

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 18-93

PROCEDURAL HISTORY

On October 9, 2018, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Renton 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 October 10, 2018, 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 November 7, 2018, OSPI received the District's response to the complaint and forwarded it to the Parent on the same day. OSPI invited the Parent to reply with any information she had that was inconsistent with the District's information.

On November 9, 2018, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. On November 15, 2018, OSPI received the requested information from the District. OSPI forwarded that information to the Parent that same day.

On November 16 and 19, 2018, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. On November 26 and 27, 2018, OSPI received the requested information from the District. OSPI forwarded that information to the Parent on November 28, 2018.

On November 30, 2018, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. On November 30, 2018, OSPI received the requested information from the District. OSPI forwarded that information to the Parent on December 3, 2018.

On November 30, 2018, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the Parent. On November 30, 2018, OSPI received the requested information from the Parent. OSPI forwarded that information to the District on December 3, 2018.

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

ISSUE

1. Did the District implement the Student's individualized education programs (IEPs) in place during the 2018-2019 school year, including providing the Student with a 1:1 paraeducator, occupational therapy, physical therapy, and speech language pathology?

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 ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 34 CFR §300.323; WAC 392-172A-03105. The initial IEP must be implemented as soon as possible after it is developed. 34 CFR §300.323(c); WAC 392-172A-03105(2). 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(3)(a). "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).

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, (9th 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 (9th Cir. 1994); *see also In re: Mabton School District*, 2018-SE-0036 ("There is no statutory or regulatory formula for calculating compensatory remedies. However, generally services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting").

FINDINGS OF FACT

2018-2019 School Year

1. During the 2018-2019 school year, the Student was in second grade and attended a District elementary school. The Student was eligible to receive special education and related services under the eligibility category of other health impairment.
2. The District's 2018-2019 school year began on August 29, 2018.
3. On August 30, 2018, the Student's individualized education program (IEP) team developed a new IEP for the Student, which included goals in the areas of fine motor, written language, academics, adaptive behavior, communication, and social/emotional. The August 2018 IEP provided the Student with the following specially designed instruction in a *special education setting* from August 31, 2018 through November 8, 2018:
 - Academics—120 minutes, 5 weekly (to be provided by a special education teacher)
 - Social/emotional—60 minutes, 5 times weekly (to be provided by a special education teacher)

- Adaptive behavior—60 minutes, 5 times weekly (to be provided by a special education teacher)
- Communication—45 minutes, once a week (to be provided by a speech language pathologist (SLP))

The August 2018 IEP provided the Student with the following related services in a *special education setting* from August 31, 2018 through November 8, 2018:

- Fine motor—30 minutes, once a week (to be provided by an occupational therapist (OT))
- Gross motor—30 minutes, once a week (to be provided by a physical therapist (PT))

The “Present Level of Educational Performance: Adverse Impact Summary” section of the August 2018 IEP reads, in part:

1:1 Paraeducator Support: [Student] requires 1:1 support to provide prompts and assistance during general education and during SDI (special education) in order for him to be successful. The para educator also provides prompts and attends to safety measures during instruction, toileting, transitional times, lunch, recess, specialists, fine/gross motor activities, and during arrival/drop off. [Student] is constantly monitored to ensure his and other’s safety.

4. During the 2018-2019 school year, the Student was educated in the elementary school’s Autism Spectrum Classroom (ASC). According to the District:
 - During the 2018-2019 school year, the ASC had 12 students (4 first grade students and 8 second grade students).
 - The ASC is usually staffed with 1 teacher and 3 paraeducators (paraeducators 1, 2, and 3).
 - The ASC used the STAR curriculum—“Strategies for Teaching Based on Autism Research,” an educational curriculum developed specifically for students with Autism Spectrum Disorder.
5. According to the District, there were difficulties in properly staffing the ASC during the first couple months of the 2018-2019 school year:
 - During the 2017-2018 school year, the ASC was located at a different school (School 1). Boxes were transferred from School 1 to the Student’s elementary school in the summer of 2018. According to the District, “The [ASC] was not set up until days before the year started. The classroom was still being set up, so instruction was minimal for the first few weeks as the team stabilized.”
 - A teacher for the classroom was not hired until mid-September, and, when a teacher was hired, she possessed an emergency substitute certification. (Prior to the hiring of the permanent teacher in mid-September, two substitutes filled the position. These substitutes were supported by the Special Education Facilitator.)
 - The SLP for the classroom was not certified through OSPI until September 19, 2018. Prior to that date, the Student received “indirect [speech] services with classroom support and [augmentative or alternative communication] support.” It was only after September 19, 2018, that the Student began receiving direct speech services.
 - Because the classroom was still being set up at the beginning of the school year, the Student did not receive pull out OT and PT services until approximately the third week of school.

