

**SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 21-111**  
**PROCEDURAL HISTORY**

On December 13, 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 Moses Lake 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 December 14, 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 January 6, 2022, the Parent provided OSPI with additional information related to the complaint. OSPI provided the District with a copy of this information the same day.

On January 6, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent the same day. OSPI invited the Parent to reply.

On January 10, 2022, OSPI received the Parent's reply. OSPI forwarded that reply to the District the same day.

On January 12 and 13, 2022, the Parent provided OSPI with additional information related to the complaint. OSPI provided the District with a copy of this information on January 13 and 18, 2022.

On January 24, 2022, the Parent provided OSPI with additional information related to the complaint. OSPI provided the District with a copy of this information the same day.

On January 31, 2022, OSPI determined that additional information would be helpful to the investigation and contacted the Parent. OSPI received the requested information from the Parent the same day. OSPI forwarded that information to the District on February 2, 2022.

On January 31, 2022, OSPI determined that additional information would be helpful to the investigation and contacted the District. OSPI received the requested information from the District on February 1, 2022. OSPI forwarded that information to the Parent on February 2, 2022.

On February 1, 2022, OSPI's investigator consulted with an OSPI Program Improvement Supervisor with an educational background and professional experience in American Sign Language (ASL) specifically, and various communication needs in students with disabilities under the IDEA, generally.

On February 2, 2022, OSPI's investigator consulted with an OSPI Program Improvement Supervisor with an educational background and professional experience as a board-certified behavior analysis (BCBA).

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

## SCOPE OF INVESTIGATION

Any information included from events prior to 2021–2022 school year is mentioned for informative, background purposes only.

## ISSUES

1. Did the District follow proper individualized education program (IEP) development procedures during the 2021–2022 school year? Specifically:
  - a. Whether the Student’s IEP team responded to any change in need resulting from the Student’s disability in the areas of communication and social-emotional-behavior;
  - b. Whether the Student’s IEP team properly considered whether the Student required the accommodation of labels on the Student’s desk and cubby; and,
  - c. Whether the Student required additional and/or amended accommodations related to transition needs?
2. During the 2021–2022 school year, did the District properly implement any provisions of the Student’s IEP that related to the use of American Sign Language (ASL) with the Student?

## LEGAL STANDARDS

IEP Development: When developing each child’s individualized education program (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.

Basis for IEP Team Decisions: Generally speaking, an IEP team’s decisions must be based on a student’s needs resulting from that student’s disability. *See generally* WAC 392-172A-03090(1); *see also* WAC 392-172A-03110. An IEP team should base its decisions on appropriate programming for a student on sufficient, relevant data on the student’s needs resulting from the student’s disability. *See, e.g.,* WAC 392-172A-03020(3)(g); *see also, generally,* WAC 392-172A-03090.

Functional Behavior Assessment: A functional behavior assessment (FBA) focuses on identifying the function or purpose behind a child’s behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP team in developing a behavioral intervention plan (BIP) that will reduce or eliminate the misbehavior. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-2).

An FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. As with other evaluations, to conduct an FBA, the district must obtain the parents’ consent and complete the FBA within thirty-five (35) school days after the district received consent. 34 CFR §300.303; WAC 392-172A-03015. *Questions and Answers on Discipline*

*Procedures* (OSERS June 2009) (Question E-4). Once the need for a reevaluation is identified, a district must act “without undue delay and within a reasonable period of time;” and the U.S. Department of Education, Office of Special Education Programs (OSEP) has indicated that waiting several months to seek consent is generally not reasonable. *Letter to Anonymous*, 50 IDELR 258 (OSEP 2008).

Behavioral Intervention Plan (BIP): A BIP is a plan incorporated into a student’s IEP if determined necessary by the IEP team for the student to receive a free appropriate public education (FAPE). The BIP, at a minimum, describes: the pattern of behavior(s) that impedes the student’s learning or the learning of others; the instructional and/or environmental conditions or circumstances that contribute to the pattern of behavior(s) being addressed by the IEP team; the positive behavioral interventions and supports to reduce the pattern of behavior(s) that impedes the student’s learning or the learning of others and increases the desired prosocial behaviors and ensure the consistency of the implementation of the positive behavioral interventions across the student’s school-sponsored instruction or activities; and the skills that will be taught and monitored as alternatives to challenging behavior(s) for a specific pattern of behavior of the student. WAC 392-172A-01031.

Positive Behavioral Interventions: Positive behavioral interventions are strategies and instruction that can be implemented in a systematic manner in order to provide alternatives to challenging behaviors, reinforce desired behaviors, and reduce or eliminate the frequency and severity of challenging behaviors. Positive behavioral interventions include the consideration of environmental factors that may trigger challenging behaviors and teaching a student the skills to manage his or her own behavior. WAC 392-172A-01142.

Consent for Initial Provision of Services: A district must obtain informed consent from the parent of the student before the initial provision of special education and related services to the student. 34 CFR §300.300(b)(3); WAC 392-172A-03000(2). Parental consent is for the initial provision of special education and related services generally, not for a particular service or services. Individuals with Disabilities Education Act (IDEA), 73 Fed. Reg. 73,007, 73,011 (December 1, 2008) (comment to 34 CFR §300.300).

Difference between Accommodations and Modifications: Accommodations: 1) do not fundamentally alter or lower expectations or standards in instructional level, content, or performance criteria; 2) provide equal access to learning and equal opportunity to demonstrate what is learned; and 3) grading and credit is the same as typical students. Modifications: 1) do fundamentally alter or lower expectations or standards in instructional level, content, or performance criteria; 2) provide a student with a meaningful and productive learning experiences based on individual needs and abilities; and 3) grading and credit are different. OSPI, Evaluation and IEP Technical Assistance Module (April 2008).

IEP Revision: A student’s IEP must be reviewed and revised periodically, but not less than annually, to address: any lack of expected progress toward annual goals or in the general education curriculum; the results of any reevaluations; information about the student provided to, or by, the

parents; the student's anticipated needs; or any other matters. If changes are made to the student's IEP the school district must ensure that the student's IEP team is informed of those changes and that other providers responsible for implementing the IEP are informed of any changes that affect their responsibility to the student. 34 CFR §300.324; WAC 392-172A-03110.

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 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 [student with a disability] and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

Compensatory Education: A state educational agency is authorized to order compensatory education, as appropriate, through the special education citizen complaint process. 34 CFR §300.151(b)(1); WAC 392-172A-05030. The state educational agency, pursuant to its general supervisory authority, has broad flexibility to determine appropriate remedies to address the denial of appropriate services to an individual child or group of children. *Letter to Lipsitt*, 181 LRP 17281 (2018). Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 56 IDELR 31, (9<sup>th</sup> Cir. 2011); *See also, Letter to Lipsitt*, 181 LRP 17281 (2018) ("The purpose of a compensatory services award is to remedy the public agency's failure to provide a child with a disability with 'appropriate services' during the time that the child is (or was) entitled to a free appropriate public education and was denied appropriate services.")

