



Solutions for Schools
& Families

May 25, 2021

Via First Class Mail and Email

Dr. Kent Kultgen
Superintendent
Snohomish School District
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Snohomish, WA 98290
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Office of the Superintendent of Public Instruction
Office of Legal Services
Old Capitol Building
PO Box 47200
Olympia, WA 98504-7200
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RE: *Due Process Hearing Request* – [REDACTED]

Dear Superintendent Kultgen,

Our firm represents [REDACTED] (Parents) on behalf of their daughter, [REDACTED]. We are filing this due process hearing asserting a denial of a free and appropriate public education (FAPE) under the Individuals with Disabilities Education Improvement Act, as amended (IDEA) to [REDACTED] by the Snohomish School District (District).

A. Identifying Information/Introduction

[REDACTED] resides with her family within the boundaries of the District at [REDACTED], [REDACTED] is currently eight years old and is just finishing the second grade. [REDACTED] attends Riverview Elementary School (Riverview), which is located at 7322 64th Street SE Snohomish, WA 98290.

Riverview is [REDACTED] neighborhood school and is the elementary school that she would attend if she were not a student with a disability. Riverview is, by definition, [REDACTED] Least Restrictive Educational (LRE) environment. As you can see below, [REDACTED] has identified that she loves Riverview because she is able to attend school with her friends:



B. Description of the Problem

■ is a student who has ■. She is eligible for special education under the qualifying disability category of Other Health Impairment. According to a draft IEP discussed on Tuesday, May 18, 2021, ■ general education teacher reports the following about her:

- ■ can follow directions and routines, she enjoys sharing ideas with the class, listens to peers, and can regulate her emotions.
- ■ has shown progress in generating ideas and listening during turn and talks during literacy instruction. In writing she also generates clear ideas and was able to complete a fictional story.
- ■ during whole group read aloud can typically stay engaged by following along in the book and turning to her partner during turn and talks with extra prompting provided from [a paraeducator]. She will occasionally become tired and lay her head on her desk instead of sitting up in her chair. During writing once she has generated her idea with [a paraeducator], she is able to sustain the writing period. During math she is also able to sustain working independently on her number formation and counting.

- During independent work time, [a paraeducator] has been an accommodation that [REDACTED] relies on. [A paraeducator] is able to provide extra prompting and time for [REDACTED] to complete assigned tasks. Having predictable routines and picture cues for directions have also help [REDACTED] gain independence.

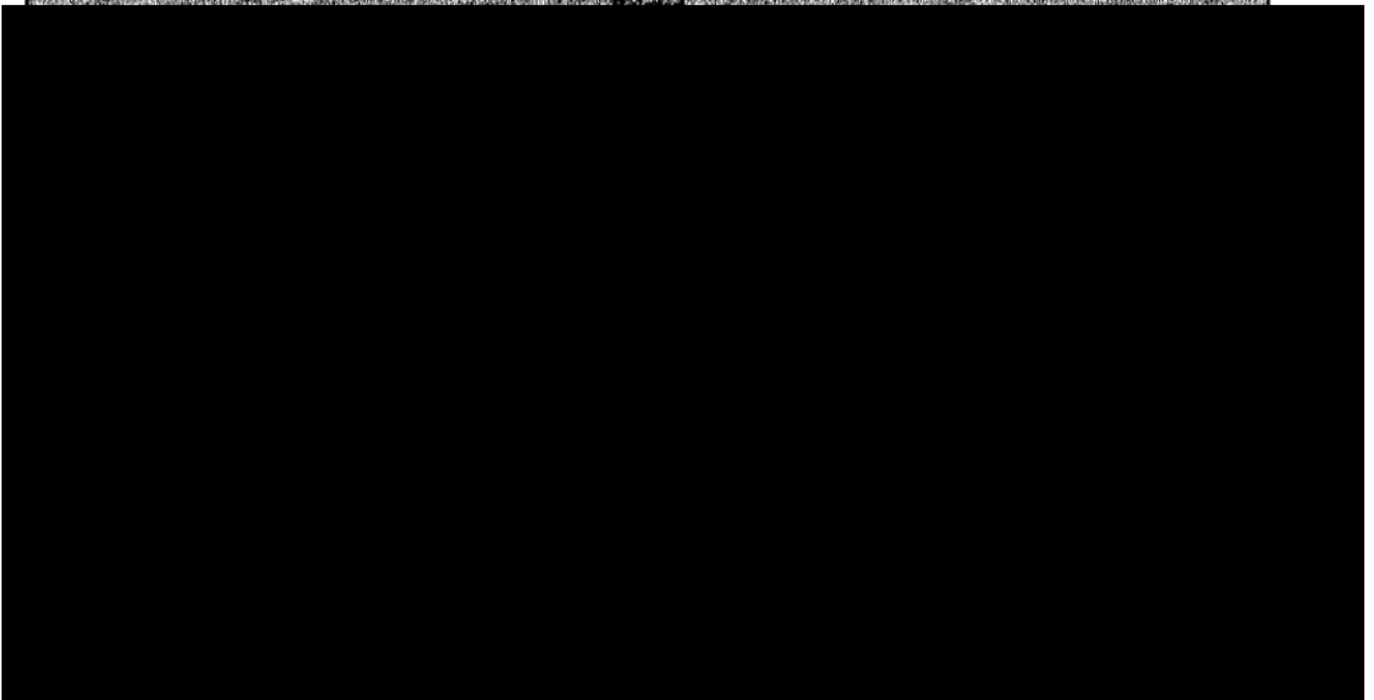
According to that same draft IEP, [REDACTED] social emotional skills have been rated as being within the average range for students her age by District staff, with them identifying that [REDACTED]

