

## **SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-148**

### **PROCEDURAL HISTORY**

On December 15, 2020, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from an attorney (Complainant) representing the parent (Parent) of a student (Student) attending the Seattle School District (District). The Complainant 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 December 16, 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 December 29, 2020, OSPI received the Complainant's responses to a questionnaire sent by the OSPI investigator in order to gather information relevant to this complaint investigation. OSPI forwarded the additional information to the District on December 30, 2020.

On January 6, 2021, OSPI received the District's response to the complaint and forwarded it to the Complainant on January 11, 2021. OSPI invited the Complainant to reply.

On January 21, 2021 OSPI received the Complainant's reply. OSPI forwarded that reply to the District on January 22, 2021.

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

### **ISSUES**

1. Did the District provide the Student with a free appropriate public education (FAPE) from April 2020 to the end of the 2019-2020 school year, including considering the Student's need for in-person services?
2. Did the District provide the Student with FAPE during the 2020-2021 school year by providing services in conformity with the Student's individualized education program (IEP), including considering the need for in-person services?

### **LEGAL STANDARDS**

IEP Implementation: At the beginning of each school year, each district must have in effect an individualized education program (IEP) for every student within its jurisdiction who is eligible to receive special education services. 34 CFR § 300.323(a); WAC 392-172A-03105(1). A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. 34 CFR §§300.320 through 300.328; WAC 392-172A-03090 through 392-172A-03115. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any

other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105.

“When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP.” *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

IEP Implementation Spring 2020: 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).

Compensatory Education: A state educational agency is authorized to order compensatory education through the special education citizen complaint process. *Letter to Riffel* 34 IDELR 292 (OSEP 2000). 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). 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). The award of compensatory education is a form of equitable relief and the IDEA does not require services to be awarded directly to the student. *Park ex rel. Park v. Anaheim Union School District*, 464 F.3d 1025, 46 IDELR 151 (9<sup>th</sup> Cir. 2006).

### **FINDINGS OF FACT**

1. During the 2019-2020 school year, the Student attended a District high school, was in the 11th grade, and was eligible for special education services under the category intellectual disability.
2. The District's 2019-2020 school year began on September 4, 2019.
3. The District closed school facilities on March 12, 2020, in response to the COVID-19 pandemic and the Governor's Proclamation 20-8, closing all school facilities in the county where the District is located.
4. On March 13, 2020, the Washington Governor issued a proclamation, announcing the closures of all public and private K-12 school facilities in the state through April 24, 2020, due to the COVID-19 pandemic and resulting public health crisis.
5. The Student's April 24, 2019 individualized education program (IEP) was in effect prior to the COVID-19 school facility closures. The Student's 2019 IEP included seven goals in the areas of adaptive/life skills, functional reading, functional math, and functional written language. The Student's IEP provided the Student with the following specially designed instruction and related services:
  - Speech language pathology: 90 minutes monthly to be provided by a speech language pathologist in a special education setting.
  - Adaptive/life skills: 110 minutes, 5 times weekly to be provided by an instructional assistant (IA) in a special education setting.
  - Functional math: 55 minutes, 5 times weekly to be provided by an IA in a special education setting.
  - Functional reading: 55 minutes, 5 times weekly to be provided by an IA in a special education setting.
  - Functional written language: 55 minutes, 5 times weekly to be provided by an instructional assistant in a special education setting.

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

- Access to sensory objects and activities;
- Clear and visual expectations;
- Give extra time to process information;
- Frequent redirect during class time;
- Speech generating device;
- Breaks available when frustration level escalates;
- Use of positives to encourage behavior and performance;
- Provide setting free from distractions and reinforcers;
- Shared classroom IA support not to exceed 7:1:2 ratio;
- Student requires the use of a dedicated speech generating device;
- Special transportation – Student is nonverbal; and,
- Special transportation – must be received "hand-to-hand" by caretaker/staff.

The Student's IEP indicated the Student would spend 23.42% of his time in the general education setting.

