

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-106

PROCEDURAL HISTORY

On September 10, 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 Kennewick 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 September 11, 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 September 25, 2020, OSPI received the District's response to the complaint and forwarded it to the Parent on October 5, 2020. OSPI invited the Parent to reply. The Parent did not provide a reply.

On October 28, 2020, OSPI requested additional information from the District. The District provided the requested information to OSPI on November 2, 2020 and it was forwarded to the Parent on November 3, 2020.

OSPI considered all of 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 Student's extended school year (ESY) services during summer 2020?

LEGAL STANDARDS

IEP Implementation during School Facility Closures for COVID-19: At the beginning of each school year, each district must have in effect an individualized education program (IEP) for every student within its jurisdiction served through enrollment who is eligible to receive special education services. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

During the COVID-19 school facility closures, as students received general education instruction and student support services, districts 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).

Specially Designed Instruction: The purpose of the IDEA is to ensure that all students eligible for special education have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 CFR §300.1; WAC 392-172A-01005. Special education

includes specially designed instruction, which means adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction: to address the unique needs of the student that result from the student's disability; and to ensure access of the student to the general curriculum, so that the student can meet the educational standards within the jurisdiction of the public agency that apply to all students. 34 CFR §300.39(b)(3); WAC 392-172A-01175(3)(c).

Continuous Learning Plan (CLP): A CLP (or similar document) is used to document the temporary services that will be made available and provided during school facility closures for COVID-19. *Questions and Answers* (OSPI, April 13, 2020). A CLP is a temporary plan that outlines the extent to which IEP services and accommodations must be delivered differently or suspended due to emergency health and safety restrictions in spring of 2020, and documents decisions regarding services, timelines, and other student specific considerations during school facility closures. While the information recorded in an individual student CLP may come from a student's IEP, such documentation is not intended to serve as, or to replace, the most recent IEP. Districts must have a method for documenting decisions made for individual students during the spring 2020 school facility closures. *Questions and Answers* (OSPI, May 5, 2020).

Progress Reporting: The purpose of progress reporting is to ensure that, through whatever method chosen by a school district, the reporting provides sufficient information to enable parents to be informed of their child's progress toward the annual IEP goals and the extent to which that progress is sufficient to enable the child to achieve those goals. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir, 2001) (parents must be able to examine records and information about their child in order to "guarantee [their] ability to make informed decisions" and participate in the IEP process). IEPs must include a statement indicating how the student's progress toward the annual goals will be measured and when the district will provide periodic reports to the parents on the student's progress toward meeting those annual goals, such as through the use of quarterly or other periodic reports concurrent with the issuance of report cards. 34 CFR §300.320(a)(3); WAC 392-172A-03090(1)(c).

Extended School Year Services: Extended school year (ESY) services means services meeting state standards provided to a student eligible for special education that are beyond the normal school year, in accordance with the student's IEP, and at no cost to the parents of the student. School districts must ensure that ESY services are available when necessary to provide a FAPE to a student eligible for special education services. ESY services must be provided only if the student's IEP team determines, based on the student's needs, that they are necessary in order for the student to receive a FAPE. The purpose of ESY services is the maintenance of the student's learning skills or behavior, not the teaching of new skills or behaviors. School districts must develop criteria for determining the need for ESY services that include regression and recoupment time based on documented evidence, or on the determinations of the IEP team, based on their professional judgment and considering the nature and severity of the student's disability, rate of progress, and emerging skills, among other things, with evidence to support the need. A student's IEP team must decide whether the student requires ESY services and the amount of those services. In most cases, a multi-factored determination would be appropriate, but for some children, it may be

appropriate to make the determination of whether the child is eligible for ESY services based only on one criterion or factor. *Letter to Given*, 39 IDELR 129 (OSEP 2003).

FINDINGS OF FACT

2019-2020 School Year

1. 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.
2. The District's 2019-2020 school year began on September 3, 2019.
3. The Student's October 11, 2019 individualized education program (IEP) was in effect prior to the COVID-19 school facility closures, and included annual goals in the areas of adaptive (daily living), behavior (social-behavioral), reading (independent reading and comprehension), communication (expressive and receptive language), math (two-digit addition), writing (independent writing), and fine motor (motor skills). Progress toward the annual goals was to be measured each trimester. The Student's IEP provided the Student with the following specially designed instruction in the *special education setting*:
 - Adaptive: 314 minutes per week (provided by a special education teacher);
 - Behavior: 315 minutes per week (provided by a special education teacher);
 - Cognitive: 869 minutes per week (provided by a special education teacher);
 - Communication: 40 minutes per week (provided by a speech language pathologist (SLP)); and,
 - Fine motor: 20 minutes per week (provided by an occupational therapist (OT)).

The Student also received 200 minutes per week of "specials" as a related service, to be provided by a specialist in the general education setting. The Student's IEP indicated the Student would be in a self-contained classroom and spend 0-39% of his time in the general education setting.