- shows kindness to others and shows them concern, she is able to engage with peers and adults, she pays attention to instructions, follows directions and is typically well behaved when unsupervised.
- tries to forgive and comfort others when needed.
- responds well when others start a conversation or activity.
- often say's (sic) "please" and "thank you"

[REDACTED] has had a very inclusive educational placement since she transitioned to Riverview three academic years ago, in which she receives all services in general education except for an hour and a half per week of cognitive instruction, forty minutes of communication instruction, and forty minutes of Occupational Therapy. Her most recent IEP calls for the following:

Services 05/22/2020 - 05/21/2021

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
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An inclusive educational placement is not only [REDACTED] LRE, but also it is widely identified as the scientifically sound and best-practice way of providing instruction to children with Down syndrome. A SUMMARY OF THE EVIDENCE ON INCLUSIVE EDUCATION (available at <https://eric.ed.gov/?id=ED596134>).

On March 13, 2020, the District ceased to provide educational services in person to its students. This was despite the plain language of Governor Jay Inslee that school districts could “provid[e] instruction thorough online learning models ... [and to use] their facilities to provide ... Individual Education Program meetings, direct services to individual students, or other activities deemed appropriate by the district administration”.

As the District is aware, the existence of the COVID-19 pandemic does not change its obligation to provide [REDACTED] with FAPE. Obligations to comply with the IDEA cannot be waived—even in an emergency—absent an act of Congress, as those obligations are rooted in the text of the IDEA itself. 20 U.S.C. § 1412. Neither the District nor the Administrative Law Judge can take action that violates the IDEA because of COVID-19 absent an act of Congress. Although there was discussion of granting the Secretary of Education authority to issue waivers, no such authority was passed. *Secretary DeVos Reiterates Learning Must Continue for All Students, Declines to Seek Congressional Waivers to FAPE, LRE Requirements of IDEA, Press Release, April 27, 2020*. Specifically, it was identified that:

U.S. Secretary of Education Betsy DeVos today reaffirmed her long-held position that individualized education must take place for all students, including students with disabilities. As a result, the Secretary is not recommending Congress pass any additional waiver authority concerning the Free Appropriate Public Education (FAPE) and Least Restrictive Environment (LRE) requirements of the Individuals with Disabilities Education Act (IDEA), reiterating that learning must continue for all students during the COVID-19 national emergency.

