

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-68

PROCEDURAL HISTORY

On June 12, 2020, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen 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, with regard to the Student's education.

On June 17, 2020, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District Superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On June 25, 2020, OSPI requested additional information from the Parent. On June 29, 2020, OSPI received the additional information from the Parent and forwarded the information to the District on July 1, 2020.

On June 29, 2020, the Parent also requested an issue be added to the complaint. On July 1, 2020, OSPI informed the Parent that the request to include the additional issue was denied as the allegation did not represent a potential violation of the IDEA.

On July 8, 2020, 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.

On July 17, 2020, OSPI received the Parent's reply. OSPI forwarded that reply to the District on the same day.

OSPI considered all 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) during the March 2020 through June 2020 school facility closures?
2. Did the District implement the quarterly staff training according to the Student's IEP?

LEGAL STANDARDS

IEP Must State Amount of Services: An individualized education program (IEP) must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the student, or on behalf of the student. An IEP must also include a statement of the program modifications or supports for school personnel that will be provided to enable the student: to advance appropriately toward attaining the annual IEP goals; to be involved and progress in the general curriculum in accordance with present levels of educational performance and to participate in

extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children in the above activities. 34 CFR §300.320(a)(4); WAC 392-172A-03090(1)(d).

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 who is eligible to receive special education services. 34 CFR § 300.323(a); WAC 392-172A-03105(1). 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. 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 must provide students with disabilities with the special education services—related services and specially designed instruction—supporting a free appropriate public education (FAPE). The U.S. Department of Education Office for Civil Rights (OCR) and Office for Special Education and Rehabilitative Services (OSERS) indicated the "exceptional circumstances" presented during the school facility closures caused by COVID-19 "may affect how all educational and related services and supports are provided" to students with disabilities. There is not an expectation that IEP services would be delivered exactly as the IEP states. *Questions and Answers: Provision of Services to Students with Disabilities During School Facility Closures for COVID-19* (OSPI March 24, 2020); *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (OCR/OSERS March 21, 2020) ("It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities...during this national emergency, schools may not be able to provide all services in the same manner they are typically provided...The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency...FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students.")

While there was not an expectation that districts implemented a student's IEP as written during school closures caused by COVID-19 in spring 2020, districts must have had a plan for how students with disabilities were to receive a FAPE, including the provision of special education. *Questions and Answers* (OSPI, March 24, 2020); *Questions and Answers* (OSPI, May 5, 2020). See also, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (U.S. Department of Education, March 13, 2020) ("SEAs, LEAs,

and schools must ensure that to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under the IDEA"). All schools were expected to have begun providing educational services for all students by March 30, 2020, which OSPI termed "Continuous Learning 2020." OSPI Bulletin 024-20 (March 23, 2020).

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

Resolution Agreement: If a resolution to the dispute is reached at resolution meeting, the parties must execute a legally binding agreement that is signed by both the parent and a representative of the school district who has the authority to bind the district and enforceable in any state court of competent jurisdiction or in a district court of the United States. 34 CFR §300.510; WAC 392-172A-05090(4)(a). Through the citizen complaint process, OSPI can investigate that a school district is not implementing a mediation agreement or a resolution agreement. 34 CFR §300.537; WAC 392-172A-05025(B).

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on June 13, 2019. 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.

FINDINGS OF FACT

1. OSPI received the complaint from the Parent on June 12, 2020. The Parent, in his complaint, alleged the following:
 - The District failed the provided social/emotional services in accordance with the Student's individualized education program (IEP).
 - The District failed to provide the services of a 1:1 behavior technician provided in the IEP.
 - The District failed provided all the minutes of academic services stated in the IEP.
 - The District failed to provide quarterly staff training to the entire team in accordance with the Student's IEP and May 28, 2019 resolution agreement between the Parent and the District.

2018-2019 School Year

2. On April 29, 2019, the Parent filed for a due process hearing with OSPI (2019-SE-0065). On May 28, 2019, the Parent and District signed a resolution agreement. The resolution agreement between the Parent and the District provided for, among other provisions, the

services of a “1:1 behavior technician” and the “provision of training for staff in area of autism – Support for School Personnel.” On June 3, 2019, the case was dismissed.

