

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-146

PROCEDURAL HISTORY

On December 10, 2020, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Kent 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 December 11, 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 21, 2020, OSPI received the District's response to the complaint and forwarded it to the Parent the same day. OSPI invited the Parent to reply.

On January 13, 2021, OSPI requested clarifying information from the District. OSPI received the requested information on January 19, 2021 and forwarded it to the Parent on January 20, 2021.

On January 21, 2021, the OSPI complaint investigator interviewed the Parent.

Also, on January 21, 2021, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District the same day.

OSPI considered all of the information provided by the Parent and the District as part of its investigation. It also considered the information received and observations made by the complaint investigator interviews.

SCOPE OF INVESTIGATION

The time period under investigation begins on December 10, 2019, as OSPI may investigate only those issues occurring during a one-year period. Any information included from events prior to December 10, 2019 is mentioned for informative, background purposes only.

ISSUE

1. Did the District implement the counseling services on the Student's individualized education program (IEP), from the commencement of the 2020-2021 school year through December 10, 2020?

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. 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).

Counseling as a Related Service: Related services means services that are required to assist a student eligible for special education to benefit from special education. WAC 392-172A-01155(1). Counseling services, as a related service, means services provided by qualified social workers, psychologists, guidance counselors or other qualified personnel. WAC 392-172A-01155(3)(b).

FINDINGS OF FACT

2020-2021 School Year

1. The District's first day of school was September 3, 2020.
2. At the commencement of the 2020-2021 school year, the Student was eligible for special education services under the category of emotional behavioral disability,¹ was in the fifth grade, and attended a therapeutic day school, which was an approved state nonpublic agency school (NPA). The Student's January 28, 2020 individualized education program (IEP) was in effect.
3. The Student's January 2020 IEP contained goals in the areas of social/emotional (making alternative plans, identifying emotional reactions, selecting coping skills), and behavior instruction (maintaining personal space, task initiation) and provided the Student with the following specially designed instruction, in the *special education setting*:
 - Social/emotional and behavioral – 168 minutes, 5 times weekly, to be provided by a special education teacher; and,
 - Behavior – 168 minutes, 5 times weekly, to be provided by a special education teacher.

The Student's IEP additionally provided the Student with 60 minutes weekly of counseling, as a related service, to be provided by a psychologist, also in the *special education setting*.² The Student's IEP team added counseling services to the Student's IEP in February 2019, in response to a recommendation made by the Student's evaluation team following the Student's February 27, 2019 reevaluation, which noted that despite the intensive instruction the Student has received in social/emotional and behavioral instruction over the last three

¹ The Student has medical diagnoses of depressive disorder and anxiety disorder not otherwise specified.

² The Student's January 2020 IEP also provided the Student with 30 minutes each weekly of related services in the areas of speech and language pathology and occupational therapy, both in the special education setting.

years, he had not made significant progress on his goals and required counseling services as a related service in order to access his specially designed instruction. While attending the NPA, the Student's counseling services were implemented weekly by a psychologist at the NPA who provided individual counseling to the Student.

4. On September 22, 2020, the Parent contacted the District's coordinator of behavior services for inclusive education (IE coordinator) by phone to discuss the Student's placement at the NPA and her concerns that the Student was unable to access the general education curriculum at the NPA despite not qualifying for specially designed instruction in academics. The Parent requested an IEP meeting to discuss changing the Student's placement to his neighborhood school.
5. In its response to this complaint, the IE coordinator noted that it was believed at that time that the Student's counseling services on his IEP could be provided by the District's inclusive education social worker.
6. On September 23 and 25, 2020, the Student's IEP team met to discuss the Student's placement. The Student's IEP team agreed to amend the Student's IEP to change his placement from the NPA to the school adjustment (SA) self-contained program at one of the District's neighborhood schools.
7. On October 5, 2020, a transition meeting was held with the Student's neighborhood school team. Two District board certified behavior analysts (BCBAs) were present. At the meeting, they explained to the Parent that they were not assigned to individual students and could not provide counseling services, but would support the Student's program the way a program specialist would and would serve as inclusive education representation at meetings when the administration was unable to be present.³
8. On October 6, 2020, the Student was withdrawn from the therapeutic day school (NPA).
9. On October 7, 2020, the Student attended his first day at his neighborhood school in the District.
10. From October 7 through December 7, 2020, the District's dean of students, Parents, coordinator of behavioral services, school psychologist, District BCBAs, general education teacher, special education teacher, and the Student's case manager exchanged several emails regarding the Student's counseling services, including who would provide the services and the provider's qualifications, and how the District would deliver the services to the Student.

