



November 24, 2020

California Department of Education
Special Education Department
Procedural Safeguards and Referral Services
1430 N Street, Suite 2401
Sacramento, CA 95841

Sent via email: speceducation@cde.ca.gov

**RE: Special Education Student [REDACTED] (DOB: [REDACTED])
Violation of Free Appropriate Public Education (“FAPE”)**

COMPLAINT ON BEHALF OF:

Parent/Holder of Education Rights: [REDACTED]
Student: [REDACTED]
Address: [REDACTED]
Phone: [REDACTED]

COMPLAINT AGAINST:

[REDACTED] Unified School District
[REDACTED]
[REDACTED]
Phone: [REDACTED]
Fax: [REDACTED]

[REDACTED] Superintendent of Schools
[REDACTED]
[REDACTED]
Phone: [REDACTED]
Fax: [REDACTED]

I. INTRODUCTION

This compliance complaint is filed on behalf of [REDACTED] pursuant to Cal. Ed. Code § 56500.2, 34 C.F.R. §§ 300.151–153, and 5 C.C.R. § 4650(a)(7)(D) and (E). [REDACTED] is a resident of [REDACTED], California and a special education student in [REDACTED] Unified School District (“[REDACTED] USD”) enrolled in a [REDACTED] (“[REDACTED]”) program. [REDACTED] USD and [REDACTED] are out of compliance with federal and state education laws with respect to my client.

II. FACTS

██████ is a fifteen-year-old special education student who attends a ██████ program at ██████ High School. ██████ resides within the boundaries of ██████ USD, which is the district of special education accountability. ██████ is eligible for special education under the eligibility categories of Intellectual Disability and Orthopedic Impairment.

An IEP meeting was held on March 12, 2020 (“3/12/20 IEP”) which served as the annual, triennial, and transition into high school IEP meetings for ██████. The IEP team determined that ██████ would remain in the ██████ program and transition into High School, despite his parents’ (“Parents”) ongoing concerns that moving to the High School was not appropriate for ██████.

██████’s Unique Circumstances Require In-Person Services

Within the 3/12/20 IEP are various statements that indicate intensive in-person services are required for ██████ to benefit from his education. For example, the following statements are included within the present levels section:

Functional ELA

- ██████ is able to respond to facial expressions made by a familiar person, such as a big smile, by looking toward and acknowledging the person during reading activities.
- He is also able to direct an eye gaze at a familiar adult while adult holds a book during 3 reading activities.
- ██████ is able to grasp cubes using his thumb and forefinger with demonstration

Functional Math

- ██████ is able to search for a familiar object used by the student that has been moved out of sight during different activities
- ██████ also shows beginning signs of demonstrating an understanding of the concept of "more" by taking more from a group of objects (e.g., familiar or interesting items and objects, snacks, etc.), when the student is encouraged to take more.

Communication Development

- ██████ benefits when the tablet is on a stand or is held on his right side.
- ██████ needs hand over hand prompting to select the icons even with the keyguard, especially when first starting to use the communication device.
- The tablet is either on a stand or brought to him at a height that allows him to select the icons. ██████ will sometimes need his arm supported to make selections.
- The sequence of using the buttons "I want"+ "to play"+ " with_" is visually modeled by the clinician at first and then the clinician asks, "What do you want ██████?".... The clinician has prompted and held his finger on the icon to teach an intentional selection of an icon. If he does select an icon, the clinician will provide the toy he selected.

Gross/Fine Motor Development

- He needs verbal and physical prompting to stand and sit upright-he tends to fatigue quickly.
- Finger feeds himself using a lateral pincer grasp to grasp individual items such as a raisin or goldfish cracker when presented, although difficulty with holding an item to take multiple controlled bites.

- He has difficulty with sustained visual attention and is easily distracted.
- turns pages of cardboard book held up vertically in front of him.
- He is able to sit unsupported by an adult for at least 5 minutes at a time and is able to pull himself up from a sitting position with support from an adult. He walks supported with two hands held for 5 steps when his hands are held
- When eating he can scoop soft foods up with a spoon and feeds self (with assistance). He can also remove food from fork after help with spearing.

Social/Emotional/Behavioral

- █████ loves to communicate and interact with others. He is highly social and loves being around people.
- He loves being out on campus and greets others with a smile, reaches out for a handshake and has been working on saying, "hello and good bye" with his tablet but this has proven to still be a challenge.
- He can also engage in age-appropriate parallel social activities (e.g., using tablet with assistance, listening to music looking at books etc.).