August 2019

3. On August 30, 2019, the Student’s IEP team met to amend the IEP (effective from August 30, 2019 to April 18, 2020). The IEP provided for annual goals and specially designed instruction in the areas of communication, motor, social/emotional, math, written language, behavior, and reading. Supplementary aids and services in the IEP included a 1:1 behavior technician for 1,950 minutes per week in the general education setting.¹ The Student’s August 2019 IEP additionally provided the Student with several accommodations and modifications. Staff supports included weekly board-certified behavior analyst (BCBA) support and quarterly consultation/training.
4. The prior written notice, dated September 5, 2019, stated the following, in relevant part:
Description of the proposed or refused action:
The IEP team met on 8/30/19, to amend the 4/19/19 IEP per a resolution meeting agreement on 5/28/19. The following changes were made to the IEP: A 1:1 behavior tech was added to the services page.

Any other factors that are relevant to the action:
The team will reconvene after the [agency] completes an [functional behavioral assessment (FBA)], we will update the Behavior intervention plan using this new data. Parent requested training through the University of Washington. [Special education director], suggested that parent send information to her regarding this training. The IEP has under supports for personnel; quarterly training/consultation which will be implemented using the [agency]. Parent did not sign the IEP. At the end of the meeting parent requested a review of pages 7-11, the IEP goals. The team already made changes to page 9, the behavior goals section. Upon review of the reading present level section a sentence was added to give clarity to the reading information. A sentence was added to the explanation of the LRE section regarding access to general education peers during nonacademic and extracurricular activities. [Special education director] asked that parent send to her their proposed changes prior to out next IEP meeting.
5. Regarding the quarterly consultation/training, the Parent alleged in the complaint that the District never completed the quarterly training. The District stated in its response the private behavior agency provided the District with consultation/training to which the Parent stated, “This was clearly rejected by the parents at the August 2019 IEP meeting.” The Parent stated the proposed training by the agency was not appropriate. The District proceeded with having the agency provide the consultation/training to the staff.

¹ The District contracted with a private behavior agency (agency) to provide the behavior technician at school and board-certified behavioral analyst (BCBA) support.

2019-2020 School Year

6. During the 2019-2020 school year, the Student attended a District elementary school, was in the fourth grade, and was eligible for special education services under the category autism.
7. The District's 2019-2020 school year began on September 4, 2019.
8. On October 1, 2019, according to the District, the Student's general education and special education teachers attended a full-day training on applied behavioral analysis (ABA) at the University of Washington.

In addition to the ABA training, the District stated staff consultation/training was conducted by the agency during the 2019-2020 school year. In its response to the complaint, the District stated, "Although Parent claims the 'entire team' did not complete the training, Student's motor and speech therapists have extensive training, expertise, and experience with Autism and did not need the training, nor was it intended for them..." Regarding quarterly training, a later email, dated June 20, 2020, from the special education teacher to the District's two special education directors and school principal stated the general education teacher and he attended the October 2019 training and there was a "follow-up session" with the agency director on October 2, 2019. The email further stated, in part, "Although there were no other 'formal' trainings, [agency director/BCBA] regularly spent additional time with me (and, I believe, with [general education teacher]) to share support strategies and data."

9. The Student's November 8, 2019 IEP (effective from November 13, 2019 to April 18, 2020) was in effect prior to the COVID-19 school facility closures. The Student's November 2019 IEP included annual goals in the area of social/emotional, behavior, math, reading, and writing. The Student's IEP provided the Student with the following specially designed instruction and related services:
 - Communication: 60 minutes, per month (provided by a speech/language pathologist in a special education setting)
 - Motor: 30 minutes, per week (provided by an occupational therapist/physical therapist in a special education setting)
 - Motor: 10 minutes, per month (provided by an occupational therapist/physical therapist in a general education setting)
 - Social/Emotional: 225 minutes, per week (provided by special education classroom staff in a general education setting)
 - Social/Emotional: 75 minutes, per week (provided by special education classroom staff in a special education setting)
 - Math: 150 minutes, per week (provided by special education classroom staff in a special education setting)
 - Written Language: 150 minutes, per week (provided by special education classroom staff in a special education setting)
 - Behavior: 225 minutes, per week (provided by special education classroom staff in a general education setting)
 - Reading: 150 minutes, per week (provided by special education classroom staff in a special education setting)

- Behavior: 225 minutes, per week (provided by special education classroom staff in a special education setting)

Supplementary aids in the IEP included a 1:1 behavior technician 1,950 minutes per week in the general education setting. The Student also had a behavioral intervention plan.