There is no requirement to provide day-for-day compensation for time missed. *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9<sup>th</sup> Cir. 1994). "There is no statutory or regulatory formula for calculating compensatory remedies. However, generally services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting. It is common in Washington for such one-to-one services to be calculated at half of the total hours missed." *In re: Mabton School District*, 2018-SE-0036.

## FINDINGS OF FACT

### Background: 2020–2021 School Year

1. At the start of the 2020–2021 school year, the Student was eligible for special education services under the category of other health impairment, was in the second grade, and attended a District elementary school (**school 1**).

2. According to the District, the Student's 2020–2021 special education teacher was not certified in the area of American Sign Language (ASL) but did "use some signs as a part of programming which is typical in most of [the District's] life skills classrooms."

According to the Parent:

One [of the Student's 2020–2021] paraeducators and the Student's 2020–2021 special education teacher both have 3 years of education [in] interpreter training. The other 3 paras [Student worked with during the 2020–2021 school year] have just learned some of the signs over the years of working with [the 2020–2021 special education teacher]. [The 2020–2021 special education teacher] would always sign and use verbal communication at the same time when talking with Student. Student used modified American Sign Language (ASL) to clarify her verbal communication due to her stubby fingers. [The 2020–2021 special education teacher] would use it for her counting, reading, social and emotional, adaptive, behavior etc. Student always learned the signs first due to understanding it better than verbal communication. Once Student learned the concrete symbols for ASL then she would learn it in verbal communication over time. This helped with her behavior staying under control along with a structured environment. Most people who know Student knew her signs and could understand her when she communicated in ASL which helped her not get frustrated when someone could not understand her. Sign is Student's preferred communication versus PECS or verbal.

3. On May 14, 2021, the Student's IEP team developed a new individualized education program (IEP) for the Student. The May 2021 IEP read, in part:

Student continues to have issues during transition times ...Student is not deaf but uses American Sign Language (ASL) as a communication clarifier. It helps her communication partners understand her true intent. It will need to continue in her new school next year...Student is resistant to a picture communication exchange system (PECS)<sup>1</sup> or other communication devices to aid in communication. However, ASL is used by Student, and she is motivated to use it as a clarifier.

...

Student is beginning to tolerate change and transition and is now getting better to adapting to large groups or children or new surroundings.

...

#### **Social Emotional**

General Social Emotional Development: Student demonstrates a strong sense of self as an individual as evidenced by saying no to an adult's request, imitates other children's actions, watches the faces of other people for cues, dramatizes adult activities such taking care of her 'baby doll', watches other children play and attempts to join in briefly, shows a sense of self as evidenced by wanting less service and dependency, is warmly responsive to adults she knows, plays alone in the presence of other children (parallel play), likes to perform for

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<sup>1</sup> The PECS pedagogy "begins by teaching an individual to give a single picture of a desired item or action to a 'communicative partner' who immediately honors the exchange as a request. The system goes on to teach discrimination of pictures and how to put them together in sentences. In the more advanced phases, individuals are taught to use modifiers, answer questions and comment." <https://pecsusa.com/pecs>

others, plays simple group games...is starting to play with peer group with adult supervision, has discovered satisfaction of doing for others, takes turns with assistance.

Initiative and Engagement Skills and Behaviors: Engages in teacher directed activities for up to 10 minutes independent of prompts, independent and small group for up to 10 minutes, with prompts, watches computer or TV activity for up to 30 minutes, engages in domestic make believe play imitating an adult activity for up to 10 minutes. This places her in the 4 to 5 year age range. Student cannot stay on a difficult task for over 5 minutes without numerous prompts, does not complete her work without one to one direction, likes to play with older children who baby her and do whatever she wants to do, does not actively participate (50% baseline with 5 verbal prompts) for up to 10 minutes in small group instruction such as circle time, small group reading instruction, or table time, while still requiring numerous prompts to stay on task and attempt to finish her work. Student continues to require social emotional specially designed instruction.

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### **Adaptive**

Student dresses herself independently for the most part, struggling occasionally with pull over garments, she eats independently, can prepare an easy snack, gets herself up and gets dressed according to parent reports. At school she continues to need help with BM clean up, she is beginning to tolerate change and transition and is now getting better at adapting to large groups of children or new surroundings. (80% baseline or about half the time will tolerate and go to medium sized group of class peers independent of adult prompting and direction). She is still being rude and/or disrespectful with certain adults (especially on the PM bus) and if angered she will hit others. She struggles with simple problem solving so she hits in frustration. (0% accuracy in times of stress, anger, sadness) She continues to struggle with maintaining participation in academic settings requiring continued prompting and redirection, she continues to struggle with adapting to the new rigor of 2nd grade curriculum. This is hampering her ability to integrate into the general education classroom. She continues to need specially designed instruction in the area of Self Help/adaption.

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### **General Education Teacher Report**

The plan for next year, dependent on where she attends school, is to integrate Student for recesses, lunches if she is interested, all assemblies and specials...with her general education peers, as well as academic sessions, mainly for reading groups. She prefers older kids and is not always eager to participate with kids her own age, is usually verbally and sometimes physically aggressive with peers her own age. The plan is to get Student integrated for at least 50% of her day next year. Her developmental delays in cognition and school readiness, social emotional skills, and self-help make integration difficult for Student, her peers, and staff. She refuses to do most activities if not supervised and will act naughty if allowed any independence, mainly for attention. She struggles with attention in a larger class and instead likes to watch from the sidelines.

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### **Math**

Student can count to 31 at 70% accuracy, receptively pointed to 20 body parts, expressively named 10, matched, pointed to, and named with ASL a circle, a star, a heart, a square, diamond, oval.

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## Communication

Student has been working on maintaining all syllables in 2- and 3-syllable words. She has learned to use hand tapping to help her with difficult words. With models, she is able to maintain 70% accuracy on this skill during therapy activities. Student has also been working on producing initial consonants on words. When approximations are allowed, she is able to maintain this skill with 63% accuracy during therapy activities. She has also worked on using 3-word common school phrases (e.g., in the..., on the..., I have..., I want..., etc.) with intelligible speech. She continues to have difficulty with this skill as intelligibility decreases significantly in her connected speech. Student often uses modified sign in place of or in conjunction with her spoken utterances. This strategy increases her ability to make choices and have her needs met. Student continues to need work on expanding her vocabulary and improving her speech intelligibility. She produces final consonants on words with 0% accuracy and CVC words with 0% accuracy. Student does not yet name categories.