- There were significant issues with staffing the paraeducator positions. For example, paraeducator 2 did not start until September 17, 2018 and paraeducator 3 did not start until October 17, 2018.
 - Furthermore, because of the significant needs of the students in the ASC during the 2018-2019 school year, the District chose to hire two additional paraeducators. These two additional paraeducators, however, did not start until October 29, 2018. (Substitutes began filling these two positions on an irregular basis starting October 1, 2018.)
6. On September 26, 2018, the special education director and the principal sent a letter to the parents of the students in the ASC. In this letter, the District stated, in part, that:
- “The program did not begin the way we would have liked it to;”
 - The teacher position had been filled with someone with an emergency teacher certification;
 - The new teacher would receive continuing guidance from the District’s special education facilitator, as well as the teacher’s veteran [autism spectrum disorder] teacher mentor;”
 - The District was going to work “with the University of Washington’s Autism Center to pursue the option of having a consultant come in and work with all our autism programs;” and,
 - The program was currently staffed by 4 paraeducators, but the special education department had just received authorization to hire 2 additional paraeducators, and the District was going to fill these positions as quickly as possible.
7. On September 28, 2018, the special education director emailed the Parent “a support structure, including names and titles, for the [ASC].” In part, the support structure read:
- Classroom:**
- [ASC teacher]
- Program Paras:**
- [Para 1]
- [Para 2]
- [Para 3]—has been offered position, has accepted, and currently is in hiring process with HR
- Additional Approved Paras:**
- [Para 4]—sub starting 10/1/18 until hired
- [Para 5]—sub starting 10/1/18 until hired
- Floating Para¹ between both ASD classrooms:**
- [Floating Para]
8. On October 1, 2018, the Parent emailed the special education director and the principal, expressing her concern that the ASC was not properly staffed. Specifically, she mentioned:

¹ According to the District, the ‘floating paraeducator’ spent about half of her time in the Student’s ASC; usually, the ‘floating paraeducator’ worked in the Student’s ASC in the afternoon.

- The Student had been “pushed off from the top of the playground [equipment]” by another student, and school personnel had not reported this occurrence to the Parent;
- The Student was consistently “very thirsty” when he got home from school; “he [would] literally drink about 32 ounces [of] fluid;” and,
- There were only 2 paraeducators working in the ASC classroom (which had 12 students).

In this email, the Parent also asked “the school to let [her] know the times and dates of [Student’s] one-on-one speech, occupational therapy, and physical therapy sessions so we can bring him for those therapy sessions.”

9. The Parent removed the Student from school on or about October 1, 2018. In her email to the special education director, dated October 1, 2018, the Parent explained she was going to remove the Student from school “until the school gets enough trained staff in the classroom to meet his needs.”
10. On October 22, 2018, the principal emailed the Parent, stating, in part: “We have hired all the paraeducators for the [ASC] with the last one having a start date on November 1st. On November 1st, all program paraeducators and 1:1 will be in the building.”

Later that same day, the Parent responded, stating, in part: “We have our IEP meeting on November 2nd. [Student] will be attending school right after the IEP meeting then.”

11. According to the special education director, on October 23, 2018, the Student received the following services:
 - 30 minutes of joint occupational therapy and speech language pathology; and,
 - 60 minutes of physical therapy.²

According to the Parent’s recollection, the Student did not receive any speech, occupational therapy, or physical therapy sessions during the time he was removed from school.

12. According to the special education director, on October 25, 2018, the Student received 35 minutes of joint occupational therapy and speech language pathology services.
13. On October 26, 2018, the principal emailed the Parent, stating, in part: “We are very excited that the classroom will be fully staffed next week!”
14. On October 29, 2018, two additional paraeducators began working in the ASC.
15. According to the special education director, on October 30, 2018, the Student received the following services:
 - 35 minutes of joint occupational therapy and speech language pathology; and,
 - 30 minutes of physical therapy.

² According to the special education director, the Parent brought the Student to school on this date to receive these services.