On April 6, 2020, the Governor identified that traditional in-person school would not restart for the 2019-2020 school year. However, he clearly identified that schools must continue to serve students and special education students specifically:

FURTHERMORE, if a public school or private school determines that the provision of in-person educational services on the premises of a school facility is essential and necessary under state or federal law, nothing in this order precludes the school from providing the services on site. However, schools are prohibited from providing these essential and necessary services unless state Department of Health guidelines for social distancing and proper hygiene practices are followed at all times.

PROCLAMATION BY THE GOVERNOR EXTENDING PROCLAMATIONS 20-08 AND 20-09 20-09.1 (emphasis in original).

The Washington Office of Superintendent of Public Instruction (OSPI) also issued guidance stating:

There remains an expectation that individualized education program (IEP) services will be delivered to the maximum extent possible during the pandemic while adjusting delivery methods to comply with state and local health/safety restrictions.

OSPI, Questions and Answers: Provision of Services to Students with Disabilities During COVID-19 in the 2020-21 School Year (originally released 3/24/20, last updated 1/13/21), Question A-1. OSPI further recognized that there have been no changes made to the IDEA or its implementing regulations, thus, school districts are not relieved of their obligation to comply with those laws. *Id.*

On July 31, 2020, the OSPI made it clear that for the 2020-2021 school year, school districts were mandated to continue to make individual decisions for students with disabilities, while also maximize the provision of services consistent with pre-pandemic IEPs:

Individualized Education Program (IEP) Development

Upon return to in-person school settings in summer and/or fall 2020, districts are expected to prioritize re-implementing pre-closure IEPs and to adjust IEPs, as needed, to provide additional services, accommodations, and/or modifications. Districts should develop policies, procedures, and practices to support IEP team decisions about individual student needs, including which students require in-person services. The content areas that follow, including IEP development, provision of services, technology supports, and specific strategies for individualized student needs are intended to support districts and IEP teams to make individualized decisions regarding services, including in-person supports.

IEP Development

- Students should not have reductions in IEP services (e.g., specially designed instruction, related services, supplementary aids and services) on annual IEPs due to school reopening models or availability of funding or staffing following the school facility closures in spring 2020.
 - Annual IEPs should document the level of services needed by the student in order to receive FAPE, including the frequency, location, and duration of special education and related services the student requires in a traditional in-person school model (unless they are enrolled in an alternate model).

In the last year, due process hearing decisions specifically on failure to offer FAPE because of the COVID-19 pandemic have begun to be issued. In *Los Angeles Unified School District*, 77 IDELR 116 (SEA CA August 24, 2020), the hearing officer determined that federal and state guidance “regarding the provision of special education and related services during the COVID-19 pandemic expressly made no change to existing law regarding requirements and standards for providing students a FAPE”.

Here in Washington, Administrative Law Judges have also reached this same conclusion, including in OSPI CAUSE NOS. 2020-SE-0061 and 2020-SE-0090/OAH DOCKET NOS. 03-2020-OSPI-01041 and 06-2020-OSPI-01078, a case involving a student with Down syndrome who also received one to one assistance.