The Student's IEP included several accommodations. These included: shortened assignments; reading of class material orally; behavior plan; daily assignment list; visual schedule; noise cancelling headphones; pencil grips; breaks (during work, between tasks, during testing, etc.); speech-to-text; text-to-speech; dictation to a scribe; use of a calculator; use of digital recordings; permission to provide oral responses to assignments/assessments; spelling and grammar devices; hands-on assignments; and, voice-to-text for writing assignments.

The Student's IEP included an extended school year (ESY) addendum¹, which provided the Student specially designed instruction over the summer by a special education teacher in the areas of cognitive, behavior, and adaptive.² The addendum included one ESY goal in reading.³

4. The Student's IEP included a behavioral intervention plan (BIP), which addressed the following behaviors: crying, stating "I can't do it" when responding to requested tasks, "twitching/jerking," heavy breathing, eloping, "yelling/arguing" with adults, and refusing to complete adult requests. The BIP instructed adults to provide designated breaks during specials and choice times, give reminders to the Student of when stories are allowed or permitted, and to teach school and class expectations when the Student is calm. The BIP included a praise and reward system to reinforce desired behaviors, emphasized the importance of having an adult to "listen and engage during [Student's] designated time to tell stories," and relayed that "adults will give [Student] space and not pressure [Student] to work while he is appropriately utilizing break space."

The BIP included a safety plan that was to be implemented if the Student exhibited suicidal/self-harm comments, as well as when the Student exhibited "physical twitching or jerking."

5. On March 6, 2020, the District entered progress reporting on the Student's goals as follows:
 - **Fine Motor (motor skills):** "Not Mastered. [Student] has a 4/6 skills on the [District] motor checklist. When motivated by a task he will write one simple sentence legibly, however needs reminders to follow the rules of writing. He still varies in his level of engagement, and lately has had a hard time participating in therapy so we have worked on more regulation and attending to gross motor or simple fine motor tasks (coordination, strength, and endurance.)"
 - **Reading (Independent reading and comprehension)** "Not Mastered. [Student] is progressing well with reading. He has been decoding and identifying more advanced words. [Student] is answering comprehension questions about second grade level texts with 50% accuracy. The hardest questions for [Student] are mostly 'why' or 'how' questions where the answer is not directed (sic) stated in the text. I have noticed that with increased levels of text, [Student] focuses so much on word identification rather than the meaning of the text."
 - **Communication (receptive and expressive language):** "Not Mastered. Current score on the Elementary Functional Communication Skills Checklist is 54. [Student] is able to follow spatial directions with 80% accuracy or better. He asks questions to elicit information. He uses superlatives such as big, bigger, biggest to describe objects."
 - **Math (two-digit addition):** "Not Mastered. [Student] continues to struggle with the concepts of regrouping. He is still reliant on visual aids with complex addition. We have been working on math in the general education curriculum still, below grade level. He has an increased interest in math, but constant reteaching/reminding is required."

¹ Amended February 2, 2020.

² The addendum did not specify the initiation date or frequency of services.

³ ESY goal in reading stated: "Independently read selected reading passages and/or stories (verbally) at 2.0-2.9 grade level equivalent and answer comprehension questions. Answering comprehension questions going from 30% accuracy to 80% accuracy."

- **Adaptive (daily living):** "Not Mastered. [Student's] daily living skills score changes from day to day. Some days [Student] is very attentive and can easily follow directions, listen to instructions, and take care of his personal needs/hygiene. Other days, [Student] displays concentration issues and will zone out, making even one step directions hard for him to follow. [Student] will also have days where he is very energetic and/or defiant, struggling to follow steps. [Student's] current adaptive score is 2.96 (77/26), increase since this goal was made."
 - **Behavior (social-behavior skills):** "Not Mastered. [Student] currently has a 2.5 mean score on the social skills rating scale, an increase from when the goal was made. [Student's] social skills and behavior can change from day to day. Some days, he is an active listener and will display self-control, while other days he struggles to do those things. He has been having more two-way conversations and showing more interest in the other person's opinions and thoughts."
 - **Written expression (independent writing):** "Not Mastered. [Student] is showing more willingness to [accept] correction when writing words. He will use all capitalization unless told otherwise by an adult, even with a model."
6. On March 12, 2020, the OT had a conference with the Parent and documented it on the Student's occupational therapy contact sheet. Prior to March 12, 2020, the OT maintained weekly notes on the occupational therapy contact sheet for the Student, describing the services provided to the Student and recording data on the Student's performance. The District did not include any occupational therapy contact sheet notes with its response dated after March 12, 2020, and the Parent reported in her complaint that the Student did not receive any occupational therapy services during the closure.
 7. 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.
 8. Also, on March 13, 2020, the District announced that schools would be closed starting March 17, 2020, and that no in-person services would be provided during this time.
 9. The Parent, in her complaint, stated the Student was not provided a free appropriate public education (FAPE) because distance learning, which was provided to all students, was not appropriate for the Student in light of the Student's "cognitive and behavior functions." The Parent wrote that the Student did not receive any of his specially designed instruction in his IEP, including "adaptive, behavior (social), fine motor, communication, reading, math, and written language," or any related therapies, including occupational therapy, physical therapy, and speech therapy. The Parent further alleged the Student was not provided services in his least restrictive environment because he was not provided access to the general education environment on Zoom, and that extended school year services (ESY) were not provided to the Student in-person as indicated.
 10. On March 16, 2020, the Student's special education teacher created a packet of activities to send home for the Student, designed to include 1.5 months of activities. In a statement provided by the special education teacher to the director of special services (director), the special education teacher stated she included at least 1.5 months of "worksheets, craft supplies, flashcards, school supplies, chalk and [her] personal classroom books based on