(Exhibit A, pages 3-5)

Additionally, █████'s progress on most of his IEP goals is directly tied to and unusually dependent upon in-person services. For example, IEP goals 5, 6, 7, 9 and 10 (**Exhibit A, pages 19-23**) all require that a person either physically assist him while working on the goal or provide daily occupational therapeutic services to support progress. Indeed, █████'s consistent need for occupational therapy (OT) services is likely why his OT service minutes are consultative/ collaborative in nature; the classroom staff must be continually trained and supervised to facilitate the daily provision of this service. (**Exhibit A, page 25**)

█████ Regresses Without Services and Was Demonstrating Emerging Skills

█████ and █ USD are aware that █████ will regress without appropriate special education services and will have a limited rate of recoupment once appropriate services resume. █████'s 3/12/20 IEP recognizes that he meets the eligibility for ESY because he has demonstrated a regression of skills during an extended time without services and has a limited ability to benefit from re-teaching of skills after an extended time without services. (**Exhibit A, pages 28-29**)

Moreover, the 3/12/20 IEP reflects that █████ had various emerging skills, including:

- “He can poke buttons with index finger with emerging accuracy for icons on iPad/touch screen table/talker” (**Exhibit A, Page 4**)
- “█████'s behavioral functioning is far better than it was two years ago.” (**Exhibit A, Page 5**)
- “He has shown steady improvement of telling us when he needs to use the restroom (signing) and stays dry for the most part at school with some accidents at times. (**Exhibit A, Page 5**)
- He has been working on building strength to sit/stand when verbally prompted by staff and has made huge progress.” (**Exhibit A, Page 5**)
- “Currently █████ has had minimal time integrating with his same aged peers during PE activities, because of his struggle to propel himself for prolonged periods of time. However, █████ has built up strength and is now able to move forward in participating in such activities. (**Exhibit A, Page 10**)

- The physical therapist was “pleased to see that [REDACTED] is showing progress in all areas.” **(Exhibit A, Page 34)**
- “All staff has noted that [REDACTED] has had less behaviors such as, fingers in his mouth, biting his arm or pulling hair than before and when he does such a simple redirection is adequate.” **(Exhibit A, Page 35)**

[REDACTED] Removed All In-Person Services and Denied Parents’ Requests for Individualized Delivery of Services

On March 17, 2020 a Prior Written Notice (PWN) was issued by [REDACTED] notifying Parents of the closure of [REDACTED]’s school beginning March 16, 2020 to prevent/contain the spread of COVID-19. Another PWN was sent to Parents on April 15, 2020 indicating that the school closures were now estimated to last through at least the end of the school year.” Another PWN was sent to Parents on June 5, 2020 indicating that extended school year services (ESY) would be delivered through video-conferencing or other form of distance learning. Another PWN was sent to Parents on September 28, 2020 addressing the [REDACTED]’s special education program during the 2020-2021 school year when the school is closed due to emergency conditions. **(Exhibit B)**

Since the school closure and movement to distance learning on March 16, 2020, [REDACTED] has not been allowed to resume in-person instruction or services. However, he has not been able to access his education via distance learning. Indeed, [REDACTED] has recognized that [REDACTED] has not engaged in distance learning. **(Exhibit C)** Parents have worked with [REDACTED] to try and help him access and benefit from on-line and asynchronous learning. They made various attempts at helping [REDACTED] attend class via Zoom. However, in each attempt [REDACTED] was either disengaged or he would bang on the computer and push it away. It is important to note that [REDACTED]’s grandmother, who is an [REDACTED]S employee, was his ESY teacher—even with a teacher uniquely familiar with [REDACTED], distance learning was not possible. Moreover, the work packets that were sent home as asynchronous work did not contain specific work related to [REDACTED]’s IEP goals. **(Exhibit D)** (Each of the PWNs sent to Parents list this as the first indicated service. **(Exhibit B)**) However, given that none of [REDACTED]’s goals are academic in nature and that a majority of his IEP goals require in-person services to work on communication, socialization, and motor skills **(Exhibit A, pages 15-23)**, it is difficult to see how a work packet could be expected to address his exceptional educational needs.

Additionally, Parents have had two consultations via Zoom with the [REDACTED] physical therapist in lieu of the individual physical therapy agreed to in the IEP **(Exhibit A, page 25)**. However, they are not able to provide the intensive therapy that [REDACTED] requires and, as a result, [REDACTED] has severely regressed. Prior to the school closure the team was working with [REDACTED] to address needs such as stretching [REDACTED]’s muscles, gross motor exercises, transitioning from sit to stand and floor to stand, walking in his walker, standing in his stander, riding a tricycle, and having assistance backing up to his wheelchair and toilet, etc. **(Exhibit A, pages 15-23)** In fact, prior to the school closure, [REDACTED] could “tolerate and maneuver for about 60 minutes in his stander...” **(Exhibit A, page 8)** He also had “improved endurance/duration and control with [his] walker” **(Exhibit A, page 4)** and Parents were told he could navigate around the classroom and from the classroom to the playground.