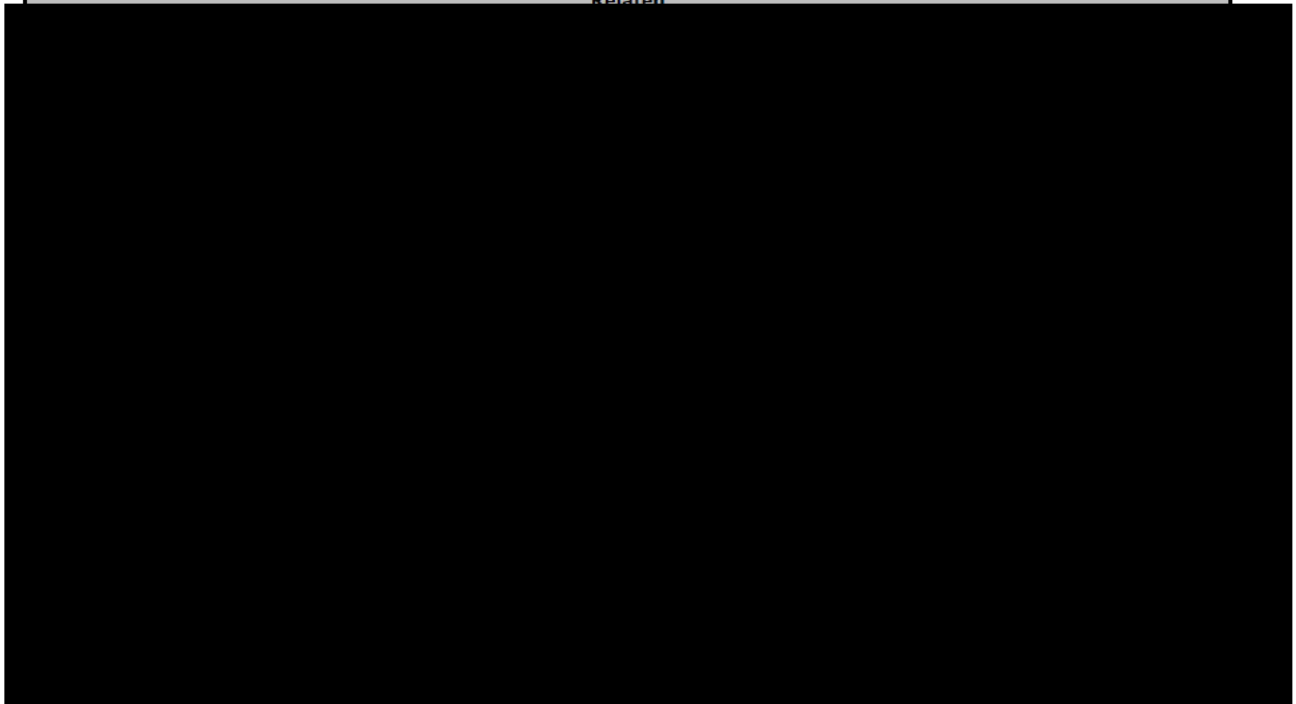
For [REDACTED], the District offered no services to her from March 13, 2020 until the end of the 2019-2020 school year that she could meaningfully access. She was not able to engage in remote learning, and the District failed to offer her the one-to-one assistance that was called for in her IEP to allow for her to access general education consistent with her IEP. [REDACTED] also lost the benefit of access to typical peers, which is a key element to her development of adaptive skills by way of having access to peer models.

The District in fact never engaged in individual decision making for [REDACTED] during the last year. It instead offered her in-person services based upon grouping her with other students with disabilities. This meant that [REDACTED] only started receiving in-person services on September 14, 2020. While her IEP calls for her to receive 1780 minutes per week of instruction, [REDACTED] was only offered 420 minutes of instruction per week until October 30, 2020. At that time, because of a staffing shortage, the District reduced its offering of instruction to [REDACTED] to just 240 minutes per week.

Separate from the dramatic decrease [REDACTED] receipt of services from 1780 minutes per week of instruction to 240 minutes per week, the District has also moved [REDACTED] to a highly segregated setting. Despite being in the inclusive setting as called for in her IEP, [REDACTED] received in-person services in a highly segregated setting where she was either with just a paraeducator or she was engaged in remote online learning zooming with a handful of other children.

Rather than acknowledge that [REDACTED] was not provided FAPE by the District from March 13, 2020 to present, the District has now proposed the [REDACTED] transition to an extremely segregated setting at an IEP team meeting that took place on May 18, 2021. The IEP the District shockingly proposed increased [REDACTED] time in segregated special education settings from 160 minutes per week to 1,100 minutes per week:

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Related							



The District members of the team stated things like that [REDACTED] needed to be with “like students” to prevent her from “falling behind” as justification for this proposal, without taking any ownership for the fact the District has simply not materially fulfilled [REDACTED] IEP since last March. One would not expect that a student who has been denied FAPE for over a year would in fact not be where one would expect her to be. Simply put, a Student whose IEP calls for 1780 minutes per week of instruction cannot make progress if she is only given 240 minutes per week of services. The District’s denial of FAPE for the last year and two months is not justification for moving [REDACTED] to a highly restrictive setting, particularly when no evaluation has been done to support this.