16. According to the special education director, on November 1, 2018, the Student received 15 minutes of joint occupational therapy and speech language pathology services.
17. On November 2, 2018, the Student's IEP team met. At this meeting, it was determined that the entirety of the Student's August 2018 IEP would remain in place and continue to be implemented as written, and that an additional IEP meeting would be scheduled for early to mid-December of 2018.
18. The Student returned to school on November 6, 2018.
19. According to the ASC teacher, "there is [no progress] data [from] before [Student] was pulled out of school...we were just focusing on keeping the kids safe while we were waiting for the positions to be filled. We weren't doing academics, so there was no way to monitor that progress."
20. After the Student returned to school, there was limited reporting on the progress the Student made towards achieving his measurable annual goals:
 - Fine Motor (11/12/2018): Emerging Skill
 - Written Language 1 (11/12/2018): Sufficient Progress
 - Written Language 2 (11/12/2018): Mastered
 - Academics 1 (11/15/2018): Emerging Skill
 - Academics 2 (11/15/2018): Emerging Skill
 - Academics 3 (11/14/2018): Emerging Skill
 - Adaptive Behavior 1 (11/15/2018): Emerging Skill
 - Adaptive Behavior 2 (11/15/2018): Emerging Skill
 - Adaptive Behavior 3 (11/02/2018): Insufficient Progress
 - Adaptive Behavior 4 (11/02/2018): Insufficient Progress
 - Social/Emotional (11/15/2018): Emerging Skill

None of the Student's three measurable annual goals in communication had progress reporting data for the 2018-2019 school year; progress on the Student's three measurable annual goals in communication was last reported on March 12, 2018.

21. The District concedes that "it did not appropriately implement the Student's IEP between August 29, 2018 through October 9, 2018—the date that [OSPI] received the Parent's complaint."³

³ In its investigation of this complaint, OSPI asked the District what changed on October 9, 2018, that resulted in the Student being provided the specially designed instruction and related services listed in his IEP. In response, the District stated, "The cut-off date was chosen because that was the date of the letter from OSPI."

To remedy this failure, the District proposed three actions:

1. Hour-for-hour compensatory education for all specially designed instruction and related services missed during these thirty-one school days, to be provided by appropriately qualified staff and the support of a 1:1 paraeducator⁴;
2. Development of an IEP implementation monitoring plan by November 21, 2018; and,
3. Training for all staff in the [ASC], along with the principal and the assistant principal, regarding the procedures for reviewing and amending IEPs. (The training to be provided no later than February 1, 2019.)

22. In its response to this complaint, the District stated, “[Student’s] schedule will be written so that [Student] has 1:1 support provided by one of the five paras in the room.”

23. In its response to this complaint, the special education director stated, “I am personally offering a meeting with the parent/guardians of every student and discussing concerns/offering compensatory.”

CONCLUSIONS

IEP Implementation – The Parent alleged that the Student’s IEP was not implemented correctly. A school district must ensure it provides all services in a student’s IEP, consistent with the student’s needs as described in that IEP. 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 student with a disability and those required by the IEP.

Here, the District materially failed to implement the Student’s August 2018 IEP. For example, for roughly the first three weeks of the school year, the Student did not receive any of the specially designed instruction or related services that was required by his August 2018 IEP. The District was able to hire a teacher for the ASC in mid-September. The ASC teacher, however, said that no academics were provided in the classroom prior to when the Parent removed the Student from school on or about October 1, 2018. Additionally, as of early October of 2018, the ASC was not staffed with the proper number of paraeducators. Under these circumstances, it was reasonable for the Parent to remove the Student from the school and compensatory education is warranted. The ASC was appropriately staffed by the end of October 2018. The Student’s IEP team met on November 2, 2018, and the Student returned to school early the next week (on November 6, 2018). Under these circumstances, compensatory education is warranted.

A state educational agency is authorized to order compensatory education through the special education citizen complaint process. 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

⁴ By the District’s calculation, this totals: specially designed instruction (12.5 hours academic, 6 hours adaptive behavior, 6 hours social/emotional, 4.5 hours communication), related services (3 hours of fine motor, 3 hours of gross motor).

place the student in the same position he or she would have been, but for the district's violations of the IDEA.

Therefore, compensatory education is required for a total of 9 weeks: a) the first four weeks of the school year, when the Student was essentially receiving no specially designed instruction or services (August 29 through September 28, 2018); and b) the roughly five weeks (from October 1, 2018 through November 6, 2018) when the Student was removed from school because the ASC was not fully staffed.

However, there is no requirement to provide day-for-day compensation for time missed. Generally, services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting.