IV. SPECIFIC ISSUES OF NON-COMPLIANCE

(1) USD and █████ failed to implement █████'s IEP by failing to provide appropriately tailored special education or related services from March 17, 2020.

█████'s inability to attend to and benefit from distance learning has left his IEP goals unimplemented. Despite this, the IEP team was never reconvened, nor an IEP amendment proposed, to individualize a distance learning plan or discuss alternative delivery of services. (*See* 20 USC 1414 (d)(4)(A); 20 USC 1414 (d)(3)(D); 34 C.F.R. § 300.324.). Moreover, both █████ USD and █████ failed to implement █████'s IEP. (*See* 5 C.C.R. Sec. 4650(a)(7)(D)).

Indeed, the CDE issued guidance on March 20, 2020 and April 9, 2020 advising that local educational agencies could consider alternative service delivery options such as in-home service delivery, meeting with individual students at school sites, or other appropriate locations to deliver services. Further, the CDE encouraged collaboration with outside agencies to ensure continuity of service. None of this happened for █████, despite multiple attempts by Parents to seek individualized services. **(Exhibit E)**

Additionally, when a request was made that a district service provider be considered an “Essential Critical Infrastructure Worker” under Executive Order N-33-20, this request was denied. Especially concerning is that the sole reason for denying this request was to simply put the blame on the student (and his parents) by stating, “[u]nfortunately, █████ has stopped accessing the [distance learning] program.” **(Exhibit F)** No reasoning or explanation was proffered to support █████'s blank assertion that they felt the distance learning option provided was appropriate. This is, again, despite multiple attempts by Parents to explain why accessing the distance learning is not a viable option for █████. **(Exhibit E)**

(2) In the alternative, █████ USD failed to provide FAPE by considering that placement in a █████ USD special education program that is now allowed to meet for in-person instruction may be appropriate given the unique circumstances.

On October 27, 2020, █████ USD began operating a special education cohort at █████ High School. However, Parents' requests that █████ be allowed to resume in-person learning at █████ High School, the very campus where he is enrolled, were denied. The sole reason for denying █████ in-person services is that the █████ program, which operates on █████ High School campus, has not resumed in-person instruction. **(Exhibit G)**

As the district of accountability, █████ USD failed to fulfill their affirmative obligation to ensure that █████ is receiving a FAPE. In light of █████'s unique circumstances that make accessing distance learning impossible, █████ USD should have convened an IEP meeting or proposed an IEP amendment to consider placement in a program that could now provide in-person instruction. Moreover, Section 56345 of the *Education Code (EC)*, amended by SB 98 provides an avenue that █████ USD could use to categorize this placement as a temporary means by which the IEP will be provided under emergency conditions (when the district of accountability but not the district of service is providing in-person services).

█████ USD's response to our inquiry as to why █████ was being denied access to in-person learning in the special education cohort currently operating at █████ High School was simply that he is enrolled in a █████ program that is “currently not able to provide in-person instruction at █████ High School...” **(Exhibit G)**

V. REQUESTED CORRECTIVE ACTION

We request the following corrective actions:

1. Order ██████ and/or ██████ USD to provide ██████'s special education services (including specialized academic instruction, language and speech therapy, intensive individual services, health and nursing-specialized physical health care services, physical therapy, behavioral intervention services, and occupational therapy) through in-person/direct services and, if necessary, consider and classify those providing the services as "Essential Critical Infrastructure Workers" under Executive Order N-33-20 or collaborate/contract with an outside agency to provide in-person services; or
2. In the alternative, order ██████ USD to allow ██████ to be placed in the ██████ USD special education program cohort receiving in-person services.

Additionally,

3. Order the District to fund compensatory in-home services with a non-public agency to make up for its failure to provide a FAPE during the 134 school days since March 12, 2020 (including ESY) by failing to provide appropriate specialized academic instruction (IEP provides for 360 minutes daily), intensive individual services (IEP provides for 360 minutes daily), and health and nursing-specialized physical health care services (IEP provides for 80 minutes daily); and
4. Order the District to provide training for all pertinent personnel on compliance with education laws and regulations, including those regulations concerning delivery of services during COVID related school closures.

Sincerely,



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Enclosures:

- Exhibit A: IEP dated March 12, 2020
 Exhibit B: PWNs dated March 17, 2020; April 15, 2020; June 6, 2020; & September 28, 2020
 Exhibit C: ██████ Distance Learning Weekly Engagement Record
 Exhibit D: Work Packet
 Exhibit E: Emails and texts from Parents to ██████
 Exhibit F: PWN from ██████ dated November 19, 2020
 Exhibit G: PWN from ██████ USD dated November 18, 2020

CC:

██████████, ██████ USD ████████████████████
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EXHIBIT

A

EXHIBIT

B

EXHIBIT

C

EXHIBIT

D

EXHIBIT

E

EXHIBIT

F

EXHIBIT

G