The District also eliminated the provision of paraeducator as a supplementary aid and service to allow for [REDACTED] to be in general education in its proposed IEP. District members of the IEP team stated that they were worried about [REDACTED] having developed a level of dependence on a paraeducator. If true, that would be an error of the District’s making by never rotating who was serving [REDACTED] or by not providing appropriate training to the paraeducator. If this was a true concern, the answer is not to move [REDACTED] to a very restrictive setting, it was for the IEP team to discuss how to better provide [REDACTED] the supplementary aids and services she needs to be in general education to the maximum extent possible, including discussing different models of paraeducator support or simply changing who was assigned to be [REDACTED] paraeducator for next year.

The Parents tried to remind the IEP team that students with Down syndrome have far better outcomes when they are included with typically developing peers as models, but they were restricted in their ability to share information with the District members of [REDACTED] IEP team by being “muted” by District staff. Muting Parents is not allowing for meaningful parental participation in decision making in any way, shape, or form.

C. Stay-Put Placement

The Parents are invoking stay put so that [REDACTED] can remain at Riverview consistent with her May 22, 2020 IEP.

D. Request for Records

Pursuant to the Washington Public Records Act (Chapter 42.56 RCW), the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99), the IDEA (34 CFR §300.613(b)(3)), and Washington Administrative Code Section 392-172A-05190, the Parents request all records related to [REDACTED] maintained by both the District, including but not limited to:

1. [REDACTED] special education records.
2. [REDACTED] general education records.
3. All data, journals, and progress reports and documents used and relied upon in generating progress reports (regardless of if they were for reporting special education or general education progress).

4. All documents created or maintained by the District for the purposes of seeking Safety Net funding for [REDACTED] including Safety Net applications and documents reflecting the granting of Safety Net funds.
5. All communications, including email communications and text messages, about [REDACTED]

The Parents are asking the District to respond to the above requests for records by providing records marked consistent with the above. That saves the Parents' from having to exercise their right under WAC 392-172A-05190(2)(a) to seek "explanations and interpretations of the records." If records are labeled with the above, then what they are is clear (or at least clearer).

E. Issues to Be Resolved at Hearing

The Parents request that the Office of Administrative Hearings, in its capacity as designee for the OSPI determine the following:

1. Whether the District denied the Student FAPE since March 13, 2020 by failing to provide her with all the specially designed instruction, related services, and supplementary aides and services as called for in her last two IEPs.
2. Whether the IEP proposed by the District on May 18, 2021 would deny the Student a placement in her LRE if implemented.
3. Whether the District failed to comply with procedural requirements of the IDEA by:
 - a. inhibiting the Parents' ability to meaningfully participate in educational decision making at the May 18, 2021 IEP team meeting by muting their ability to speak in a remote meeting.
 - b. predetermining what specially designed instruction, related services, and supplementary aids and services the Student would receive prior to the May 18, 2021 IEP team meeting, including predetermining that the Student would be moved to a substantially more restrictive educational placement.
 - c. predetermining prior to the May 18, 2021 IEP team meeting that the Student would be moved to a substantially more restrictive educational placement without first having the IEP team consider:
 - i. what supplementary aids, services, and other supports would enable the Student to continue to be educated with nondisabled students to the maximum extent appropriate; and
 - ii. what changes to the existing provision of supplementary aids, services, and other support would enable the Student to continue to be educated with nondisabled students to the maximum extent appropriate.
 - d. failing to base its determination that the Student would be moved to a substantially more restrictive educational placement on evaluative data.

F. Relief Sought

1. Declaratory relief finding that the District violated the IDEA and that Student was denied FAPE by the District's actions.
2. Compensatory education and supplemental services for the Student to allow her to obtain the educational benefit that she would have received, but not for the District's violations of the IDEA and denial of FAPE.
3. An annual IEP for the 2021-2022 school year that includes a placement in the Student's LRE with the supplementary aides and services that the Student needs to receive FAPE.
4. An Order that includes whatever additional relief the court may find just and equitable.

Thank you for your prompt attention to this matter.

Sincerely,

CEDAR LAW PLLC



Shannon McMinimee
Lara Hruska
Attorneys for the Parents

CC: Clients