reading level and/or students' interests." When describing how she selected the activities included in the packets, she explained:

I had all of the students' names out in a line on the floor. I went through each worksheet and decided who it was appropriate for based on their level and goals. Worksheets included reading, writing, and math activities. Many worksheets also included critical thinking and daily living knowledge using pictures. Unfortunately, I could not tell exactly which activity what (sic) sent home since I was making packets to last over a month for 11 totally different leveled-students over the span of 1 day. I did go through each student and think to myself "is this appropriate for them? Would this help their goal growth? Is this something they are interested in? Is this something they can do without help? Is this something they can do with help?"

She further noted that in math:

[Student] fell about 2 grade level behind. He was working on mid-end of year first grade level at the time of the closure. For a few students, including [Student], I sent home worksheets from the general education math curriculum, Origo Step It Up, accessed by requesting copies from a first [grade] general education teacher. Other worksheets related to math included functional math skills such as identifying clocks, addition, subtraction and more.

Regarding writing, the special education teacher explained:

Many of the worksheets included simple writing practice, such as CVC words or copying down words. I also included functional writing words practice. Writing is an area that [Student] struggles in because of the frustration that comes with using his fine motor skills. I included crafts supplies, scissors, chalk and stickers in hopes to make any fine motor time exciting.

For reading, the special education teacher stated: "The personal classroom books I sent home were primarily late first grade and second grade-level books, encouraging [Student] to continue working towards his reading goal. The worksheets also had activities to build his reading skill."

The special education teacher also added that she included another copy of the "[District] Social Skills Checklist," so that parents were reminded of the daily living and social/behavioral skills their children were working on. The special education teacher also included online resources, including math games and learning math games.

11. 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.
12. On March 25 and 26, 2020, the District provided staff with guidance for "moving forward with services during the closure." This guidance included information about contacting families, identifying barriers, providing classroom materials, instruction, providing continuous learning opportunities, progress reporting, tracking services, and holding meetings, among other

topics.⁴ Staff were informed that continuous learning opportunities for students with disabilities may include recorded Zoom sessions posted by teachers online, learning activities emailed to parents as a portable document format (PDF) links to resources with recommendations of which activities a student should complete (“books to read, responses to questions, flashcards, etc.”), and discussion boards.

13. Also, on March 25, 2020, the Student’s special education teacher sent an email to parents, notifying them that she sent home resources, activities, and objectives prior to the school closures for students to work on. She also notified parents that they should join the school Facebook page and that she was available to answer questions.
14. On March 30, 2020, continuous learning began in the District. That same day, the special education teacher emailed the parents of students in her class a website containing each day’s assignment. The special education teacher explained in an email to the director that she chose this website because the reading options were to build reading skills, especially comprehension, and because the site had a “read-aloud” option, which the special education teacher felt was important for students who may not have parents present to read to them. The special education teacher also stated the site offered activities in all IEP goal subject areas, including daily living skills and fine motor (e.g., drawing).⁵ The activities could be accessed from any mobile device.⁶

⁴ In its guidance to staff, District administration asked staff to keep track of services and recommended an excel sheet that listed each student’s name, goals to track, services provided, and information regarding contact with the parent (including if a parent declined service). Staff were informed that this information would be necessary to determine when school reopened if students required additional services. Staff were also informed by the District that they should continue progress reporting “to the greatest extent possible,” and that if they were unable to report progress data on a particular goal “due to the school closure or unavailability of needed information,” to document this “as well as a plan to complete with updated information when school reopens.” Staff were instructed to email progress reports to parents in a PDF format or to mail to families once restrictions on staying home were lifted.