6. The Complainant, in the complaint, stated the Student was not provided any of the services as outlined in the Student's 2019 IEP during the spring 2020 school facility closures.
7. 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.
8. On March 30, 2020, continuous learning began in the District for all students.
9. On April 6, 2020, the Governor extended the March 13, 2020 school facility closure directive through the remainder of the 2019-2020 school year.
10. Also, on April 6, 2020, OSPI issued guidance on "Continuous Learning 2020", which included recommended guidelines for maximum student commitment each day, as follows for high school students: Grades 9-12: 30 minutes per class (3 hours maximum).
11. The District was on spring break from April 13 to 17, 2020.
12. The Student's file contained a "Meeting Notice," convening an IEP team meeting on April 23, 2020, at 12:00 am (sic). Most of the form is blank, including the information regarding who the notice was directed to, the date of the notice, contact information for the case manager, and the reason for the meeting.
13. Also, on April 23, 2020, the District issued a prior written notice, proposing to change the IEP review date and postpone the meeting until a date within 30 days after school resumed based on the Parent's request to wait until school resumed so assessments could be conducted to get accurate baseline data. The Complainant acknowledged that the Parent "did not want to

convene the IEP team remotely and conduct the annual review because she did not want to move forward without accurate assessments and baseline data.” The Parent wished to wait until in-person services resumed.

14. Based on the documentation provided in the investigation, the Parent and District knew that remote learning was not a successful method of instruction for the Student. The documentation indicates the Parent did not specifically request in-person services in the spring, as she believed that the District would resume normal operations in the fall of 2020.
15. On April 24, 2020, the District provided the Parent with the Student’s Schoology<sup>1</sup> login information for remote learning opportunities.
16. The District developed the Student’s continuous learning plan without a meeting. The continuous learning plan included the following information:
  - The plan stated that the following IEP team members participated in the development of the continuous learning plan:
    - Special education teacher;
    - IAs; and
    - Speech language pathologist
  - The following services were included on the Student’s continuous learning plan commencing May 1, 2020:
    - Twice weekly group meeting via teams
    - Once weekly 1:1 meeting with Special Education teacher
    - Reading, writing, math assignments posted via Schoology
    - Voice over reading assignments posted to Youtube linked in Schoology
    - Student operates at an awareness level and requires experience learning opportunities.
  - The continuous learning plan noted that the Student needed access to stronger internet connection to support video conferencing and access to touch screen devices.

17. The District’s response to the complaint described the District’s attempts to provide services to the Student:

Here, consistent with OSPI guidance, the District developed a continuous learning plan (“**CLP**”) for Student. The CLP included group meetings through video conference twice a week and 1:1 meetings over video conference with [teacher] once a week. [Teacher] also posted online reading, writing, and math assignments to Schoology, as well as links to voice-over reading assignments. The CLP also provided that the Speech Language Pathologist would be in contact with the family. From April to June 2020, Parent did not access the posted assignments or most of the video conference meetings. During the weeks of May 11-15 and 18-22, Student was away at camp and, therefore, did not access any of the offered group or 1:1 video conference meetings. Student was also at camp during several weeks in June, so did not access the offered services during that time period either.

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<sup>1</sup> Schoology is a learning management system and platform used by the District that can be used to create content, design lessons, and assess student understanding. See, <https://www.schoology.com/k-12>.

18. The District provided the Parent with the Student's third quarter progress report on May 14, 2020. The progress reported indicated "N/A" on each goal, documenting that no services were provided after March 12, 2020.

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

### **Summer 2020**

20. The Parent emailed the District on August 24, 2020, explaining that the Student required in-person, small group instruction, and noted that distance learning was a challenge for the Student and the Parent. The Parent further requested that the District fund a community care program provided to the Student in the community where he attends a day program while the Parent works. The Parent explained that the providers at the community program could help facilitate online learning.

21. On August 28, 2020, a program specialist at the District acknowledged the Parent's email and indicated that the District would be contacting her soon to make a plan for the Student.