The Student's November 2019 IEP additionally provided the Student with the following accommodations and modifications:

- | | |
|------------------------------|---|
| • Graphic organizers | • Shortened assignments |
| • Individual Visual Schedule | • Task analysis for core academics |
| • Multiplication table | • Text-to-speech |
| • Oral tests | • Use of a calculator |
| • Preferential seating | • Use of a scribe |
| • Presentation of task | • Use of yellow lined paper for all assignments and reading |
| • Read-Aloud English | |
| • Scribe | |

The Student's IEP also provided for staff supports that included weekly "BCBA support" and quarterly "consultation/training."

10. The prior written notice documenting the November 2019 IEP meeting stated the following:

Description of the proposed or refused action:

The team discussed a new FBA, and amended the IEP to include a new Behavior Intervention Plan. Parent concerns were added to the considerations page. [Student's] concerns were added as well. [Speech language pathologist (SLP)] minutes change from 30 minutes weekly to 60 minutes monthly. Services page was amended to change monthly motor from 60 minutes monthly to 10 minutes monthly.

A description of each procedure, test, record, or report we used or plan to use as the basis for taking this action is as follows:

New FBA (prepared by [school psychologist], school psychologist, from the FBA provided by [agency]), new Behavior Intervention Plan (prepared by [special education teacher], IEP case manager, from the BIP provided by [agency]), IRR (individual reading record) testing, teacher-made assessments, and parent and staff input. [Student] was also given a Phono-Graphix Test of Reading Subskills and Code Knowledge, as well as additional IRR testing for reading accuracy only.

Any other factors that are relevant to the action:

Parents emailed after the meeting and decided to rescind their signature, although they attended the meeting. [Student] attended the meeting briefly, sharing his thoughts with the IEP team about what he liked about his program at [elementary school] this year, and a couple of ideas for improving it.

11. On March 4, 2020, the District informed all parents in the District that all schools would be closed beginning March 5, 2020 for up to 14 days in response to COVID-19. The District told parents in the District the transition to online learning would begin on March 9, 2020.

12. On March 5, 2020, the Parent requested the District provide the services of a behavior technician at home. The District responded that service providers would not go into students' homes to provide services because of the safety risk due to COVID-19.
13. On March 7, 2020, the Parent again requested the behavior technician services be provided at home. When OSPI asked if the Parent assisted the Student during instruction during the school closure, the Parent stated he worked from home and the Student's mother worked outside the home. The Parent stated he assisted the Student when the private behavior technician was not present to keep the Student on task and reminded the Student of appropriate behavior. The Parent stated that even when the private behavior technician was with the Student at home, the Student sometimes interrupted the Parent while the Parent worked and at other times, the Parent would have to assist the behavior technician to intervene with the Student.
14. On March 9, 2020, the District informed the Parent that the behavior technician services would be provided at home "during the remote learning period necessitated by the COVID-19 outbreak." The prior written notice, dated March 9, 2020, stated, "Behavior Tech services" would be provided at home starting the same day. According to the District's documentation, services in reading, writing, and math began on the same day and continued through June 19, 2020, with the exceptions noted below.
15. On March 9, 2020, according to the Parent, the Parent received a general announcement about school closure in the District.
16. About this time, according to the Parent, the District informed the Parent that "Academics and OT (occupational therapy) and PT (physical therapy) addressed in the IEP would be delivered via remote (distance) learning..."
17. On March 11, 2020, the District emailed the Student's schedule for the day to the agency. The documentation showed that the District emailed the Parent the Student's schedule each day. The schedule for March 11, 2020 was as follows:
 - 8:30 – Organize your space, check on earlier assignments, and make sure you have them completed
 - 9:00 – Zoom Morning Meeting - quick check in and go over the schedule
 - 9:15 – Continue Zoom to talk about new reading assignment today about "Paired Text"
 - 9:30 – Reading work time
 - 10:30 – Optional Zoom Meeting to check in about work; also watch the video about submitting work with a picture or scan
 - 11:00 – Lunch
 - 12:00 – Zoom Meeting to talk about math quiz
 - 12:20 – Take the math quiz and submit it back to me
 - 1:00 – Music
 - 1:45 – Kudos question will be posted
 - 2:00 – Early Release
18. The District's daily documentation also included a daily point sheet used each day to determine whether the Student followed directions, used technology appropriately, and

transitioned back to his desk successfully. The District kept daily data on the Student from March 11 to June 19, 2020 in the following areas:

- Following teacher directions
- Following behavior technician directions
- Work completion
- Time on task (general education)
- Time on task (special education)
- Time on task (specialists)
- Time on task (home learning)
- Requesting attention
- Requesting escape
- Requesting compromise
- Tolerating denial
- Verbal refusal
- Disruptive noises
- Property destruction
- Noncompliance

19. 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.