⁵ The District provided documentation that each week, the special education teacher created a schedule for the Student of activities included on the website provided to the Student. Activities fell under the following categories: watching a story; reading a book; completing a “word match” activating; answering a reading comprehension question (“fact or fiction?”), “which came first;” watching a video; and, drawing. While the activity changed each day, the categories under which the activities fell remained the same until the special education teacher changed to a new online platform on May 3, 2020. When the special education teacher began using a new online platform in May 3, 2020, she no longer created individual weekly schedules for the Student because the parents were able to select activities under subject headings that mirrored the goal subject areas on the students’ IEPs (e.g., “reading,” “writing,” “math”).

⁶ The Student was not provided access to any general education activities during the school closures.

15. Also, on March 30, 2020, the Parent informed the Student's special education teacher that their family was moving, but that she would be in touch when "life is less crazy."⁷
16. On March 31, 2020, the special education teacher messaged the Student to say hello.
17. On April 1, 2020, the special education teacher emailed the parents of students in her class a scavenger hunt activity.
18. On April 3, 2020, the special education teacher and Parent communicated about the family's move. The Parent responded that they had moved into their new house and were working on organizational skills. That same day, the Parent told the special education teacher they would be working on unpacking from the move and then doing the scavenger hunt activity previously sent to them. The special education teacher wrote that she did not know how much parents had been receiving from other teachers and specialists and had "been worried about sending too much out." The Parent replied that it had not been too much work for the Student, but also that the Student could not "really do much on the computer for another week."
19. On April 6, 2020, the Governor extended the March 13, 2020 school facility closure directive through the remainder of the 2019-2020 school year.
20. The District was on spring break from April 6 through April 10, 2020.
21. On April 13, 2020, the District issued a special services update, reminding its special education teams of its obligation to provide remote services to students who required them, and the need to provide "some one-on-one instruction for students with significant delays or who require specific types of therapy." Staff were also asked to begin considering what students may require ESY services.
22. Also, on April 13, 2020, the special education teacher sent the Student the week 2 reading assignment.
23. On April 20, 2020, the special education contacted the Parent and to set up an individual video chat. That same day, the special education teacher sent the Parent the week 3 reading assignment. The Parent responded that she had not heard anything about Chromebook. The special education teacher replied that she would ask during her meeting with the school that week.
24. On April 23, 2020, the special education teacher wrote the Parent to ask if she had heard anything about Chromebook. The Parent responded that she had not. The special education teacher wrote that she heard fifth and fourth graders would be getting theirs that week and that she was hoping the Student would be soon.

⁷ During the school closures, the Parent and special education teacher communicated and sent documents for the Student's remote learning via the "Remind App," on the Parent's mobile device.

25. On April 27, 2020, the special education teacher told the Parent that she had spoken with the vice principal and was informed that the Parent was not recorded as having requested a Chromebook. The special education teacher told the Parent she would be contacted by someone by the District regarding her request for a Chromebook.
26. Also, on April 27, 2020, the special education teacher sent the Student the week 4 reading assignment.
27. On April 28, 2020, the District issued a special services update with information on continuous learning plans (CLP). District staff were reminded that documentation was required for all attempts to contact parents and of services provided to students with disabilities during the school closures. The District requested IEP teams develop CLPs for those students for whom teachers had been in contact with parents during the closures, and for students who had accessed services, to document the services that had already been provided to the student. The District instructed its staff to use the date instruction during the school closures began as the date of the CLP, and encouraged staff to explain the CLP document to families who may not be actively engaging. In the April 28, 2020 update, the District noted that special education teachers were not required to submit weekly learning plans or post them online, as was required of general education teachers, due to the individualized nature of each students' needs. However, special education teachers were reminded that they should be sharing weekly individualized plans with their students' families.
28. On May 2, 2020, the Parent told the special education teacher she had heard from the District and would be receiving a Chromebook for the Student the following Monday.
29. On May 3, 2020, the special education teacher invited the Student to a Zoom meeting to "touch base and say hi." The Parent confirmed the Student would be there.
30. Also, on May 3, 2020, the special education teacher informed the parents of students in her class that starting the next day, the class would be moving over to "Wide Open Schools." The special education teacher told parents they were free to continue anything she had previously sent home with the students, including worksheets, file folders, flashcards, and crafts, "instead of or in addition to Wide Open School." The Parent was instructed that for each week's assignments, the Parent should click on the provided link, select "We are a family," click on the "daily schedule," and go to the "K-2" tab. From there, the Parent was instructed to "follow the daily schedule for morning, mid-day, afternoon, and evening activities."

When the special education teacher switched the online website to Wide Open Schools from the previous website, she stopped creating weekly schedules for her students. The District's response indicated she did this because Wide Open Schools created its own daily schedule that included a math, reading, and writing activity, as well as additional weekly alternating activities in math, reading, and writing. The special education teacher recalled that she "checked in" regularly with parents to update them and to see if students needed support, solicited feedback, and reviewed materials provided to her. She stated the Student's parent

communicated using an app, but that the Parent did not provide her with progress information or submit completed assignments for her to review.