The May 2021 IEP included the following annual goals:

- **Social emotional:** ability to participate “in the activities up to 15 minutes improving participation rate from 50% with 5 prompts for 10 minutes to 80% of the time independent of prompts for 15 minutes.”
- **Adaptive:** “ability to problem solve by following a 3 step picture problem solving chart 1. what happened? 2. Why did you do it? 3. What's the plan to solve your problem? from 0% problem solving to 50% accuracy.”
- **Cognitive/Math Readiness 1:** ability to improve “rote counting skills from counting up to 31 (70% accuracy) using sign and orally to counting up to 50–80% accuracy using sign and orally.”
- **Cognitive/Reading Readiness:** “when given letters combinations...Student will name, using ASL or orally, word family names such as the ‘at’ ‘ad’ ‘as’ and other word family groups (cat, hat, bat, had, bad, etc.) improving letter sound fluency and blending fluency from 5 words in eve order (80% accuracy) (Dad, did, see, bee, him) to 25 CVC words from word families.”
- **Communication 1:** “when given 20 familiar pictures Student will name each picture improving articulation of the initial and final consonants /p, b, m, t, d, n, s, f, l, k/ (approximations acceptable) from 0% accuracy with cues and models to 50% accuracy without cues and models.”
- **Communication 2:** “when given pictures of items in each category Student will name 10 early learned categories improving her vocabulary and concepts from 0% accuracy to 60% accuracy.”<sup>2</sup>

The May 2021 IEP provided the Student with the following accommodations “as needed for assessment accuracy”: alternate response options; American Sign Language; familiar listener for oral tests; scribe; and speech-to-text.

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<sup>2</sup> In addition to the goals listed here, the Student’s May 2021 IEP included an additional math goal, a writing goal, and two occupational therapy goals. Said goals, though, did not relate to the Student’s social-emotional, transition, and/or communication needs—which were the primary concerns of the Parent—and so they were not listed here.

The May 2021 IEP provided the Student with the following accommodation “as needed to assist in understanding communication”: augmentative communication.

The May 2021 IEP provided the Student, in part, with the following specially designed instruction and related services: cognitive reading readiness: 90 minutes 5 times a week in a special education setting.

The May 2021 IEP stated the Student will spend 0 – 39% in the *general education setting*. On this point, the May 2021 IEP read, in part: “During current health crisis, state, county, local guidelines prevent cohorts from mixing. Student currently spends her entire day in the Life-skills classroom. We will attempt to integrate again when regulations are relaxed. She does attend recess with peers, but social distancing is practiced.”

4. The District’s response included a progress report for the Student dated June 2021 with the following entries for the following annual goals:
  - **Social emotional:** “10 minutes, 3 prompts, 70% accuracy.”
  - **Adaptive:** “Showing some understanding of the concept, can describe what happened but is blaming others for actions, 5% accuracy in step 1.”
  - **Cognitive/Math Readiness 1:** “Maintaining skills, new IEP in May.”
  - **Cognitive/Reading Readiness:** “8 words, 30% accuracy Kindergarten no excuse words/Readwell assessment.”
  - **Communication 1:** “New IEP. Still at baseline for this skill.”
  - **Communication 2:** “New IEP. Still at baseline for this skill.”

### **2021–2022 School Year**

5. The District’s first day of school was September 7, 2021.
6. At the start of the 2021–2022 school year, the Student was eligible for special education services under the category of other health impairment, was in the third grade, and attended a District elementary school. At that time, the Student’s May 2021 IEP was in effect.

According to the District, “the District opened a new elementary school [in the] fall of 2021 and with boundary changes, the Student’s school [location] changed to [a new] elementary school (**school 2**)...the Student’s parents were notified of this change before the [2020–2021] school year.”

7. According to the Parent’s complaint request, during the 2021–2022 school year:
  - “[The District did not] provid[e] someone to assist with American Sign Language (ASL) communication in order for Student to improve in her communication amount [with] her peers [and this is unacceptable because the Student’s] IEP states Student uses ASL as a communication clarifier [and] this is not being [provided] at [**school 2**].”
  - “No labels [were] on [Student’s] desk or cubby, so Student [could not] recognize the location of her seat and cubby for her belongings.”



- “Transitions were [only] implemented after we mentioned [the Student’s] need for transitions.”
- At least occasionally, the Student would elope from the appropriate area in the school building but “when Student was going to [school 1], this never happened, and I felt safe with Student at school every day.”

In part, the Parent’s complaint request read: “I would like Student to be transferred to [school 1] where Student can progress in her education, verbal, ASL, and social needs.”

Also, according to the Parent’s complaint request, throughout the fall 2021 semester, on multiple occasions, the Student would “run...out of [the] room and get...stuck in the elevator or janitor[’s] closet for more than 10 to 20 minutes at a time.”

8. The District’s response read, in part:

**School 2** is a new school, recently built and opened during the 2021–2022 school year. The special education teacher was able to enter her classroom only one day prior to the school year beginning due to construction. Once the teacher was able to get established in the classroom and address all individualized needs, labels and visual aids were implemented and provided throughout the classroom, including those on Student’s desk and cubby. [The Student’s desk and cubby were labeled by the] end of September [and/or] in place [at the] beginning of October.

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For the 2021–2022 school year, the [school 2] team is using some signs [with Student] although Student is verbal.

9. On September 8, 2021, the special education teacher texted the Parent, in part: “Student uses sign periodically...I don’t think we’re having any problems communicating with her.”
10. On September 16, 2021, the special education teacher texted the Parent, in part: “Student sometimes refuses to participate in classroom activities but a short break and/or a little encouragement gets us back on track.”
11. According to the Parent’s complaint request, on September 22, 2021, the Student eloped from the classroom on two occasions.
12. According to the Parent’s complaint request, on September 28, 2021, the Student “told the paraeducator to shut up and the Student threw her math counters.”
13. According to the Parent’s complaint request, in October 2021, the Student either demonstrated social-emotional dysregulation and/or eloped on at least 7 occasions.<sup>3</sup>

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<sup>3</sup> The dates of these incidences were as follows: October 1, 6, 12, 14, 15, 20, and 22, 2021. The Parent’s description of these incidences included, in part, the following: “Student was knocking over tables”; “Student went under the table and would not get out”; “Student refused to come in from recess”; “Student said she was gonna shoot the paraeducator with her finger”: and, “Student threw [her shoes] at [the] paraeducator and another student.”