³ During her interview with the OSPI complaint investigator, the Parent relayed that she felt behavior intervention services provided by the BCBA team at the District were not helpful to the Student because they were not intended for students with mental health disabilities, like the Student, who she indicated did not always have control over his behaviors, and whose behaviors did not always have a "clear and understandable" function. The Parent explained the Student's behaviors required mental health interventions, which was an area the BCBA staff were not trained.

The emails documented that the Student required a counselor who was able to provide individual counseling/therapy to the Student, and who had an appropriate level of expertise and training due to the needs of the Student resulting from his mental health diagnoses and the impact they had on his ability to access his specially designed instruction. The emails also documented that the team determined the District's social worker was not qualified to provide the counseling services on the Student's IEP because she was not a licensed clinical social worker (LCSW) and therefore, was not licensed or insured to deliver therapy in an official capacity. It was also discussed that other mental health service providers previously used by the District may also be inappropriate because they were often interns or mental health providers currently in training, which would not meet the Student's needs for more specialized care. The emails also documented the Parent's concerns that from October through December 2020, the Student appeared to be regressing in his ability to attend to online learning due to a lack of counseling services.

11. In its response, the District stated that while it acknowledged it had not implemented the counseling services on the Student's IEP, it was "moving forward to secure a contract therapist to provide these services twice weekly for an hour each session until services missed from 10/7/2020 are made up, and then once a week for an hour, as outlined in the IEP."

According to the District's response, from October 7 through December 18, 2020, the Student did not receive the 60 minutes (1 hour) weekly of counseling services as outlined in his IEP. This resulted in the Student not receiving 11 hours of counseling services provided in his IEP.⁴

12. On December 10, 2020, the IE coordinator emailed the Student's private counselor to inquire if she would be interested in contracting with the District to provide counseling services to the Student for the amount of time provided on his IEP, and for additional make up hours to compensate the Student for hours not previously provided since October 2020. That same day, the Student's private counselor responded that she would be happy to provide the Student's counseling services.
13. On December 16, 2020, the IE coordinator forwarded the December 10, 2020 email exchange between the District and the Student's private counselor to District staffing and agency contract staff and requested it set up a contract for services as soon as possible.
14. In its response, the District proposed the following corrective actions to address the admitted violation:
 - "Compensatory services to consist of an additional hour each week of counseling services for 10 weeks"
 - "Train appropriate staff on implementation of all services listed in the IEP, including counseling, and inclusive of the following:
 - i. Process for assigning a counselor or other staff member to deliver counseling services
 - ii. Training of which school staff are qualified to deliver counseling services

⁴ The Student missed 11 weeks of counseling services, which the District acknowledged. Accordingly, OSPI assumes the District intended to propose 11 weeks of compensatory services, instead of the 10 weeks proposed in the District's response.

iii. Requirements of the District to fully implement IEPs.”

15. On January 18, 2021, the District provided documentation that it had contracted with the Student’s private counselor to provide one to two hours of counseling per week from (tentatively) February 1 to June 18, 2021.
16. On January 21, 2021, the complaint investigator interviewed the Parent regarding the District’s proposal. The Parent expressed concerns about adding an extra direct counseling session into the Student’s week. The Parent noted that adding more minutes of direct counseling during a one-week time period than the Student required for a free appropriate public education (FAPE), in addition to private counseling outside of school, may be harmful to the Student, noting that additional counseling was something the Student required only when in crisis. She further explained that the Student often had difficulty when transitioning to fewer counseling sessions per week and worried about the impact additional counseling sessions per week could have on the Student when any additional sessions would end—especially if they were not going to remain part of his schedule or routine.

The Parent did, however, note that she had been paying out of pocket to maintain the counseling services outlined in the Student’s IEP during the weeks the District was not providing it to ensure the Student was successful at school, and that she agreed with the District’s proposal to begin providing direct counseling during the school day as outlined in his IEP to ensure the Student received a FAPE. She agreed the Student required compensatory services, but proposed that hours of counseling services provided as compensatory hours during the week be used as time for the counselor to consult with the Student’s teachers and other providers working with the Student to offer strategies to help implement the Student’s IEP and improve access for the Student to the general education setting and curriculum, and to collaborate with the Student’s IEP team on developing the Student’s IEP.

The Parent added that while utilizing the Student’s private counselor in the short term for the remainder of the current school year was a temporary solution, that the Student’s private counselor did not typically work with school districts to provide counseling services to students, that the private counselor was doing so as a short-term favor to the Student, as no other qualified mental health providers were available. The Parent stated she felt it was necessary for the District to work on securing a long-term solution to prevent future gaps in providing mental health services to students in the District who required them to receive a FAPE.