### **2020-2021 School Year**

22. The District's 2020-2021 school year began on September 4, 2020.

23. The Student's April 2019 IEP remained in place as the annual IEP meeting, originally scheduled in April 2020, had been postponed.

24. On September 10, 2020, the assistant principal and the Student's case manager emailed District administrators, requesting that the District prioritize the community program or other daytime supports for the Student, stating that he "needs consistent and constant in person supports to make progress on his IEP goals and help him with daily living routines and tasks." The assistant principal further requested that the support be provided as quickly as possible, so that the Student "can have the supports he needs to access his [free appropriate public education] FAPE."

25. On September 11, 2020, a special education supervisor responded and expressed concern that, "This is going to be a request for all kids in that class."

26. On September 14, 2020, the Parent emailed the District and expressed frustration that she has not heard from the District regarding special education services for the Student. Also, on this date, a program specialist responded that she was not part of the team working with the Student's school. The email was forwarded to the Student's new team.

27. On September 15, 2020, the Parent emailed the District, requesting contact information for the new team and expressing frustration because she was unable to go to work with the Student at home. On the same date, a special education supervisor replied that an IEP team meeting was being scheduled, but that it was a large undertaking due to the involvement of multiple departments in order to address the health and safety concerns.

28. On September 17, 2020, the Parent, responded expressing concern about the delay in convening the IEP team.
29. On September 19, 2020, in advance of the upcoming IEP meeting, the Parent emailed the team to offer a potential solution to meet the Student's needs for all day in-person instruction. She suggested as a compromise that the District fund the Student's participation in a community program, whose providers could then assist the Student to access a computer and provide support for remote learning. She also requested make-up services for each day of school missed this school year.
30. An invitation to review the IEP, included in the District's response, provided notice of a meeting scheduled for September 23, 2020, to discuss the Student's annual goal progress, review the IEP, and review instructional needs.
31. On September 23, 2020, the Student's IEP team met. The resulting IEP drafted at the September 23, 2020 meeting documented that the IEP start date was September 30, 2020. The Student's September 2020 IEP included seven goals in the areas of adaptive/life skills, functional reading, functional math, and functional written language. The IEP provided the Student with the following specially designed instruction and related services:
  - Speech language pathology: 90 minutes monthly to be provided by a speech language pathologist in a special education setting.
  - Adaptive/life skills: 110 minutes, 5 times weekly to be provided by an IA in a special education setting.
  - Functional math: 55 minutes, 5 times weekly to be provided by an IA in a special education setting.
  - Functional reading: 55 minutes, 5 times weekly to be provided by an IA in a special education setting.
  - Functional written language: 55 minutes, 5 times weekly to be provided by an IA in a special education setting.

The Student's 2020 IEP additionally provided the Student with the following accommodations and modifications:

- Access to follow up practice time, frequent review of skills learned;
- Access to visual daily schedule;
- Frequent positive reinforcement of appropriate behavior;
- Give short, one-step directions;
- Informs Student prior to transitions and/or change in routine;
- Quiet area for sensory breaks; and,
- Student selected break available.

The Student's IEP indicated the Student would spend 23.42% of his time in the general education setting.

32. After the IEP team meeting on September 23, 2020, the District issued a prior written notice, proposing to initiate the September 2020 IEP for the Student. The prior written notice contained the following relevant information, summarized:

- The team considered in-person services and determined those services were needed and appropriate. A plan to provide those services was being worked out in collaboration with the District, the District's Health and Safety team, and the IEP team.
  - The District declined to contract with the community organization to provide adult supervision for the Student while he accesses online learning opportunities.
  - The District offered in-person services for an hour a day, a few days a week, per state health and safety best practice. The District was prepared to discuss specific details regarding days and times of service. The Parent informed the District that she needed a full day of in-person instruction. She left the meeting.
  - The District determined that as many as two hours per day could be offered.
33. On October 20, 2020, in response to an email from the Parent requesting updated information, the District indicated that the target date for starting services was the end of October or early November. Further, the special education teacher indicated that the plan for in-person services was four days per week, three hours per day.
34. On October 27, 2020, the Parent emailed the District, requesting an update on services. The District responded on October 29, 2020, stating that new regulations required that staff providing in-person learning opportunities had to have training on personal protective equipment protocols. The email closed with "More to follow..."
35. On November 3, 2020, the Parent emailed the District, requesting specific information on start dates for services.
36. On December 15, 2020, OSPI received the Parent's complaint and opened this investigation. As of the date the complaint was filed, there was no documentation that the Student was receiving in-person instruction.
37. The District's response to the complaint stated, in part, that the Student's IEP team will consider recovery services as soon as the Student is able to receive in-person safely.
38. On January 20, 2021, the District informed OSPI that the Student would begin to receive in-person services on January 22, 2021.

## **CONCLUSIONS**

**Issue One: IEP implementation during the 2019-2020 school year** – The Complainant and Parent alleged the District failed to provide the Student with a free appropriate public education (FAPE) from April 2020 to the end of the 2019-2020 school year. Specifically, the Complainant and Parent alleged the lack of in-person services denied the Student FAPE, due to the Student's inability to benefit from virtual instruction.

Given the exceptional circumstances of the COVID-19 global pandemic, the federal Department of Education and OSPI recognized that individualized educational programs (IEPs) may not be implemented as written as school facilities shut down and districts transitioned to various distance learning formats in spring 2020. 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 FAPE, including the provision of specially designed instruction and related services.

After the District closed school facilities on March 13, 2020, the Student's IEP was not implemented as written, which during this time alone does not represent a violation of the IDEA. However, that does not end the analysis as the District still had an obligation to offer students with IEPs special education services during the school facility closures. On March 23, 2020, OSPI communicated the expectation that districts would begin providing educational services to all students by March 30, 2020 (continuous learning); and, as instruction was being provided to all students, districts must have a plan for how students eligible for special education services would receive a FAPE, which consists generally of specially designed instruction and related services. OSPI described the nature of instruction that students were to receive during the COVID-19 closure as follows: "[School districts] should avoid assuming that continuity of education outside of a typical school building can only occur through online means. Districts will provide instruction using printed online learning materials, phone contact, email, technology-based virtual instruction, or a combination to meet student needs."

During spring 2020, all students in the District were offered remote instruction and/or learning activities; and, for health and safety reasons, no in-person instruction was provided to any student in the District. Here, the documentation indicates that while no written plan for special education services was developed for the Student until May 1, 2020 (continuous learning plan (CLP)), there is documentation that services were offered beginning in April 2020. In April 2020, the District provided academic assignments, including voice-over reading assignments, video conferencing with staff, individual meetings with the Student's teacher, and contact with the speech/language pathologist. According to the District, the Parent did not access the assignments or video conferencing. In addition, the Student attended camp for four weeks during May and June 2020, during which the Student did not access District services.

The documentation does indicate that the District and Parent knew the Student would not benefit from remote instruction and needed in-person instruction. Despite knowing this, the Student's May 1, 2020 CLP only included remote services, partially due to current safety requirements. This likely was also in part due to the fact that the Parent declined to attend any planning meetings and stated she preferred to wait until in-person instruction was provided before updating the Student's services and reestablishing the Student's baseline. Although dilatory in developing the student's CLP, the District offered continuous learning opportunities consistent with OSPI guidance. Because the District offered services, but the Parent indicated she wanted to wait until in-person services resumed, OSPI finds no violation related to spring 2020.

Although no violation is found for spring 2020, the District is still required to individually determine whether recovery services are necessary to make up for any lack of progress of the Student. While the District is not at fault given the circumstances of the pandemic, the reality is that the Student did not access educational services in spring 2020. Because the District was not able to provide services to the Student, no progress monitoring was conducted to determine what skills, if any, the Student might have lost. Prior to the District consideration of recovery services,

OSPI recommends the District reevaluate the Student to determine new present levels as a basis for any recovery services.

