, etc.)"; these types of games are intended to help Student build enjoyment and engagement with remote learning while also supporting regulation and interactions in game play. Games are led by the teacher to ensure appropriate involvement and pacing of play.

CONCLUSIONS

Issue 1: IEP Implementation – The complaint alleged the District failed to implement the Student's individualized education program (IEP), including accommodations for virtual learning. At the beginning of each school year, each district must have in effect an IEP for every student who is eligible to receive special education services. Here, the Student's May 2021 IEP was in effect at the beginning of the 2021–2022 school year and provided the Student with a total of 90 minutes of social/behavioral specially designed instruction weekly and accommodations primarily designed for in person instruction. A district must ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. Here, due to unanticipated growth in the virtual program because of the COVID pandemic, the District struggled to hire and onboard new teachers at the start of the 2021–2022 school year. This resulted in a delay to the provision

of special education services for students and the District did not provide the Student direct services in the virtual setting for the first two weeks of school.

However, 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 child with a disability and those required by the IEP. This analysis is relevant for the specific Student to determine whether Student specific corrective actions are warranted. Here, the Student was entitled to 90 minutes a week in social/emotional specially designed instruction and thus was not provided approximately three hours of services. The District's failure to provide these special education services to the Student for the first two weeks of school is a violation. However, the documentation reviewed by OSPI demonstrated the District notified parents that a free appropriate public education (FAPE) was safe and available through in-person services, but that the District would honor the Parent's selection of remote school. The Student thus had access to his special education services in-person from the start of the school year. Additionally, special education teacher 2 provided indirect services by observing the Student during the second week of class and general education teacher 2 stated on September 7, 2021 that she was willing to accommodate the Student and would make 1:1 time available to connect with him. Thus, due to the availability of special education services for the Student through in-person services, the indirect services provided by special education teacher 2 during the second week of school, the accommodations provided by general education teacher 2, and the minimal amount of instruction missed, OSPI does not find the failure to implement the Student's IEP to be material. However, because it is unclear how much this impacted the Student and given that compensatory education is an equitable remedy, the Student will be included in the corrective action ordered below.

The documentation does indicate the District virtual academy was overwhelmed with student enrollment and teacher shortages at the beginning of the school year. Given these factors, it is likely that other students with IEPs did not receive special education services during the first two weeks of school, which could have led to a material failure by the District. While OSPI understands the challenges the District faced, the District was required to implement IEPs from the first day of school in order to provide each eligible student a FAPE. As such, the District will be required to—as outlined below—identify students with IEPs in the virtual program for whom there may have been a material impact during the first two weeks of school. And, following OSPI review and approval of the identified students, the District will provide a tutoring program to provide compensatory education to the eligible students.

Issue 2: Parent Request for IEP Meeting – The complaint alleged the District failed to respond to the Parent's concerns about the Student's IEP and requests for IEP meetings, beginning in May 2021. Specifically, upon investigation, the Parent seemed most concerned about the fact that she requested an IEP meeting in August 2021 and a meeting was not scheduled until the end of September 2021.

When a parent requests an IEP meeting, the district must schedule the meeting at a mutually agreeable time and place, and appropriately invite the parent to the meeting. Neither the IDEA, nor the implementing regulations, include a specific timeline for when an IEP meeting must be

scheduled when parents request a meeting. Here, the Student's May 2021 IEP was in place at the beginning of the 2021–2022 school year. Due to unanticipated growth in the virtual program because of the COVID pandemic, the District was struggling to hire and onboard new teachers. Based on the communications reviewed, this resulted in a delay in getting an IEP meeting scheduled. District staff responded to the Parent's emails and tried to convene a team meeting but were not able to do so until September 23, 2021. The District did communicate directly with the Parent and families in the remote program generally, explaining the delays the school was experiencing and asking for patience considering the rapid growth of the program. Based on the documentation provided in response to this complaint, the general education teacher agreed to provide additional accommodations to the Student on September 7, 2021, and the special education teacher began providing indirect support. Ultimately, the Student's IEP team convened on September 23, 2021 and added four accommodations specific to virtual learning to the Student's IEP. The documentation reviewed by OSPI demonstrated the District acted as quickly as the circumstances permitted in response to the Parent's requests for an IEP meeting and held the IEP meeting during the fourth week of school. While this took longer than the Parent wanted, considering the circumstances, the District reasonably scheduled a meeting as soon as it was able and OSPI finds no violation.