20. Also, on March 13, 2020, according to the Parent, the Parent was notified that behavior technician services at home were being stopped by the District.

21. On March 20, 2020, according to the District, the District informed the Parent that behavior services in the home were discontinued due to COVID-19, but the District would continue to provide support to the Student and Parent remotely. The prior written notice, dated March 20, 2020, stated, "Due to COVID-19, the priority is the health and safety of all. At this time, the district cannot ensure the safety of your child, your family, and our employee, so the district is stopping in-home services."

22. According to the District, the District continued to contract with the agency to provide remote services for the Student. The District stated:

From March 30 through the end of the 2019-2020 school year (with the exception of Spring Break), [agency] provided Student with [behavior technician (BT)] services remotely for approximately 2.5-3.5 hours per day. [Agency] also provided BCBA consultation and support once or twice a week. The BT and BCBA worked on Student's social and behavior goals that could be addressed through distance learning, and provided support with Student's online instruction and assignments. Student's Special Education Teacher provided 60-90 minutes of SDI [specially designed instruction] per week, with additional optional check-in time. Student's General Education Teacher provided three hours of instruction, approximately five hours of student work/assignments, and optional check-in time. Student's motor services were provided through a 15-minute online session and assigned typing practice. Student's speech services were offered through 30-minute online sessions beginning April 19th. In addition, music, PE and library were offered each week.

23. On March 21, 2020, the Parent emailed the District superintendent, special education director (director), and other District administrators, requesting that the District continue providing the in-home behavior technician services.

24. In the Parent's reply to the District's response to the complaint, the Parent argued that the Governor's guidance regarding closures due to COVID-19 was for "facilities" and did not apply to homes. The Parent stated, "An in-home BT is not using a school facility." The Parent also

argued that OSPI's guidance stating that special education and related services "must be provided from a distance in most instances" meant most services but not all services.

25. On March 23, 2020, the special education director emailed the Parent, stating that because of safety concerns, the in-home, in-person behavior services could not be provided.
26. On March 23, 2020, OSPI issued guidance, instructing districts that while school facilities are closed and not providing traditional in-person instruction, education must continue. OSPI's guidance outlined the expectation that "continuous learning" would begin for all students by Monday, March 30, 2020.
27. From April 2 to June 19, 2020, the Parent contracted with the agency to provide private behavior technician services to the Student in-person, at home. The Parent submitted the following information regarding when the in-home services were provided:
 - April 2-April 3: 5.5 hours per day
 - April 6-April 10 (half days 8:30-12:30): 4 hours per day
 - April 13-April 17: 5.5 hours per day
 - April 20-April 24: 5.5 hours per day
 - April 27-May 1: 5.5 hours per day
 - May 4-May 6 and May 8 (took 5/7 as a day off): 4 days at 5.5 hours per day
 - May 11-May 15: 5.5 hours per day
 - May 18-May 22 (Private pay BT continued this week - online only due to COVID exposure): 5.5 hours per day
 - May 26-May 29 (Memorial Day weekend week): 2 days via remote, resumed in Home
 - May 28: 5.5 hours per day
 - June 1-June 5: 5.5 hours per day
 - June 8-June 12: 5.5 hours per day
 - June 15-June 19: 5.5 hours per day

According to the District, the agency employed two behavior technicians who worked with the Student. One behavior technician was contracted through the District and provided remote services to the Student. The other behavior technician worked in-person, at home with the Student and was contracted by the Parent. BCBA consultation was also part of the contracts with the agency and was provided by the District remotely and also provided as part of the contract with the Parent.