14. The Parent's complaint request included a note from a District staff member dated October 14, 2021. It read, in part: "Student had a hard time transitioning today" between lunch, physical education (PE), and recess.

15. The District's response included a progress report for the Student dated November 2021 with the following entries for the following annual goals:

- **Social emotional:** "Student is making progress. Student participates in preferred activities i.e., morning meeting and plan, do review for as long as 30 minutes. Small group for reading and math we are working for 10 minutes effectively before needing a three minute break. 60%."
- **Adaptive:** "Student is making progress towards her goals. When we are able to de-escalate Student is able to answer questions in step 1 and step 2 consistently."
- **Cognitive/Math Readiness 1:** "Student is making progress and counts to 11 consistently before skipping. 35%."
- **Cognitive/Reading Readiness:** "Student is able to read 8 words from the Kindergarten no excuse words and Readwell curriculum."
- **Communication 1:** "Student can produce initial /p/ and /m/ words with 71% accuracy and final /p/ and /m/ words with 53% accuracy. Student is producing /f/ and /s/ words in all positions at 10% accuracy."
- **Communication 2:** "Student has a difficult time with naming categories. She can name many pictured items but is not yet naming categories."

16. According to the Parent's complaint request, in November 2021, the Student either demonstrated social-emotional dysregulation and/or eloped on at least 3 occasions.<sup>4</sup>

17. On November 2, 2021, the special education teacher texted the Parent, proposing a potential reevaluation of the Student "since it was waived last year. I so badly...want to figure out a way that I can reach her when she gets in an escalated state."

Later that day, the Parent responded to the special education teacher's text message, stating, in part: (1) Student was supposed to be provided with an ASL interpreter; and (2) it was frustrating Student was demonstrating behavioral challenges on a relatively consistent basis.

18. The Student's IEP team met on November 3, 2021. The District's response included a prior written notice dated November 3, 2021. It read, in part:

[The Student's school] change [this year] has affected her routine and her behaviors. She has been eloping from the classroom and refusing to come back. She has become angry, flipped chairs, and hit staff members...The team will start to implement the following:

1. Use a timer for transitions (not a visual one);
2. Use a 5 minute verbal warning before transitioning to next activity;
3. Student will attend general ed recess and push into the 3rd grade class in the afternoon;

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<sup>4</sup> The dates of these incidences were as follows: November 8, 22, and 24, 2021.

4. Start to use an incentive chart, such as a star chart; and,
5. Change wording: "safe hands", "soft hands."

...

More time in general education class [was rejected because] the team agreed to start off with Student going to general ed recess and going to 3rd grade in the afternoon. We will see how she is doing at conferences.

The Parent's complaint request included notes written by the Parent from the November 3, 2021 IEP meeting. Those notes read, in part:

They do not do transitions currently or have any transition skills in place. My husband and I told them they need a 5 minute timer of some sort during transitions because she will transition easier....Student has gone to [her] general education [classes in the past] but has not [gone] the last two weeks because she [has] refused.

In relation to the November 3, 2021 IEP meeting, the District's response read, in part:

This meeting was held to...discuss Student's transition to [**school 2**] and increasing behaviors. [The] change in school buildings affected her routine and behaviors [such as] eloping, flipping chairs, [and] hitting staff members...Prior to the meeting, the special education teacher requested a discussion regarding a re-evaluation for Student considering the previously-waived re-evaluation in 2020. At the meeting, the team discussed implementing the following changes: use a timer for transitions, use a 5 minute verbal warning before transitioning to next activity, have Student attend general education recess and push into the 3rd grade classroom in the afternoon, use of an incentive chart, and adjust staff language from 'safe hands' to 'soft hands'. In addition, the team offered the support of the behavior team and implementation of a positive behavior support plan and/or staff communication plan to ensure Student's social-emotional needs are met with consistency. The parents rejected any plan or support from the behavior team and/or discussion regarding a functional behavior assessment. The team also agreed to connect again during parent-teacher conferences during the week of November 17th (Student's conference was held on 11/18/21) to review response to these behavioral strategies, determine how they are working, and the need to increase/decrease specially designed instruction or general education time or make adjustments to other strategies being used.

19. Handwritten notices by a District staff member, dated November 3, 2021, mention, in part, the following strategies either having been utilized with the Student or to be utilized with the Student moving forward: "5 minute warning"; "visual timer"; "good/soft hands"; "deep breaths"; and "good day/bad day stamp."

The District's response also included typed notes related to the November 3, 2021 meeting. They read, in part: "Student will let you know when she's mad or upset- she uses a lot of ASL/hand gestures."

20. On November 4, 2021, the special education teacher texted the Parent, stating, in part: "Setting a timer on our phone really helped" with transitions.
21. According to the Parent's complaint request, on November 8, 2021, District staff worked with the Student on "soft hands, soft feet, and safe words" and "working on 'soft hands, feet and

safe words' was happening at [school 1] with ASL [support] and Student progressed significantly."

22. According to a November 18, 2021 prior written notice, on or about that date, the director, Parent, and speech language pathologist (SLP) met "during [student] conferences to discuss communication as a follow-up to the meeting held on November 3, 2021 in regards to questions brought up regarding ASL."

According to the November 18, 2021 prior written notice:

[The group:]

1. Discussed how sign language was used at [school 1] and at home.
2. Reviewed communication goals and supports at [school 2.]
3. Discussed implementation of sign language supports (teaching approximately 2 signs per week) and use of visuals at school 2 to support vocabulary growth.

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1. Parent willing to share signs that Student knows and currently uses at home with school staff. In accordance with IEP, ASL was used "as needed for assessment accuracy" while Student attended [school 1].
2. Parent stated that they use signs, gestures, picture cues at home to support Student with verbal communication and then fade the gestures as Student learns to verbalize new words.
3. Discussed using a combination of visuals and signs in the classroom to support Student with learning new vocabulary.

...

[Provision of an] ASL interpreter was discussed and rejected...as Student is verbal and uses gestures and signs to connect new words verbally.

The Parent's complaint request stated: on November 18, 2021, she participated in a "conference" concerning the Student. And, at that time, there were "still no labels (name tags) for Student's seating or cubbies."

In its response, the District stated the following regarding the November 18, 2021 meeting: "The District has an ASL interpreter on staff...and is available to consult with the Student's IEP team. This service was offered to the Parent in the...meeting."<sup>5</sup>

23. According to the Parent's complaint request, on December 3, 2021:

I was called [by] Student's life skills teacher and she informed me that Student had gotten on the elevator again and she won't come out. I tried speaking with Student and it still

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<sup>5</sup> During this investigation, the Parent offered the following statement regarding whether the District offered, on November 18, 2021, for an ASL specialist to consult with the Student's IEP team: "The director said the District [once] had 3 ASL interpreter[s], however they are down to one and she works someplace else (I don't recall the exact comment the director made). I was not offered an ASL interpreter for Student, but they said we could meet Student's speech [teacher]. We did that but nothing came of it."

didn't work. They finally got her out to the bus but couldn't get her on. So, I had to walk over and pick her up again.