31. On May 4, 2020, the Parent told the special education teacher via her phone communication app that she was confused "for grading purposes," and asked if the Student would be receiving services via Zoom like other students in the District with autism. The Parent wrote that she had heard other students were receiving Zoom services, but that the Student was not. The special education teacher wrote to the Parent that "Since special education is a bit different, you won't see anything in unified classroom from me. I can, however, email you the PDF weekly assignments for [Student] and he can work on them while he has time."
32. Also, on May 4, 2020, the special education teacher responded to the Parent that since the Student had a Chromebook, she wanted to try Zoom out. The special education teacher wrote that she was "advised against doing full classroom zoom meetings for privacy mostly, and since students are all at different academic places." She wrote that she wanted to meet individually with the Student and assured the Parent that the Student's grades would not be impacted, noting that assignments would only be to boost the Student's grades.
33. Also, on May 4, 2020, the District provided a question and answer document to remind staff that they should be creating a CLP for students who were accessing services. In the document, when responding to a question of how to document services provided on the CLP where services may have overlapped or it may not have been clear how many minutes of a particular service was provided because areas may have been fluid during instruction, the District noted that the services listed on the CLP "should be divided up similar to how they were on the IEP for students in self-contained classes."
34. On May 6, 2020, the Parent informed the special education teacher that the Student had not received anything therapy related. That same day, the special education teacher told the Parent she would look into it.
35. On May 7, 2020, the special education teacher told the Parent the District had just held a district-wide meeting regarding related therapies and decided they would be sending a flyer to the Parent each week with activities.
36. On May 11, 2020, the special education teacher sent the Parent a link from the OT with activities.⁸
37. On May 14, 2020, the special education teacher told the Parent the District was turning in ESY recommendations for the Student. She noted that the District had "[Student] down already"

⁸ On November 2, 2020, the District provided OSPI with copies of fliers, containing general occupational therapy activities the District asserted were emailed to parents on March 27, April 29, May 6, 8, 14, 23, 29, June 5, and 12, 2020. It is not clear if the Parent received these activities because the Student did not have access to a laptop prior to May 4, 2020, and the Parent did not appear to be receiving email communications prior to that date. The activities in the flyer emailed to the Parent on May 11, 2020 were not individualized for the student.

for ESY, but asked for family preference regarding whether the Parent would prefer in-person ESY only, distance learning ESY only, or whether the Parent was open to either option. The Parent reported that she was only open to in-person ESY.

38. On May 26, 2020, the special education teacher scheduled a Zoom meeting with the Parent and Student to check in and see how school was going. The special education teacher also sent a link to Wide Open Schools and later checked in with the Parent to see if the Student was able to find any games he liked on Wide Open Schools.
39. On May 27, 2020, the District issued a special education update as a reminder that prior to the last day of the school year, a CLP needed to be completed for each student whose parents had been in communication with their students' teacher during the closure and who also had accessed services during that time.
40. On May 28, 2020, the special education teacher met with the Student via Zoom for 30 minutes.
41. On June 3, 2020, the special education teacher informed the Parent that only online ESY would be offered by the District. The special education teacher asked the Parent if she wanted the Student to do assignments on Monday and Wednesday or Tuesday and Thursday. The special education teacher also told the Parent that she could take the Student "off the [ESY] list" if she did not want the Student to receive ESY services remotely.
42. On June 8, 2020, the Parent told the District that the Student "would not do distant ESY" services. That same day, the Parent expressed concern that the Student was regressing academically and socially due to not having full-time in-person services. The special education teacher responded that she agreed.
43. On June 12, 2020, the District entered progress reporting on the Student's goals. All of the Student's goals indicated either that "due to school closure from COVID-19, no progress has been recorded," or that "distance learning was provided from 3/30/2020-6/18/2020. During the school closure, no cumulative data [on goal] has been collected." The progress reporting noted that "progress monitoring will be based on the previous progress monitoring period," and "It will be collected again during the progress monitoring period after returning to school."
44. On June 18, 2020, the director of special services (director) developed a CLP for the Student, which documented the services the District stated it provided the Student during the school closure from March 30 to June 18, 2020. It stated that during distance learning, the Student's IEP needs were met "in the form of online resources and work tasks sent home prior to the school closure." According to the CLP developed for the Student, the District indicated it provided the Student the following special education services during the closure:
 - Cognitive: 250 minutes weekly (delivered remotely by responsible staff);
 - Behavior-social: 20 minutes weekly (delivered remotely by responsible staff);
 - Adaptive: 20 minutes weekly (delivered remotely by responsible staff);
 - Communication: 5 minutes weekly (delivered remotely by responsible staff); and,
 - Motor: 5 minutes weekly (delivered remotely by responsible staff).