The Parent expressed further frustration that she felt the behavior interventions provided by the behavior team at the District, which included only board certified behavior analysts, focused on interventions based on the premise that all behavior has a clear and understandable function, which she said she did not feel was appropriate for a student with mental illness, where the cause of behaviors may not always be clear. The Parent relayed that she hoped moving forward, the District would improve the access students with mental health disabilities have to mental health services, including qualified counselors.

CONCLUSIONS

Counseling Services – The Parent alleged the District did not implement the counseling services in the Student’s individualized education program (IEP) from the commencement of the 2020-2021 school year through December 10, 2020. At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction who is eligible to receive special education services. It must provide all services in a student’s IEP, consistent with the student’s needs as described in that IEP. Counseling services may be included on a student’s IEP if an IEP team determines they are necessary for the student to access his special education services, and may be provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

Here, the Student began the 2020-2021 school year at a nonpublic agency (NPA), at which he was provided counseling services as outlined in his IEP. Upon changing placements to his neighborhood school on October 7, 2020, the District acknowledged it was unable to implement the counseling services in the Student’s IEP due to it not having a qualified provider at the District. Although a social worker, psychologist, or guidance counselor may provide counseling services, the provider must be qualified to provide the services based on the Student’s individual needs. The Student’s IEP team determined the Student required individual therapy for mental health disorders that were preventing the Student from being able to access his specially designed instruction, which required services by a provider who was both able to deliver individual therapy to the Student during the school day, and who possessed a certain level of expertise in counseling. In its response, the District acknowledged it had not implemented 60 minutes (1 hour) weekly of counseling services from October 7, 2020, when the Student began attending his neighborhood school, through December 10, 2020, the date when this complaint was filed (11 weeks). OSPI agrees with the District and finds it in violation. The District has documented it has since secured a contract with a qualified counselor to provide the counseling services in the Student’s IEP in addition to compensatory services. The District has also proposed training for District staff on IEP implementation relating to the provision of counseling services.

OSPI agrees with the District’s proposal to provide compensatory services for the 11 hours of counseling services the Student was denied. The services may be provided in the form of direct counseling or as consultation services.

CORRECTIVE ACTIONS

By or before **February 26, 2021, March 5, 2021, April 12, 2021, and June 25, 2021**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

COMPENSATORY EDUCATION

By or before **February 19, 2021**, the District and the Parent together will develop a schedule for providing the following compensatory education to the Student: 11 hours of counseling services.

The services will be provided by a qualified licensed mental health professional who is qualified to provide individual therapy. The compensatory hours may be provided in the form of direct therapy sessions or consultation services. The District must consider input from the Parent, including any information from the Student's current private mental health provider offered by the Parent, when determining whether to provide the compensatory services as direct or consultation services.

The District will provide OSPI with documentation of the schedule for services by or before **February 26, 2021**.

If the District's provider is unable to attend a direct counseling 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 **June 18, 2021**, including those needing to be rescheduled, unless the District and Parent agree to an alternative timeline, which must be approved by OSPI.*

No later than **June 25, 2021**, 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.

If necessary, the District either must provide the transportation necessary for the Student to access these services or reimburse the Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must provide reimbursement for round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **June 25, 2021**.

DISTRICT SPECIFIC:

TRAINING

The following District staff will receive training: special education administrators, the principal, the assistant principal, and special education certified staff, including educational staff associates (ESAs), at the school that the Student was enrolled in during the 2020-2021 school year. The training will cover the following topics:

1. IEP implementation, including counseling services when included on the IEP, and inclusive of the following:
 - i. Process for assigning a counselor or other staff member to deliver counseling services when included on an IEP;
 - ii. Training of which school staff are qualified to deliver counseling services; and,
 - iii. Requirements of the District to fully implement IEPs.

The training will include examples. The training may be conducted by someone who was an employee of the District during the timeline of this complaint. The individual that presents the

training should consult with ESD 121 staff in the creation of the training materials. The District will provide the trainer with a copy of this decision, SECC 20-146.

By or before **February 26, 2021**, the District will notify OSPI of the name of the trainer and provide documentation that the District has provided the trainer with a copy of this decision for use in preparing the training materials.

By or before **March 5, 2021**, the District will submit a draft of the training materials for OSPI to review. OSPI will approve the materials or provide comments by March 12, 2021.

By **April 5, 2021**, the District will conduct the training regarding the topics raised in this complaint decision. The training may be conducted remotely due to the current COVID-19 pandemic.

By **April 12, 2021**, the District will submit documentation that required staff participated in the training. This will include 1) a sign-in sheet from the training, and 2) a separate official human resources roster of all staff required to attend the training, so OSPI can verify that all required staff participated in the training.

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 January, 2021

Glenna Gallo, M.S., M.B.A.
Assistant Superintendent
Special Education
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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.)