24. During this investigation, the Parent provided OSPI with footage from a residential camera showing the Student had eloped from school on December 15, 2021 and was supervised during the elopement by two District staff members.
25. The District was on winter break from December 20, 2021 through December 31, 2021.
26. During this investigation, the Parent provided OSPI with written statements from: herself, the Student's father; and the Student's sister. Collectively, these statements assert the Student experienced emotional dysregulation on the following dates in January 2022: 12, 13, 18, and 19.
27. During this investigation, the Parent provided OSPI with completed worksheets from three different days in January 2022. These worksheets showed, in part: District staff worked with Student on 'soft hands, soft feet, and safe words.' The worksheets also included a behavior reporting scale.
28. The District's response included two pictures of different visual schedules for the Student, utilized and/or created on or about January 5, 2022.
29. On January 12, 2022, the director emailed the Parent, stating, in part:

I just wanted to follow up with an email regarding our phone conversation this morning and the options for Student. **[School 2]** continues to want to work with you to support Student. We can offer to develop a positive behavior support plan which, as I mentioned this morning, is really a communication plan for the adults to be consistent in the strategies that they are using.

In addition, I also proposed the following alternatives to **[school 2]** as **[school 1]** is not an option at this time as our program at that site is over the number of students to staff ratio. We do have space at the following sites: **[school 3]** - next closest elementary; or **[school 4]** - current teacher is certified ASL.

Later that day, the Parent responded, stating in part:

I hear your response; however, after speaking with my husband, Student has already lost 5 months of learning due to her behaviors at **[school 2]**. I do not want Student at **[school 2]** knowing they are not capable of dealing with Student and keeping her safe. This is not the behavior she had before. And her safety I worry about even more now since she escaped from **[school 2]** and was not in safe hands. Our concern is we do not want to be in the same spot we are at right now in 5 months. We know Student is safe and will be in good hands at **[school 1]**.

I also spoke with [Student's former **school 1** teacher] today, he says he has 5 paraeducators with 12 kids and he is more than willing to take on Student knowing he will be over by 2. I explained the situation and what has gone on the last five months with Student and that I

was concerned for her behavior and safety. [Student's former **school 1** teacher] was super surprised about her actions and behaviors and was concerned for her as well.

I know he had his kids over last year when Student was there. They are well qualified staff and have done amazing helping Student get where she needs to be in all her developments...Student's behavior was improving towards the end of the year which stated in her IEP as well...[W]e have to decline the offer for an alternative placement besides **[school 1]**.

30. According to a voicemail transcript left on the Parent's phone by a District staff member, the Student likely experienced a social-emotional regulation challenge on January 19, 2022.

31. On January 19, 2022, the Student was assigned a two-day suspension for throwing objects, including, on occasion, at people. According to the suspension document, the Student also "destroy[ed] the classroom" during the incident in question.

According to the January 19, 2022 suspension document, the Student's two-day suspension was served January 20 – 21, 2022.

32. The District's response included a January 20, 2022 prior written notice that read, in part: The director had a phone call with Student's parents on 1/20/22 to follow up on the following proposal[s]:

1. Parents requested that Student return to **[school 1]** where she attended prior to boundary changes for the 2021–22 school year. This was refused as **[school 1]** is currently in overage. The district agreed to put Student on a waitlist for **[school 1]**.
2. The district proposed a change of placement to another elementary life skills classroom. Space is available at **[school 3]** and **[school 4]**. The District would provide transportation for this option. Parents denied this option.
3. The District proposed a reevaluation for Student as the last reevaluation was waived (due to Covid). The Parents denied this option.
4. The District proposed a functional behavior assessment (FBA) in response to Student's behaviors and to develop a behavior intervention plan (BIP). The Parents agreed to this option.<sup>6</sup>

33. On January 22, 2022, the Student's **school 1** special education teacher emailed the assistant special education director (assistant director), the principal of **school 1**, and the director, stating, in part:

Parent explained Student's regression across the board [this school year] and I have concerns over that as well. We were integrating for all non-academic instruction successfully until COVID. Student was showing slow and successful growth on I-Ready assessments. We had no severe behavior concerns, nor did we see anything to the level

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<sup>6</sup> On January 21, 2022, the director emailed the Parent, stating, in part: "We have a date set for February 11, 2022 to meet regarding the FBA." According to the District, the purpose of the February 11, 2022 meeting "is to discuss the results of the FBA and finalize the BIP."

Parent is telling me is happening at **school 2**. Just wanted to keep you in the loop. I am not trying to instigate anything here, just supporting a former parent with information.

34. On February 3, 2022, the Parent emailed the special education director, stating, in part: I approved the functional behavior assessment, so the specialist can figure out why Student is behaving the way she is. And if it is due to how the classroom teachers are handling it. I need everyone to understand we will not sign any form of a behavioral intervention plan for Student because she has never needed one in the past years at **school 1**. I just wanted to make that clear. I am fine with her being assessed by the behavior specialist, but I do not want her on any behavior plan.

## CONCLUSIONS

**Issue 1: IEP Development** – The Parent alleged the District did not follow proper individualized education program (IEP) development procedures in responding to any potential change in need resulting from the Student’s disability in the areas of: social-emotional-behavioral; labels for Student’s desk and cubby; and transition services.<sup>7</sup>

When developing a student’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. An IEP team should base its decisions on appropriate programming for a student on sufficient, relevant data on the student’s needs resulting from the student’s disability.

### *Social-Emotional-Behavioral*

During the 2020–2021 school year, the Student was educated at **school 1**. The District opened a new elementary school in the fall of 2021 and with boundary changes, the Student’s school location changed to **school 2**. Throughout the fall 2021 semester, the Student demonstrated a fairly significant increase in emotional regulation challenges. For example: in September 2021, the Student eloped on at least two occasions and experienced emotional dysregulation on at least once occasion; in October 2021, the Student demonstrated social-emotional dysregulation and/or eloped on at least 7 occasions; in December 2021, the Student eloped on at least two occasions; and, in January 2022, the Student demonstrated social-emotional dysregulation and/or eloped on at least four occasions.