45. Also, on June 18, 2020, the District provided the Parent a prior written notice (PWN) that it was "proposing to initiate a CLP." The reason stated on the PWN for the proposed action was, "Services outlined in the current IEP changed due to COVID-19 closures." The PWN documented the IEP team's development of CLP to "outline services provided for distance learning due to COVID-19 closures," and informed the Parent that the plan "outlines the special education services that [were] provided to your child." The PWN stated the action was initiated on March 30, 2020.
46. June 18, 2020 was the last day of the 2019-2020 school year for the District.

Summer 2020

47. In its response to this complaint, the District stated ESY services were provided via distance learning as the number of reported COVID-19 cases in the county continued to be high. The Parent declined the remote ESY services offered by the District.

2020-2021 School Year

48. September 1, 2020 was the first day of the 2020-2021 school year for the District.
49. On September 8, 2020, in-person services began in the District for students in self-contained programs. Face-to-face instruction has been provided one day a week for this student group.
50. On September 9, 2020, the District sent the Parent an invitation to attend a meeting to initiate a triennial reevaluation.
51. On September 10, 2020, the Parent filed this special education citizen complaint.
52. On September 14, 2020, District school facilities were closed to all in-person services due to hazardous air quality from wildfires. These facility closures were extended on the 15th through the week. During this time, services were offered via distance learning.
53. On September 15, 2020, the Student's multi-disciplinary team met to initiate a reevaluation for the Student. The team agreed to have a facilitated IEP meeting with Sound Options Group.
54. On September 15, 2020, the Student's IEP team met via Zoom to review the Student's eligibility, services, and placement. Meeting notes documented the team's agreement to complete standardized assessments in the area of cognitive, academic, communication, adaptive, social/behavior, and motor. The notes also documented that the Student was attending school in person one day per week, and that the team agreed not to conduct the agreed upon assessments during the Student's in-person instruction day. The team also adjusted the Student's therapy schedule so the Student would not miss in-person instruction to receive therapy. The notes mentioned the Parent's request for the Student to be tested in-person for occupational and speech therapy and not over Zoom. The meeting notes indicated the team agreed to this request. The Parent additionally requested speech and occupational therapy be provided to the Student in person, but was told therapies would be delivered via

Zoom. During the meeting, the Parent provided the team with additional information about the Student's medical needs, including recent mental health diagnoses, which she believed were negatively impacted by time spent online. There was no documentation of the team discussing the Student's need for recovery services.

55. On September 21, 2020, the Student's IEP team met to "work on [Student's] Safety Plan/Behavior Plan rough draft."
56. On October 8, 2020, the Student's evaluation team met via Zoom to review his reevaluation. The Parent, special education teacher, general education teacher, District representative, director, SLP, school psychologist, and OT attended. The reevaluation included assessment of the Student in the following areas: review of records (including input from Parents and teachers); medical, cognitive, academic (reading, writing, math); adaptive (self-help); behavior; communication; and, motor. The evaluation concluded the Student "has made progress, but continues to demonstrate a need for specially designed instruction" in reading, writing, math, communication, adaptive, behavior, and motor.
57. On October 13, 2020, the Student's IEP team met to discuss a consultation with the District's mental health specialist regarding community resources and a draft version of the Student's behavior plan and safety plan. The Parent, special education teacher, school psychologist, and mental health specialist attended.
58. On October 21, 2020, the Student's IEP team met for his annual review. The Parent, school psychologist, assistant principal, general education teacher, special education teacher, director, OT, and SLP attended. The team determined the Student continued to be eligible for special education services, updated the Student's present levels of performance based on the results of the Student's reevaluation, and either revised the Student's baseline and/or created new IEP goals for the Student. The team also developed an IEP for the Student, which provided the Student with the following specially designed instruction, to be provided in the *special education setting*:
- Reading, 325 minutes weekly, by a special education teacher;
 - Math, 325 minutes weekly, by a special education teacher;
 - Behavior, 310 minutes weekly by special education teacher;
 - Adaptive; 300 minutes weekly by a special education teacher;
 - Writing, 308 minutes weekly by a special education teacher;
 - Motor, 20 minutes weekly by either OT or PT staff; and,
 - Communication, 20 minutes weekly by an SLP.

The IEP team did not discuss whether the Student needed recovery services.

59. Also, on November 3, 2020, the director informed OSPI that she was personally meeting with the Parent to discuss concerns regarding recovery services.

CONCLUSIONS

Issue One: IEP Implementation – The Parent alleged the District failed to implement the Student's individualized education program (IEP) from March 13 through June 18, 2020, during

the school facility closures caused by the novel coronavirus (COVID-19). Specifically, the Parent alleged the Student did not receive his specially designed instruction in adaptive, behavior, cognitive, communication, and fine motor skills—all of which the Student's IEP indicated should be provided to the Student in the special education setting. The Student's IEP also indicated the Student would spend 200 minutes per week in the general education setting during "specials," which was included on the Student's IEP as a related service. The Student's IEP also included several accommodations, a behavioral intervention plan, and an addendum noting the Student qualified for extended year services (ESY).