28. The District was on spring break from April 6 to April 10, 2020.
29. On April 6, 2020, the Governor extended the March 13, 2020 school facility closure directive through the remainder of the 2019-2020 school year.
30. Also, on April 6, 2020, OSPI issued guidance on Continuous Learning 2020, which included recommended guidelines for maximum student commitment each day. The recommended instructional time for grades four and five was 90 minutes.
31. On April 8, 2020, OSPI issued an amended guidance for long-term closures. The guidance, in part, stated:

Facilities should only be used for providing direct services to individual students where there is no alternative for the service delivery and both the service is necessary and essential AND the use of the facility is both necessary and essential. This is expected to be an unusual occurrence.

32. On April 17, 2020, the Student's IEP team met over video conferencing to develop a new IEP for the Student. The following attended the IEP meeting:

- Parents
- Special education teacher
- General education teacher
- District representative 1
- District representative 2
- Speech/language pathologist
- Occupational/physical therapist
- Agency BCBA
- Director of Schools-Agency
- Psychologist

The IEP provided for annual goals in the areas of reading, math, written language, behavior, social/emotional, communication, and motor. The Student's IEP provided the Student with the following specially designed instruction and related services:

- Communication: 30 minutes, per month (provided by a speech/language pathologist in a special education setting)
- Motor: 20 minutes, per week (provided by an occupational therapist/physical therapist in a special education setting)
- Motor: 20 minutes, per month (provided by an occupational therapist/physical therapist in a general education setting)
- Social/Emotional: 20 minutes, per week (provided by special education classroom staff in a special education setting)
- Social/Emotional: 200 minutes, per week (provided by a general education teacher in a general education setting)
- Math: 150 minutes, per week (provided by special education classroom staff in a special education setting)
- Written Language: 150 minutes, per week (provided by special education classroom staff in a special education setting)
- Behavior: 200 minutes, per week (provided by a general education teacher in a general education setting)
- Reading: 150 minutes, per week (provided by special education classroom staff in a special education setting)
- Behavior: 225 minutes, per week (provided by special education classroom staff in a special education setting)

The Student's IEP also provided for the services of a behavior technician as follows:

- Behavior technician: 1,140 minutes, per week (provided by a behavior technician in a general education setting)
- Behavior technician: 570 minutes, per week (provided by a behavior technician in a special education setting)

33. The prior written notice, dated April 17, 2020, stated the following:

Description of the proposed or refused action:

As a result of the IEP meeting, it is proposed to implement the IEP as written.

....

Description of any other options considered and rejected:

1. Parents are refusing services for pullout SLP and OT only (totaling 50 minutes per month); Parents are not refusing the OT/PT consultation services in general education.
2. Team discussed eliminating the place value goal in math.
3. Team discussed eliminating instructional level within the text of each reading goal.
4. Team discussed adding a spelling goal.

The reasons we rejected those options were:

1. The school district is required to provide all services through the IEP that the student qualifies for, including Motor and Speech therapy, so these services are continuing.
2. For the math goal, team considered different options, and decided it was worth continuing this goal.
3. For the reading goal, instructional levels were kept in the text of each goal per OSPI guidance.
4. For the considered spelling goal, team opted instead to turn off spell check 2-3 times weekly (not all the time).

Any other factors that are relevant to the action:

The team clarified that, after the general ed teacher presents the mini-lesson, the BT can act in a "teaching" capacity by breaking down the academic task into smaller chunks for [Student] to learn.

Approximately 6 weeks into the new school year, the team will discuss and review the proposed plan of using [specially designed instruction] minutes to have the special ed teacher pre-teach material to [Student] prior to the general ed mini-lesson...Additional parental concerns were submitted in letter form, and are attached to this IEP. [Student] will not participate in SBA testing this year because state testing was cancelled due to the COVID-19 outbreak and state mandated school closure.

For the duration of the distance learning period that was put into effect as a result of the COVID-19 outbreak and state mandated school closures, [Student's] SDI minutes will be reduced, with specific areas of instruction prioritized.

34. On April 29, 2020, the District learning center teacher emailed the Parent the following questions:

- What seems to be going well for you?
- What service area(s) would you like to prioritize (it is OK to state you like the current plan)?
- Which of your student's accommodations do you feel need the most attention?
- What are other areas that you or your child need support in?