The Student’s IEP team determined the Student’s increased social-emotional-behavioral needs were due, at least in part, to the Student transitioning to a new school – **school 2**. For example, in relation to the November 3, 2021 IEP meeting, the District’s response stated, in part: “[The] change in school buildings affected Student’s routine and behaviors [such as] eloping, flipping chairs, [and] hitting staff members.”

In relation to the District’s response to this change in need, the facts show the following:

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<sup>7</sup> Whether the District followed proper IEP development procedures in response to any change in need resulting from the Student’s disability in the area of communication will be addressed below, in Issue 2.

- On November 2, 2021, the special education teacher texted the Parent, proposing a potential reevaluation of the Student and stated, "I so badly...want to figure out a way that I can reach her when she gets in an escalated state." (In the Parent's responsive text message, the Parent did not appear to directly respond to the special education teacher's proposal to re-evaluate the Student, with an emphasis to be placed on the Student's social-emotional-behavioral needs.)
- According to the District's response, at the November 3, 2021 IEP meeting, the Parent rejected both the implementation of positive behavioral supports, as well as completion of a functional behavior assessment (FBA).
- Also at the November 3, 2021 IEP meeting, the IEP team agreed several transition-related interventions needed to be provided to the Student, see below. These transition-related interventions appeared to relate, at least in part, to the Student's social-emotional-behavioral needs.
- On January 12, 2022, the District (via an email to the Parent from the director) offered, in part: implementation of positive behavioral supports ("a positive behavior support plan"); and, transferring Student to **school 4**, where the "current teacher is certified ASL."<sup>8</sup> Later that day, the Parent responded, stating the Student should be returned to **school 1**.
- On January 20, 2022, the Parent again requested that Student be returned to **school 1**. On or about that date, the Parent also consented to an FBA being completed, and, according to the District, a meeting is scheduled to take place on February 11, 2022 "to discuss the results of the FBA and finalize the BIP." (Though, in a February 3, 2022 email to the director, the Parent stated her consent for an FBA was not agreement that "any form of a BIP" be provided to the Student, and that the Student should be returned to **school 1**.)

On the foregoing facts, OSPI makes the following conclusions:

An FBA focuses on identifying the function or purpose behind a child's behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP team in developing a behavioral intervention plan (BIP) that will reduce or eliminate the misbehavior. An FBA is generally understood to be an individualized evaluation of a child to assist in determining whether the child is, or continues to be, a child with a disability. Once the need for a reevaluation is identified, a district must act "without undue delay and within a reasonable period of time;" and the U.S. Department of Education, Office of Special Education Programs (OSEP) has indicated that waiting several months to seek consent is generally not reasonable.

Here: the Student appears to have first demonstrated increased social-emotional-behavioral challenges on September 16, 2021; District staff implemented some positive behavioral interventions to the Student, such as breaks and encouragements, beginning on September 16,

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<sup>8</sup> As discussed in Issue 2, below, the Parent believed the Student's communication and ASL needs related, in part, to Student's social-emotional-behavioral needs.



2021; the Student's social-emotional-behavioral challenges continued through October 2021 – despite the implementation of positive behavioral interventions; and, on November 2, 2021, the special education teacher proposed a reevaluation of the Student “to figure out a way that I can reach Student when she gets in an escalated state.” In other words, the Student demonstrated a behavioral need, the District attempted positive behavioral interventions, and, when those interventions did not succeed, the District proposed an FBA. These facts do not represent a violation of the IDEA.

Positive Behavioral Interventions: Positive behavioral interventions are strategies and instruction that can be implemented in a systematic manner to provide alternatives to challenging behaviors, reinforce desired behaviors, and reduce or eliminate the frequency and severity of challenging behaviors. Positive behavioral interventions include the consideration of environmental factors that may trigger behaviors and teaching a student the skills to manage their own behavior.

Here, District staff provided positive behavioral interventions to the Student, such as breaks and encouragements, beginning on or about September 16, 2021.<sup>9</sup> Then, beginning on or about November 3, 2021, the District began implementing additional positive behavioral interventions, including, in part: use of a timer for transitions; verbal warnings prior to transitions; and use of specific verbiage (“safe hands, soft hands”). This represents a correct utilization of positive behavioral interventions, and OSPI does not find a violation of the IDEA.

However, OSPI does note: in the director's January 12, 2022 email, the director appears to offer positive behavioral supports to the Student – for the Parent to consider and accept and reject. On this specific point, OSPI reminds the District: while an IEP team should always consider a parent's input in determination of appropriate special education services, a district does not require a parent's consent for the implementation of positive behavioral interventions. Positive behavioral interventions can be – and, oftentimes, should be – provided prior to completion of an FBA and/or creation of a BIP. And positive behavioral interventions are pedagogical approaches that can, and should be, utilized for all students – regardless of a particular student's eligibility for special education services under the IDEA.

District's Ability to Implement a BIP: In a February 3, 2022 email to the director, the Parent stated her consent for an FBA was not agreement that “any form of a BIP” be provided to the Student, and that the Student should be returned to **school 1**. On this subject, OSPI reminds both the District and the Parent: a district must obtain informed consent from the parent of the student before the initial provision of special education and related services to the student; and parental consent is for the initial provision of special education and related services generally, not for a particular service or services. So, in this instance, while the Student's IEP team should collaboratively address any of the Parent's concerns with the BIP that is developed at the February

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<sup>9</sup> This conclusion is supported by the special education teacher's September 16, 2021 text to the Parent, as well as some of the November 2021 progress report entries.

11, 2022 IEP meeting, the District does not need the Parent's consent to implement the BIP that is developed at that meeting to address the student's needs.<sup>10</sup>

### *Labels for Student's Desk and Cubby*

The documentation provided to OSPI during this investigation was relatively sparse on the issue of whether the Student's needs resulting from the Student's disability required the Student's desk and cubby to be labeled. For example, the Student's May 2021 IEP is silent on this issue. According to the Parent's complaint, though, the Student required this to locate her seat and cubby to place her belongings – to this extent, then, the Parent's concern on this point may relate to the Student's transition needs, see below.

According to the District, as of either late September or early October 2021, the Student's desk and cubby were labeled with the Student's name. But, according to the Parent, on November 18, 2021, she participated in a "conference" concerning the Student, and, at that time, there were "still no labels (name tags) for Student's seating or cubbies." However, it is not clear whether, or to what extent, the Parent expressed this concern to the District earlier in the fall or raised it at the November 3, 2021 IEP meeting. It is not clear the IEP team was aware this was a concern of the Parents and thus able to respond.

Based on the documentation provided to OSPI during this investigation, OSPI cannot conclude there was a violation of the IDEA – that the Student's needs resulting from the Student's disability required the Student's desk and cubby be labeled, and that the IEP team did not respond to this need appropriately. However, as OSPI will be requiring the IEP team to meet as a result of other aspects of this decision, the Student's IEP team will be required to determine whether the Student's needs resulting from the Student's disability required the Student's desk and cubby be labeled; and, as needed, update the Student's May 2021 IEP.