Given the exceptional circumstances of the COVID-19 global pandemic, the federal Department of Education and OSPI recognized that IEPs may not always be implemented as written as school facilities shut down and districts transitioned to various distance learning formats. While there was not an expectation that districts implement a student's IEP as written during school facility closures caused by COVID-19 in spring 2020, districts had to have a plan for how students with disabilities were to receive a free appropriate public education (FAPE), including the provision of specially designed instruction and related services. Accordingly, all schools were required to have begun continuous learning for all students by or around March 30, 2020, which was to include a written plan for providing special education services, including specially designed instruction and related services to the greatest extent possible, to students during the school facility closures. In addition, districts were required to document in writing, the individualized special education services it was providing to each student with an IEP.

Following the school closures in March 2020 and upon the commencement of continuous learning in the District through May 3, 2020, the Student was provided weekly enrichment activities in the form of packets of activities the special education teacher developed for the Student prior to the school closure. When developing the packet of activities for the Student, the special education teacher considered the Student's goal areas and activities she felt the Student would enjoy and be able to access independently. From March 30 through May 3, 2020, the Parent was also provided access to an online platform, containing activities the Student could access, and a weekly schedule to help navigate the different activities provided, which the teacher selected due to alignment with the Student's goal areas. However, while documentation showed the Parent tried to help the Student access some of the activities during this time through an app on her phone, because the Student did not have a Chromebook until May 4, 2020, it is not clear how much online materials the Student was able to access prior to this time.

During this time, the Parent was not also contacted by the speech therapist or occupational therapist to inform her that the Student would not be receiving any specially designed instruction in the areas of fine motor or communication, or to notify the Parent that the Student's needs in these areas would be met a different way.

On May 11, 2020, the special education teacher provided the Parent with a flyer created by the occupational therapist with links to a list of activities the Parent could do with the Student. The flyer was provided to all students receiving therapies. The District provided OSPI with other similar fliers the District's occupational therapy and physical therapy staff sent to parents during the closure, but there was no documentation the Parent received these activities prior to that, likely

because she was not receiving email communications from the District, only texts and documents from the special education teacher through the cell phone app. Further, although the flyer contained activities the Parent could do with the Student at home, the Parent did not receive any communication, explaining the activities provided or how they met the Student's individual needs. The documentation also showed the Student was not provided access to any general education activities from March to June 2020, which was included on the Student's IEP as a related service.

The District included with its response a continuous learning plan (CLP) it developed for the Student on June 18, 2020, and asserted the CLP documented the amount of specially designed instruction and special education services the Student began receiving on March 30, 2020. While the Student began receiving activities related to his goal areas around March 30, 2020, and documentation shows the special education teacher individualized the activities provided for the Student, the internal guidance provided by the District instructed staff to base the number of minutes of specially designed instruction it listed on the CLP based on the minutes listed in the Student's IEP, and not on the instruction or services actually documented to have been delivered, even if the nature of the services delivered differed significantly from what was provided for in the Student's IEP. Accordingly, while the Student received services, OSPI is unable to determine from the documentation provided if the Student received the amount of specially designed instruction provided in the CLP.

Thus, while as previously stated, the District was not required to implement the Student's IEP as written during the school facility closures, it was required to have a plan for providing students with special education services, including specially designed instruction and related services, and to have written documentation of the individualized special education services it was providing the Student by or around March 30, 2020. The District was also not relieved of its obligation to provide a FAPE and accordingly was required to complete progress monitoring on the Student's IEP goals in order to help determine the Student's need for additional services to mitigate the impact of the school closures. Here, while the special education teacher provided the Parent a sample schedule and information on how to access activities she determined were appropriate for the Student based on his IEP goals, the Parent was not provided written communication, informing her how the activities provided met the Student's individual needs, until the District developed a CLP for the Student in June 2020. Development of a CLP after services have already been provided and back-dating it to March 30, 2020 does not comply with the requirement to provide written notice by or around March 30, 2020—which was when continuous learning was to begin. Further, creation of a CLP at the conclusion of the school year absent other contemporaneous documentation is not sufficient to conclude the Student was provided or received the amount of specially designed instruction written on the CLP. Although the Student's CLP stated he received weekly specially designed instruction in each IEP goal area via paper packets and access to online activities, the documentation provided by the District showed the Student was provided one packet of activities prior to the school closure, some reading assignments, and access to an online webpage with activities, which the Student may not have had access to until mid-May due to lack of access to a laptop. Accordingly, it was difficult to determine how the services the Student was provided aligned with what was documented on the Student's CLP. Further, because the District did not conduct progress monitoring, the District was

unable to determine if the Student was making progress on his IEP goals with the activities provided, despite the IEP not being implemented as written. Accordingly, OSPI finds the District to be in violation.

