

78 IDELR 116

121 LRP 7029

In re: Student with a Disability

Wisconsin State Educational Agency

20-055

February 22, 2021

Related Index Numbers

116.30 IEP Development and Review

116.20 Contingency/Distance Learning Plans

265.010 Development of IEP

315.025 Placement

Judge / Administrative Officer

Barbara Van Haren, Assistant State Superintendent

Ruling

The Wisconsin Department of Education found that a district failed to properly develop and implement the IEP of a student with a significant cognitive disability for the 2020-21 school year. The state ED instructed the district to determine appropriate compensatory services, develop an IEP that clearly describes its commitment of resources to the student during in-person instruction, develop a contingency plan to be implemented when in-person services are prohibited due to the COVID-19 pandemic, and review the IEPs of all other students with disabilities receiving in-person instruction to ensure they are based on the students' individual needs.

Meaning

When districts decide a student needs some in-person instruction to receive FAPE while most students are learning remotely, they must individualize the number of hours the student will learn in person. Offering a set amount of in-person service hours to each student needing such instruction violates the requirement that districts base IEPs on a student's unique needs. Rather than predetermining that this student would have one day per week of in-person instruction because of his cognitive disability, the IEP team should have discussed how many hours of such instruction the

student needed to make progress during the pandemic.

Case Summary

While a Wisconsin district made an individualized determination that a student with a significant cognitive disability required some in-person instruction to receive FAPE during the COVID-19 pandemic, it dropped the ball when it failed to individualize the amount of that instruction. The Wisconsin ED determined that the district violated the IDEA by failing to develop and implement an IEP based on the student's disability-related needs. The state ED observed that districts meet their FAPE obligation, in part, by developing a program based on a student's unique, disability-related needs that is reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances, documenting that program in the IEP, and implementing the program as articulated in the IEP. Here, after determining that the student was incapable of receiving FAPE without in-person instruction, the district decided the amount of in-person and remote instruction the student would receive based on a pre-determined schedule. "The IEP team did not base this schedule on a discussion of the student's unique, disability-related needs," the state ED wrote. The ED found flaws in how the IEP was written, as well. First, the IEP was universally updated to remote learning for each service, the state ED observed, failing to reflect that the student would learn in person one day per week. Second, the description of the student's supplementary aids and services were revised in a manner that made the district's commitment of resources unclear. "For example, the description of services includes language such as services 'can be' provided 'as needed.' This vague language renders the IEP impossible to implement appropriately," the state ED wrote. The state ED ordered the district to convene the student's IEP team to determine the amount of compensatory education needed to make up for its violations.

Full Text

IDEA Complaint Decision 20-055

- Unnamed School District

On September 25, 2020, the Department of Public Instruction (department) received a complaint under state and federal special education law from [] (complainant) against the [] (district). The issues identified are whether the district, for the 2020-21 school year, properly developed and implemented the individualized education program (IEP) of a student with a disability.

School districts meet their obligation to provide a free and appropriate public education (FAPE) to each student with a disability, in part, by developing a program based on the student's unique, disability-related needs that are reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances, documenting that program in the IEP, and implementing the program as articulated in the IEP. For most students, the IEP must be designed to allow the student to progress from grade to grade, but if that is not possible, the IEP should be appropriately ambitious in light of the child's circumstances. At the beginning of each school year, each district must have in effect, for each child with a disability, an IEP, and special education and related services must be made available to the student in accordance with the student's IEP. (34 CFR §§ 300.320-300.324; Wis. Stat. § 115.78[2]; *Endrew F. v. Douglas County School District*, 137 S.Ct. 988).

The student who is the subject of this complaint is identified as a student with a most significant cognitive disability and receives instruction aligned to alternate achievement standards across all academic content areas. At the beginning of the 2020-21 school year, the student had an IEP in place developed at an annual IEP team meeting on March 6, 2020. The IEP included a variety of supplementary aids and services such as simplified directions and questions, tasks broken into smaller segments, verbal cueing when the student is off task, frequent repetition of information when off task behavior is noted, and preferential seating. The student's IEP also provided 20 minutes of

specially designed instruction in vocational, soft skills, and social skills and 40 minutes of functional academics of either Math and Science or English and Social Studies each day. Each class meets on alternate A/B school days. District staff explained that in practice, this meant the student received 20 minutes of specialized instruction in vocational, soft skills, and social skills and 40 minutes of functional academics of either Math and Science or English and Social Studies each day. According to the IEP, the student received this instruction and spent most of the day in a self-contained special education environment.

The district is providing synchronous virtual instruction four days a week and asynchronous virtual instruction one day per week for all students during the COVID-19 pandemic. In addition, the district has been providing limited in-person services for those students where IEP teams have determined it necessary in order to receive FAPE. The district developed a set of criteria for IEP teams to consider while determining whether a student requires in-person services. On August 26, 2020, the student's IEP team met to determine the services the student would receive during the pandemic. Applying the district's criteria, the IEP team determined that the student qualified for a set amount of in-person services based on a predetermined schedule, not on an individualized discussion of the student's unique disability-related needs.

The complainant did not agree with the services determined by the IEP team and placed the student in a childcare program at the complainant's expense. The IEP developed at the August 26th team meeting was not implemented as written; however, the student was able to attend school remotely while at the childcare program, beginning on the first day of school. District staff attempted to implement the services in the student's IEP remotely as best as possible. The student received synchronous virtual specially designed instruction four days per week.

On November 16, 2020, the complainant and district staff exchanged emails agreeing to update the

student's IEP to include virtual learning. Rather than describing the circumstances under which the services were intended to be provided in-person and when they would have to be provided virtually, the IEP was universally updated to virtual ("remote learning") for each service. This update gave the impression that the student was to receive all services virtually while the placement page states the IEP will be implemented at the school the student would attend. In addition, the description of the student's supplementary aids and services were revised in a manner making the district's commitment of resources unclear. For example, the description of services includes language such as services "can be" provided "as needed." This vague language renders the IEP impossible to implement appropriately. The predetermined schedule of specially designed instruction delivered synchronously four days per week continued. The IEP team did not base this schedule on a discussion of the student's unique, disability-related needs. The district failed to properly develop and implement the student's IEPs for the 2020-21 school year.

Within 10 days of the date of this decision, the IEP team must meet to determine the compensatory services needed to address the failure to properly develop and implement an IEP based on the student's unique, disability-related needs. The department recognizes that a local public health order will go into effect on November 27, 2020, which prevents in-person services until January 15, 2021. As such, the IEP team must develop an IEP that provides FAPE and clearly describes the both the commitment of resources the student will be provided during times in-person instruction is possible and a contingency plan to be implemented when in-person services are prohibited. The district must provide the student's updated IEP to the department within 30 days of the date of this decision. Additionally, within 30 days of the date of this decision, the district must develop a district-wide corrective action plan to review the IEPs of students who require in-person services to ensure the schedule of those services are based on their

disability-related needs and that all services are clearly described so that the commitment of resources are clear and the IEP can be implemented.

All noncompliance identified above must be corrected as soon as possible but in no case, more than one year from the date of this decision. This concludes our review of this complaint. This decision is final for the IDEA State Complaint process. These issues may be addressed through other dispute resolutions, including mediation and due process hearings. For more information, visit the department's website at <http://dpi.wi.gov/sped/dispute-resolution>.

Sincerely,

Barbara Van Haren, PhD

Assistant State Superintendent

Division for Learning Support

For questions about this information, contact
DPI Sped Team (608) 266-1781

Cases Cited

137 S. Ct. 98869 IDELR 174 -- Followed