### *Transition Services*

In relation to the Student's transition needs, the May 2021 IEP noted the Student had a need in this area, but that Student was "beginning to tolerate change and transition." Beginning with the 2021–2022 school year, though, the Student showed a potential regression in this area. For example: a District staff member's October 14, 2021 note read, in part: "Student had a hard time transitioning today" between lunch, physical education (PE), and recess; the Parent's notes concerning the November 3, 2021 IEP meeting recorded that Student had difficulty transitioning to the Student's general education classes beginning, at the latest, on October 22, 2021; and, the District's response notes that, as of the November 3, 2021 IEP meeting, its staff were aware the Student was having difficulty with certain transitions during the school day, and that these difficulties related, at least in part, to the new environment of **school 2**.

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<sup>10</sup> Though the Parent, in this instance, would have the option of revoking consent for the provision of all special education services. See WAC 392-172A-01040; see also WAC 392-172A-03000.

Therefore, on November 3, 2021, the Student's IEP team, including the Parent, met to determine how to best address the Student's changed need in transitions. Ultimately, the Student's IEP team adapted several strategies, including, in part: use of a timer for transitions; a verbal warning before transitioning to a new activity; and use of different verbiage, such as "safe hands" and "soft hands."

And the documentation provided to OSPI during this investigation shows these transition-related interventions were subsequently provided to the Student. For example, in part: on November 4, 2021, the special education teacher texted the Parent, stating, in part: "Setting a timer on our phone really helped" with transitions; according to the Parent's complaint request, on November 8, 2021, District staff worked with the Student on "soft hands, soft feet, and safe words"; and, the District's response included, in part, worksheets showing that, on at least three days in January 2022, District staff worked with the Student on "soft hands, soft feet, and safe words."

These transition-related interventions appear to – at least initially, have been additional positive behavioral interventions that were going to be utilized by the Student's providers. After a certain amount of time, though, during which these transition-related interventions continued to be utilized, they became – functionally, accommodations. For example: accommodations: 1) do not fundamentally alter or lower expectations or standards in instructional level, content, or performance criteria; 2) provide equal access to learning and equal opportunity to demonstrate what is learned; and 3) grading and credit is the same as typical students.

Here, though, the documentation provided to OSPI does not show the Student's May 2021 IEP was revised to reflect the addition of these accommodations. A student's IEP must be reviewed and revised periodically, but not less than annually, to address: any lack of expected progress toward annual goals or in the general education curriculum; the results of any reevaluations; information about the student provided to, or by, the parents; the student's anticipated needs; or any other matters;<sup>11</sup> this, therefore, is a violation of the IDEA.

The Student's IEP team will be required to meet to determine the Student's current transition-related accommodations and to update the Student's May 2021 IEP accordingly. The District will then be required to provide a copy of the updated IEP, as well as a related prior written notice, to both the Parent and each of the Student's service providers.

**Issue 2: IEP Implementation: American Sign Language** – The Parent alleged the District, during the 2021–2022 school year, did not implement those portions of the Student's May 2021 individualized education program (IEP) that related to American Sign Language (ASL).

A district must provide all services in a student's IEP, consistent with the student's needs as described in that IEP. When a school district does not perform exactly as called for by the IEP, the

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<sup>11</sup> On this point, it is also important to note: if changes are made to the student's IEP the school district must ensure that the student's IEP team is informed of those changes and that other providers responsible for implementing the IEP are informed of any changes that affect their responsibility to the student.

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 student with a disability and those required by the IEP.

As a preliminary matter, the District and the Parent have differing opinions as to what ASL services need to be provided to the Student under the May 2021 IEP. For example: the District stated the full extent of ASL support under the May 2021 IEP was: "as needed for assessment accuracy." The Parent, though, stated: the May 2021 IEP required that the Student be provided with an ASL interpreter.

The disagreement over the meaning of the ASL provisions in the May 2021 IEP appears to relate, in part, to the parties' different understandings of the Student's ASL needs. For example, based on the documentation provided to OSPI, it appears the Parent believes the Student requires substantive and constant ASL support – in order to both improve her ability to communicate with peers, as well as to maintain emotional balance. The District, though, appears to believe the Student is largely verbal – and only utilizes a combination of "gestures and signs [when learning] to connect new words verbally" (the November 18, 2021 prior written notice).<sup>12</sup>

In the documentation provided to OSPI during this investigation, there is some data to support each parties understanding. For example, in support of the Parent's position: (a) the May 2021 IEP explicitly stated Student will need to utilize ASL, in conjunction with oral communication, to make progress on the **cognitive/reading readiness** goal; and (b) the November 3, 2021 meeting notes mention Student "uses a lot of ASL." In support of the District's position, the May 2021 IEP notes the Student is verbal but utilizes "modified sign", when needed, as a "communication clarifier."

The lack of clarity in the Student's May 2021 IEP regarding the Student's ASL needs represents a violation of the IDEA. For example, each individual responsible for implementing an IEP, or portions thereof, to a student must be informed of their responsibilities under that IEP. Stating similarly, an IEP team must have sufficient, relevant data on a student's needs resulting from the student's disability, and the IEP team's understanding of those needs must be clearly and accurately reflected in the IEP. Here, as noted above, there is a certain lack of clarity around what ASL services need to be provided to the Student under the May 2021 IEP.

Therefore, the Student's IEP team will be required to meet to determine the exact nature of the Student's ASL needs. Based on that determination, the Student's IEP should consider whether the

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<sup>12</sup> In relation to this disagreement, OSPI notes the following: gestures are different from ASL. ASL is a formal language, complete with grammatical structure and rules of syntax, whereas gestures generally lack these specific complexities. (During this investigation, OSPI's investigator consulted with an OSPI Program Improvement Supervisor with an educational background in, and professional experience with, American Sign Language specifically, and the various potential communication needs of students with disabilities under the IDEA, generally. See also: <https://www.glossa-journal.org/article/id/5109/>)

IEP needs to be amended, and a prior written notice should be provided to the Parent explaining the IEP team's determination of the Student's current ASL needs.<sup>13</sup>

Regarding the implementation of those portions of the Student's May 2021 IEP that related to ASL, in contrast to the District's assertion – that the May 2021 IEP only provided the Student with ASL support "as needed for assessment accuracy," the May 2021 IEP explicitly states Student will need to utilize ASL, in conjunction with oral communication, to make progress on the **cognitive/reading readiness** goal.