35. On May 5, 2020, the Parent emailed the special education director regarding the Student's progress. According to the Parent, the Student lacked social/behavior support at home and "fostering connections is the biggest issue that the school is not addressing." The Parent reported the Student was feeling very alone, although the Parent had set up video chats and game time with others. The Parent also noted positive responses, including the Student's schedule being stabilized, weekly groups for lunch, and connecting with other students. The Parent suggested more virtual contact with the Student's peers through virtual recess and zoom sessions.

36. On May 10, 2020, according to the Parent, the Parent received a "PWN (prior written notice) Continuous Learning plan" from the special education teacher. The prior written notice, dated May 9, 2020, stated, in part:

The IEP was recently held on April 17, 2020. Parent input was given at that meeting and is included on that IEP. Additional comments have been shared by parents in subsequent email correspondence. In addition to his regular classroom sessions with [general education teacher], as well as SLP (speech/language pathologist) services provided by [speech/language pathologist], and Motor services provided by [physical therapist], [Student] is scheduled for lessons with [special education teacher] three times weekly, with (optional) support/consultation time with [special education teacher] scheduled at least one time weekly. He also receives daily support from the Behavior Technician (BT) from [agency], either in-person at [Student's] home, or remotely by Zoom.

Due to the COVID-19 school closure, educational services are being provided through distance learning. Just as general education services have been reduced during this time, special education services will not be the same as provided when school is in session. As a result, we identified and prioritized special education services in order to provide continuous learning that can be implemented during this time.

37. According to the Parent, at the start of the COVID-19 outbreak, the Student's mother implemented a safety protocol at home because she worked in the health care field. On April 21, 2020, the Student's mother was exposed to COVID-19 and removed herself from the home until May 28, 2020. The private behavior technician services were also suspended until April 27, 2020, when the Student's mother tested negative. The Parent stated the Parent and the Student "has been self-isolating since March 4th and had not entered any private or public structures for over 14 weeks."

38. On May 14, 2020, a new private behavior technician was assigned to the Student and received training at the Student's home. On May 17, 2020, the agency informed the Parent that the behavior technician had tested positive for COVID-19. The Parent stated the Student and he self-isolated and was tested twice for exposure. Both tests were negative.

39. On May 28, 2020, the Parent stated private, in-home behavior technician services began again and continued through June 19, 2020, the end of the school year in the District.

40. On June 12, 2020, OSPI received the Parent's complaint and opened this investigation.

41. On June 18, 2020, according to the District, the District offered an IEP meeting during the first six weeks of the 2020-2021 school year to determine compensatory services. The District stated the Parent declined the IEP meeting because the Parent believed compensatory services did not need to be determined by the IEP team.

42. According to the June 19, 2020 progress report, the Student made the following progress toward his April 2020 annual goals:

- Math (place value): Sufficient progress
- Math (fractions): Emerging skill
- Math (one-step word problems): Sufficient progress

- Math (two-step word problems): Emerging skill
- Reading (phonics): Emerging skill
- Reading (comprehension): Sufficient progress
- Reading (inference): Emerging skill
- Reading (text evidence): Emerging skill
- Written language (composition): Sufficient progress
- Written language (capitalization): Sufficient progress
- Written language (paragraphs): Emerging skill
- Social emotional (requesting breaks): Sufficient progress
- Social emotional (requesting a compromise): Sufficient progress
- Behavior (work completion): Sufficient progress
- Behavior (following directions): Insufficient progress
- Behavior (participation): Emerging skill
- Motor (keyboarding): Sufficient progress
- Communication (articulation): Sufficient progress

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

CONCLUSIONS

Issue One: IEP Implementation – The Parent alleged the District failed to implement the Student’s individualized education program (IEP) during the school closures, failing to provide: the social/emotional services; 1:1 behavior technician services; and academic services. The Parent alleged the Student could not access the special education services without the 1:1 behavior technician providing the Student with direct support at home.

Under normal circumstances, a district must implement IEPs as written. During the school closure due to the COVID-19 pandemic, because of health and safety concerns, districts were not necessarily expected to implement IEPs as written. IEP services should have been implemented to the extent possible, including the provision of specially designed instruction. If a service was not implemented, a district should have documented why it could not be implemented and what other options were considered. Districts should have clearly communicated to parents what services were being offered and were expected to collaborate with parents about the implementation of the services, including parent capacity to assist in service implementation. The district was expected to monitor student progress toward annual goals.