**Issue Two: IEP implementation during the 2020-2021 school year** – The Complainant and Parent alleged the District failed to provide the Student with a FAPE during the 2020-2021 school year. Specifically, the Complainant and Parent alleged the lack of in-person services denied the Student FAPE due to the Student's inability to benefit from virtual instruction.

The District is required to provide FAPE based on the Student's educational needs and in light of his unique circumstances. Although COVID-19 health and safety requirements have created additional challenges, the District was aware that this Student needed in-person instruction in order to benefit from the services in his IEP.

The District proposed implementing an IEP drafted on September 23, 2020, with a September 30, 2020 start date that provided for 275 minutes of specially designed instruction per day (1,375 minutes per week) in a special education setting, and an additional 90 minutes per month of speech services in a special education setting. The corresponding prior written notice documents the IEP team's agreement regarding the Student's need for in-person instruction in order for the Student to receive FAPE. The assistant principal and case manager communicated with a special education supervisor and other District administrators that the Student needed in-person learning opportunities in order to receive FAPE based on the nature and severity of his disability. The Parent requested that services be delivered consistent with the September 2020 IEP. At the September 23, 2020 IEP meeting, the District offered in-person services for an hour per day. The Parent rejected this amount. The team then determined that two hours per day of in-person learning opportunities could be offered. An October 20, 2020 email indicated that three hours per day, four days per week in-person services could be offered. Although, this amount of service was never formally offered in the form of a prior written notice. The District described barriers to commencing in-person services, including training for staff on the appropriate use of personal protective equipment. However, the reasons for these delays were never formally documented, and the IEP start date remained September 30, 2020. There is no documentation that indicates the Student began receiving services in person during the period under investigation in this complaint, and due to his disability, could not receive or benefit from remote instruction.

The District failed to provide any special education services consistent with the Student's IEP during the time period relevant to this investigation. The Student was provided with no special education or related services in the 2020-2021 school year prior to the complaint being filed, despite the District's documentation that the Student needed in-person services in order to receive FAPE. The District violated its duty to provide FAPE in conformity with the Student's IEP. A deprivation of this magnitude warrants compensatory education.

The Student's IEP provided for 275 minutes of specially designed instruction per day (1,375 minutes per week) in a special education setting, and an additional 90 minutes per month of speech services in a special education setting. From September 30 to December 15, 2020, the date the Complainant filed the complaint, the Student missed approximately 230 hours of instruction and approximately 2.5 hours of speech services. As the Student will be receiving compensatory

services in a 1:1 setting (allowing for more intensive instruction) when school is not in session (i.e., before school, after school, or during school breaks), the compensatory services have been decreased. The District will provide the Student with 2.5 hours of compensatory speech services and 92 hours of instruction, related to the IEP services and goals in the IEP that were not provided this fall. The District and Parent will develop, with OSPI approval, a compensatory services plan. The plan must include a schedule of when the compensatory services will be provided. If the Parent and District disagree over any part of the plan, OSPI will consider all the information provided by the Parent and District and make the final decision.

### **CORRECTIVE ACTIONS**

By or before **March 5, 2021**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

By **February 26, 2021**, the District and the Parent will develop a compensatory services plan for the Student. The plan must include the compensatory services, including frequency and amount of services, a schedule of the services, and a form to document the implementation of services and by whom, and periodic updates to OSPI. All compensatory services must be provided no later than **January 7, 2022**.

By **March 5, 2021**, the District will provide OSPI with the proposed compensatory services plan, along with a detailed explanation of what options were considered and why, if any, were rejected by either the District or the Parent.

By March 12, 2021, OSPI will either approve the plan or provide feedback to amend the plan.

#### **DISTRICT SPECIFIC:**

None.

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

Dated this \_\_\_\_ day of February, 2021

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

**THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT**

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