In light of this fact, the District will be required to provide the Student with the following compensatory education:

- 1.5 hours of Fine Motor Related Services (approximately one-third of the services missed in this area)
 - 9 weeks of 30 minutes once a week equals 270 minutes. This equates to 4.5 hours. One third of 4.5 hours is approximately 1.5 hours.
- 1.5 hours of Gross Motor Related Services (approximately one-third of the services missed in this area)
 - 9 weeks of 30 minutes once a week equals 270 minutes. This equates to 4.5 hours. One third of 4.5 hours is approximately 1.5 hours.
- 2.25 hours of Communication Specially Designed Instruction (approximately one-third of the services missed in this area)
 - 9 weeks of 45 minutes once a week equals 405 minutes. This equates to 6.75 hours. One third of 6.75 hours is approximately 2.25 hours (or 75 minutes).
- 30 hours of Academics Specially Designed Instruction (one-third of the instruction missed in this area)
 - 9 weeks of 120 minutes 5 times weekly equals 5,400 minutes. This equates to 90 hours. One third of 90 hours is 30 hours.
- 15 hours of Social/emotional Specially Designed Instruction (one-third of the instruction missed in this area)
 - 9 weeks of 60 minutes 5 times weekly equals 2,700 minutes. This equates to 45 hours. One third of 45 hours is 15 hours.
- 15 hours of Adaptive Behavior Specially Designed Instruction (one-third of the instruction missed in this area)
 - 9 weeks of 60 minutes 5 times weekly equals 2,700 minutes. This equates to 45 hours. One third of 45 hours is 15 hours.

CORRECTIVE ACTIONS

By or before **December 21, 2018, January 11, 2019, February 8, 2019, March 29, 2019, June 19, 2019,** and **September 13, 2019,** the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

1. By **January 11, 2019**, the District will work with the Parent to develop a schedule to provide the Student with the following compensatory education:
 - a. 1.5 hours of Fine Motor Related Services (approximately one-third of the services missed in this area)
 - b. 1.5 hours of Gross Motor Related Services (approximately one-third of the services missed in this area)
 - c. 2.25 hours of Communication Specially Designed Instruction (approximately one-third of the services missed in this area)
 - d. 30 hours of Academics Specially Designed Instruction (approximately one-third of the instruction missed in this area)
 - e. 15 hours of Social/Emotional Specially Designed Instruction (approximately one-third of the instruction missed in this area)
 - f. 15 hours of Adaptive Behavior Specially Designed Instruction (approximately one-third of the instruction missed in this area)

The services will be provided outside of the District's regular school day. If the District's provider is unable to attend a scheduled session, the session must be rescheduled. If the Student is absent, or otherwise does not attend a session without providing the District with at least 24 hours' notice of the absence, the District does not need to reschedule. The services must be completed no later than **August 30, 2019**. The District will provide OSPI with documentation of the schedule by **January 11, 2019**.

The District will be required to provide OSPI with periodic progress reports on the provision of compensatory education to the Student: On **March 29, 2019** and **June 19, 2019**, the District will provide OSPI with documentation of the compensatory services that have been provided up until those respective dates.

No later than **September 13, 2019**, the District shall provide OSPI with documentation that all of the compensatory services have been completed. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled by the District or missed by the Student.

The District must either provide the transportation necessary for the Student to access these services, or must reimburse the Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must reimburse the Parent for round trip mileage at the District's privately owned vehicle rate. The District must provide OSPI with the documentation pertinent to this corrective action by **September 13, 2019**.

2. By **December 21, 2018**, the District will develop a schedule for the Student that allows him to receive 1:1 paraeducator support in the ASC. By **December 21, 2018**, the District will provide OSPI with a copy of this schedule.

DISTRICT SPECIFIC:

1. By **January 11, 2019**, the District will develop a plan to monitor the implementation of the IEPs for the students in the ASC classroom. This plan will specify: a) on what dates reporting to OSPI will be made; b) what information will be reported to OSPI; c) who will be responsible for gathering the necessary information; and, d) who will be responsible for filing the reporting with OSPI.

By **January 11, 2019**, the District will provide OSPI with a copy of the proposed plan. OSPI will review the proposed plan, and inform the District of any required changes to the plan by January 22, 2019. The plan will be implemented immediately thereafter.

2. By **February 1, 2019**, the District will provide training to all staff in the ASC classroom, the principal, and the assistant principal regarding the procedures for reviewing and amending IEPs. The training will include examples. The training will be presented by someone who is not an employee of the District.

By or before **December 21, 2018**, the District will provide a draft of the training materials to OSPI. By or before January 2, 2019, OSPI will provide feedback on the training materials.

By or before **February 8, 2019**, the District will provide OSPI with a sign-in sheet that lists those individuals who attended the training. The District will also provide a roster of all the staff working in the ASC, as well as the principal and assistant principal.

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 December, 2018

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.)