After the District closed school facilities on March 5, 2020, the Student’s IEP was not implemented as written, which during this time does not represent a violation of the IDEA by itself. However, that does not end the analysis as the District still had an obligation to provide students with special education services (i.e., specially designed instruction) during the school facility closures. Here, the District began providing online services to the Student on March 9, 2020 on a temporary basis because, at the time, it was believed that schools would soon reopen.

The Student’s IEP provided academic and behavior instruction and services, including a 1:1 behavior technician throughout the school day. According to the District, beginning on March 30, 2020, the special education teacher provided 60-90 minutes a week of specially designed

instruction with “additional optional check-in time.” The District provided a daily schedule, informing the Parent what instruction and activities were occurring. The District also stated the behavior agency continued to provide BCBA consultation and behavior technician services remotely to the Student.

Both the Parent and District acknowledged that the Student’s IEP could not be implemented as written since the IEP was written to be implemented at school. However, the Parent argued that the behavior technician services should have been implemented in-person, at home. The Parent also argued that the State-wide limitation on providing services at school did not extend to home, and that there was a minimal health risk of exposure because of the precautions the Parent had taken at home. Still, the District declined at the time to provide the behavior technician at home because of the health risk. However, the District continued to provide behavior services remotely. Ultimately, the Student’s mother and the private behavior technician were both exposed to the virus. Even at the time before the exposure, OSPI finds the District made a reasonable decision based on the potential health risks to the Student, family, staff, and community at large. Regarding the remaining IEP services—like the behavior technician services—the District did not provide the services as written on the IEP, but services were provided and reflected the Student’s needs and abilities, albeit not perfectly given the circumstances of the closures. The District was not necessarily expected to implement the IEP as written, only to the extent possible given the circumstances.

The documentation also showed that the District conferred with the Parent about his concerns regarding the implementation of the services. The Parent may have disagreed with the services provided, but disagreement does not mean the District ignored the Parent’s concerns. In addition, the documentation showed the District implemented the services and monitored the Student’s progress. The District also coordinated the instruction and activities for the Student with the private behavior technician, who was working directly with the Student at home. The progress monitoring provided by the District indicated the Student was making sufficient progress in many of his goals despite the abbreviated services. Thus, OSPI finds no violation.

Issue Two: Staff Consultation/Training – In the complaint, the Parent stated, “The entire team has not completed the mandated quarterly training on Autism for 2019-2020 as noted in IEP and Pre-dispute resolution agreement.” An IEP must include a statement of the program modifications or supports for school personnel that will be provided to enable the student: to advance appropriately toward attaining the annual IEP goals; to be involved and progress in the general curriculum in accordance with present levels of educational performance and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children in the above activities. An IEP, including supports for school personnel, must be implement as written.

Here, the Parent and District signed a May 2019 resolution agreement, which included the “provision of training for staff in area of autism – Support for School Personnel.” The training provision was incorporated in the Student’s IEPs during the 2019-2020 school year as a provision that provided quarterly “consultation/training” under supports for school personnel. The IEP did not indicate which staff were to be trained or receive consultation services, or by whom. The

documentation showed that the Student's general education teacher and special education teacher attended an applied behavioral analysis (ABA) conference, in October 2019, which was relevant to the Student's needs. Until March 2020, the District contracted with the private behavior agency to provide board-certified behavioral analysis (BCBA) support and the services of an in-person behavior technician for the Student at school. The documentation showed that the BCBA provided supervision to the behavior technician and regularly consulted with the District about the Student's behavior. After the District denied the Parent's request for in-home behavior technician services following the school closures, the Parent began contracting with the agency for private behavior technician services for the Student. Meanwhile, the documentation showed the District continued to receive consultation services from the private agency even while the in-person behavior technician services from the District transitioned into remote services.

Although the IEP language is somewhat ambiguous, the IEP could reasonably be interpreted to mean consultation or training. The resolution agreement simply stated "training," which may have indicated that the Parent and District meant the provision to mean staff would be provided training and not consultation. However, OSPI notes that consultation is a form of training as District staff were provided information, new learning, and support from experts from a private agency. Although the Parent may have had some specific training in mind for the entire team, the IEP was not specific about who was to provide it or who was to receive the training. Based on the documentation that the special and general education teachers attended a conference in October 2019, and the BCBA continued to consult with District staff about the Student throughout the school year, OSPI finds the District substantially complied with the IEP. No violation is found.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this ____ day of July, 2020

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.)