Issue 3: IEP Development – The complaint alleged the District failed to follow procedures to develop an IEP for the Student for the 2021–2022 school year.

The Student's May 2021 IEP was in place at the beginning of the 2021–2022 school year. The Parent requested to convene the Student's IEP team to develop an IEP or amend the IEP to address the Student's needs in the virtual setting. IEPs are developed annually, and a team is not required to convene just because the student opted into the virtual program; however, the team can and should meet as necessary to address a student's needs. The Parent informed general education teacher 2 that the Student struggled to sit still during Zoom meetings and feels comfortable with people he has established a 1:1 connection with. General education teacher 2 stated she would accommodate the Student and make time for 1:1 meetings with the Student. Here, the Student was already receiving some virtual accommodations, despite the accommodations not being documented in the May 2021 IEP. When the team met on September 23, 2021, they amended the Student's IEP to include four accommodations for the virtual setting. Based on the documentation provided in response to this complaint, the District did not fail to develop the Student's IEP. OSPI finds no violation.

The complaint also alleged the District failed to appropriately document its offering of FAPE in the email sent to the Parent on September 10, 2021, when it failed to attach a prior written notice referenced in the email. Prior written notice must be provided to parents a reasonable time before the district proposes, or refuses, to initiate or change the identification, evaluation, or placement of the student. Although the District's September 10, 2021 communication with families regarding its offering of FAPE for the 2021–2022 school year referenced a prior written notice, a prior written notice was not necessarily required in that instance. The purpose of the communication was to inform families that any services not available virtually would be available in person, and the email included the substantive language from the prior written notice, regarding in-person availability

for services. Further, the Parent was provided a prior written notice with the same information following the September 23, 2021 IEP meeting specific to her Student. Thus, while OSPI recognizes that the email was confusing in that it referenced but did not provide the attachment, given that this was not a proposal or refusal regarding identification, evaluation, or placement of the Student *and* that the Parent subsequently received a prior written notice with the same information, OSPI finds no violation.

CORRECTIVE ACTIONS

By or before **December 20, 2021**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Tutoring Program

Identification of Students

By or before **December 20, 2021**, the District will provide OSPI with the following information in an excel spreadsheet (or similar format):

- A list of the students in the virtual program who are eligible for special education;
- Confirmation that those students were enrolled in the virtual program during the first two weeks of school (i.e., exclude students that enrolled after the first two weeks);
- The areas and minutes of specially designed instruction and related services for each student; and,
- Whether the District believes there was a material impact to the student based on not receiving special education services during the first two weeks of school.

Additionally, by **December 20, 2021**, the District will provide OSPI with a copy of each of the above identified students' first quarter progress report.

OSPI will review the above information and confirm which students are entitled to participate in a compensatory education tutoring program based on the amount of services they missed in the first two weeks of school and whether there appears to have been a negative impact on the student's progress. OSPI will approve the group of eligible students by January 5, 2022.

Development of the Tutoring Program

Based on the number of eligible students, by January 5, 2022, OSPI will provide the District with further instructions for the corrective actions. The number of eligible students will inform whether OSPI will require the District to format the tutoring program as a general program with a set number of hours for all students to opt into, or a program with individualized compensatory education plans. By January 5, 2022, OSPI will provide the District with:

- Requirements and deadlines for the format of the program.
- Requirements and deadlines to notify the families of eligible students.

- Requirements and deadlines to notify OSPI of the students who have opted into participation.
- Requirements and deadlines to provide updates and then complete the tutoring program.

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 November, 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.)