OSPI notes the District has already conducted a reevaluation of the Student, updated the Student's present levels of performance and developed new IEP goals. The special education director has also indicated she has plans to meet with the Parent to discuss concerns regarding recovery services. Accordingly, the Student's IEP team will be required to meet to review the information it has available, including that from the recent reevaluation and to follow up on the conversation the Parent had with the director, to determine if the Student requires recovery services, as this has not yet been addressed. The District is reminded that the IEP developed for the Student must be appropriately ambitious and the goals designed to meet challenging objectives in light of the Student's circumstances.

OSPI additionally recognizes the violations identified in this complaint regarding the staff and providers' lack of progress monitoring on the Student's IEP goals indicates a need for the District to provide its staff with training on how to measure progress during non-traditional instruction. OSPI recently ordered the District to develop a training on this topic for its staff as part of the corrective actions to special education citizen complaint (SECC) 20-100, issued by OSPI on October 27, 2020. OSPI finds the training ordered in SECC 20-100 to also be a sufficient remedy to address the violations in this complaint, and as such, no additional training will be ordered for the District at this time.

Issue Two: The Parent alleged that the District failed to provide the Student special education services during extended school year (ESY).

Given the exceptional circumstances of the COVID-19 global pandemic, OSPI recognized that IEPs could not be implemented as written during ESY given the ongoing public health situation. OSPI expected districts to provide ESY services to eligible services; however, these services could have been provided in-person or using distance technology, depending on the specific health restrictions in the District community. Here, the Student's October 2019 IEP included an ESY addendum, which stated the Student would access ESY services during the 2020 summer. The District stated it offered ESY services and initially planned to provide ESY in-person. The District stated, however, that the "county continued to have high numbers of COVID cases. Based upon recommendations from the local health department all summer school including ESY were offered via distance learning." On June 3, 2020, the special education teacher informed the Parent that the District would not be providing in-person services for ESY and asked if the Parent did not want ESY if services were unable to be provided in-person, and if the District could "take [Student's] name off the [ESY] list." On June 8, 2020, the special education teacher, after not receiving a response from the Parent, emailed the Parent and asked if the Parent wanted her to take the Student off the list of students receiving ESY services. The Parent responded that she would like the Student removed from the list of students receiving ESY services, adding that "[Student] won't do out of person ESY."

Here, given the local health restrictions, the District's decision to provide ESY using distance technology was reasonable. In retrospect, the Student's IEP team could have explored other options for ESY at the time or additional support to make distance ESY work for the Student, and may want to consider whether the Student continues to require ESY services next summer due to his inability to access ESY services last summer. OSPI finds no violation as the District offered ESY and the Parent declined to have the Student participate.

CORRECTIVE ACTIONS

By or before **December 11, 2020**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

IEP Meeting

By **December 11, 2020**, the Student's IEP team will meet to discuss the Student's reevaluation and updated progress reporting, as well as any other relevant information provided by the Parent or other IEP team member regarding the Student's progress during the school facility closures and current special education needs. During the meeting, the team will determine what special education services the Student requires to:

- Mitigate the impact of the District not providing the Student individualized specially designed instruction during the school facility closures from March 25 through June 18, 2020 in the following areas: adaptive, behavior, cognitive, communication, and fine motor skills.
- Mitigate the impact of the District not offering the Student access to general education time during "specials" from March 25 through June 18, 2020.
- Any additional special education services the IEP team thinks the Student may require due to the general impact of the school facility closures on the Student's ability to make meaningful progress in light of his current circumstances on his current IEP goals, including from the Student not receiving extended school year (ESY) services.⁹

By **December 11, 2020**, the District will provide OSPI with the following documentation from the IEP meeting:

- 1) Invitation or scheduling documentation;
- 2) Agenda or meeting notes;
- 3) A copy of any documents used to determine what services the Student required.
- 4) An explanation of how the IEP team determined what services were appropriate, including what Student-specific and (if any) mitigating factors were taken into consideration;
- 5) IEP or amended IEP, if applicable;
- 6) Plan for additional special education services, which should include how many hours of services the Student will receive, the nature of the services, qualifications for the provider of the services, and dates by which District intends to complete delivery of services;
- 7) Prior written notice; and,

⁹ OSPI reminds the District that ESY services are not required to be provided only over the summer and may be provided over other breaks, such as winter break.

8) Any other relevant documentation.

Once OSPI has received the above documentation, it will review the proposal by the IEP team, and either approve or modify it, and determine if additional deadlines are required to ensure the Student has received any compensatory services the IEP team has determined the Student requires.

DISTRICT SPECIFIC:

Training

Although training needs were identified in this complaint, OSPI has ordered the District to complete training that is the same as what would be ordered here as part of the corrective actions ordered in Special Education Citizen Complaint (SECC) 20-100, issued on October 27, 2020. Accordingly, no further training is ordered.

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

Dated this ___ day of November, 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.)