The May 2019 IEP also stated the Student would utilize "sign" and "modified sign" to work on **cognitive/math readiness 1** and **communication 1 – 2**, respectively. Again, gestures or modified signs are different from ASL. Furthermore – and also as noted earlier, the May 2021 IEP notes the Student is verbal but utilizes "modified sign", when needed, as a "communication clarifier." For these two reasons, OSPI's understanding is that, for **cognitive/math readiness 1** and **communication 1 – 2**, something less than full ASL instruction or interpretation needed to be provided to the Student.

In terms of what gestures, sign language, and/or ASL was actually provided to the Student during the 2021–2022 school year, the documentation shows the **school 2** team used "some sign" with the Student, and that this was, generally speaking, an effective way to communicate with the Student. For example: in supplemental information provided to OSPI, the District stated, "For the 2021–2022 school year, the [**school 2**] team is using some signs [with Student] although Student is verbal"; on September 8, 2021, the special education teacher texted the Parent, stating, in part, "Student uses sign periodically...I don't think we're having any problems communicating with her;" the November 3, 2021 meeting notes read, in part, "Student will let you know when she's made or upset – she uses a lot of ASL [and/or] hand gestures;" and, the November 18, 2021 prior written notice reads, in part, "[**School 2** staff are] teaching approximately 2 signs per week." Based, in part, on the foregoing information, OSPI concludes: during the 2021–2022 school year, Student was provided, fairly consistently, with sign and/or gestures, but was not provided with substantial ASL support on a continual basis.<sup>14</sup>

In relation to **cognitive/math readiness 1** and **communication 1 – 2**, then, it appears the appropriate sign and/or gestures – something less than full ASL, was provided to the Student. And, as per the November 2021 progress report, Student made little to no progress in

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<sup>13</sup> On this point, OSPI notes: an IEP team's decisions must be based on sufficient, relevant data on a student's needs resulting from the student's disability. Here, it is possible the Student's IEP team has enough existing data to determine the Student's exact ASL needs. It is also possible, though, the IEP team will need to gather additional data through the administration of new assessments. If that is the case, the District will need to procure the Parent's consent for said new assessments prior to administration of the same.

<sup>14</sup> From the documentation provided to OSPI during the course of this investigation, it is clear the Parent believes the Student was provided more substantive ASL support, on a more consistent basis, while at **school 1**.

**cognitive/math readiness 1** and **communication 2**. But Student does appear to have made significant progress in **communication 1**.

As detailed above, though, the May 2021 IEP required that ASL be provided, at least in part<sup>15</sup>, to the Student so as to enable the Student to progress on the **cognitive/reading readiness** goal. And that level of ASL does not appear to have been provided to the Student on a substantial and/or consistent basis. Therefore, this is a violation of the IDEA, and some compensatory education is warranted.

Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. There is no statutory or regulatory formula for calculating compensatory remedies. However, generally services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting.

Here: the May 2021 IEP provided the Student with seven and a half hours of specially designed instruction in cognitive/reading readiness each week (90 minutes 5 times a week); September 7, 2021 through January 28, 2022 represents approximately 16.5 weeks of school; according to the November 2021 progress report, the Student made very little progress on the **cognitive/reading readiness** goal; and, under the May 2021 IEP, the **cognitive/reading readiness** goal could be worked on, at least in part, verbally. Based on the foregoing information, OSPI determines an appropriate compensatory education remedy is 14 hours of specially designed instruction in **cognitive/reading readiness** (representing approximately two weeks of specially designed instruction in this area under the May 2021 IEP). This compensatory education will take place in a one-on-one setting – meaning, just the service provider and the Student. And the service provider will be an individual specifically trained in, and experienced with, ASL.

### **CORRECTIVE ACTIONS**

By or before **March 4, 2022** and **October 31, 2022**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

##### Compensatory Education

By or before **March 4, 2022**, the District and the Parent will develop a schedule for providing the following compensatory education to the Student: 14 hours of specially designed instruction in **cognitive/reading readiness**. The District will provide OSPI with documentation of the schedule for services by or before **March 4, 2022**.

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<sup>15</sup> As per the May 2021 IEP, **cognitive/reading readiness** could be worked on, in part, verbally.

The compensatory education will occur in a one-on-one setting and be provided by a certificated special education teacher. The instruction will occur outside of the District's school day and may occur on weekends or during District breaks. Because of the COVID-19 pandemic, the compensatory education may be provided remotely.

If the District's provider is unable to attend a scheduled session, the session must be rescheduled. If the Student is absent, or otherwise does not attend a session without providing the District with at least 24 hours notice of the absence, the District does not need to reschedule. *The services must be completed no later than October 31, 2022, including those needing to be rescheduled.*

No later than **October 31, 2022**, the District shall provide OSPI with documentation that all of the compensatory education has been completed. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled by the District or missed by the Student.

The District either must provide the transportation necessary for Student to access these services, or reimburse Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must provide reimbursement for round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **October 31, 2022**.

#### IEP Meeting

By or before **March 2, 2022**, the Student's IEP team will meet.

At the meeting, the IEP team must address the following topics:

1. The Student's current need for transition-related accommodations;
2. The exact nature of the Student's ASL needs; and,
3. Whether the Student's needs resulting from the Student's disability require that the Student's desk and cubby be labeled.

By or before **March 4, 2022**, the District will provide OSPI with: i) a prior written notice, summarizing the group's discussion and decisions concerning the above matters; ii) a copy of the Student's amended IEP; iii) any relevant meeting invitations and prior written notices; iv) a list of people, including their roles, who attended the meeting; and v) any other relevant documentation.

**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.

### **REMINDERS**

While an IEP team should always consider a parent’s input in determination of appropriate special education services, a district does not require a parent’s consent for the implementation of positive behavioral interventions. Positive behavioral interventions can be – and, oftentimes, should be – provided prior to completion of an FBA and/or creation of a BIP. And positive behavioral interventions are pedagogical approaches that can, and should be, utilized for all students – regardless of a particular student’s eligibility for special education services under the IDEA.

A district must obtain informed consent from the parent of the student before the initial provision of special education and related services to the student; and parental consent is for the initial provision of special education and related services generally, not for a particular service or services. So, in this instance, while the Student’s IEP team should collaboratively address any of the Parent’s concerns with the BIP that is developed at the February 11, 2022 IEP meeting, the District does not need the Parent’s consent to implement the BIP that is developed at that meeting.<sup>16</sup>

Dated this      day of February 2022.

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.)

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<sup>16</sup> Though the Parent, in this instance, would always have the option of revoking consent for the provision of all special education services. See WAC 392-172A-01040; see also WAC 392-172A-03000.