

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-116**

### **PROCEDURAL HISTORY**

On September 20, 2022, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community 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 September 26, 2022, 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 October 13, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent on October 17, 2022. OSPI invited the Parent to reply.

On October 28, 30, and 31, 2022, OSPI received the Parent's reply that consisted of five emails with attachments and thirteen emails that provided a link to a shared Google drive. The Parent was informed that three of these links could not be opened. OSPI forwarded the accessible information to the District on October 31, 2022.

On November 1, 2022 OSPI received additional information from the Parent that consisted of eight emails that provided a link to a shared Google drive. The Parent was informed that seven of these links could not be opened. OSPI forwarded the accessible information to the District on November 8, 2022.

On November 2, 2022, OSPI received additional information from the Parent that consisted of one email that provided a link to a shared Google drive, and four emails with attachments. OSPI forwarded this information to the District on November 8, 2022.

On November 3, 2022 OSPI received additional information from the Parent that consisted of two emails with attachments. OSPI forwarded this information to the District on November 8, 2022.

On November 4, 2022 OSPI received additional information from the Parent that consisted of one email with attachments. OSPI forwarded this information to the District on November 8, 2022.

On November 6, 2022 OSPI received additional information from the Parent that consisted of seven emails and five with attachments. OSPI forwarded this information to the District on November 8, 2022.

On November 7, 2022 OSPI received additional information from the Parent that consisted of two emails with attachments. OSPI forwarded this information to the District on November 8, 2022.

On November 8, 2022 OSPI received additional information from the Parent. OSPI forwarded this information to the District on the same day.

On November 2, 2022, the OSPI complaint investigator conducted a telephone interview with the Parent.

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

### **SCOPE OF INVESTIGATION**

This decision references events that occurred prior to the investigation period, which began on September 21, 2021. These references are included to add context to the issues under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.

### **ISSUE**

1. Since September 21, 2021, did the District implement the Student's individualized education program (IEP) during the 2021–2022 school year?

### **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 served through enrollment who is eligible to receive special education services. 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.

"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 [child with a disability] and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

### **FINDINGS OF FACT**

1. During the 2021–2022 school year, the Student attended a District elementary school as a kindergartener and was eligible for special education services under the category of developmental delay.
2. The Student's May 5, 2021 IEP was in effect at the beginning of the 2021–2022 school year. From August 31, 2021 through May 11, 2022, the IEP provided specially designed instruction (SDI) and related services in:
  - Speech Language-articulation: 30 minutes/4 times per month (provided by a speech language pathologist (SLP), in a special education setting)
  - Speech Language-language: 30 minutes/4 times per month (provided by an SLP, in a special education setting)
  - Social/Emotional Skills: 30 minutes/4 times per week (provided by a special education teacher, in a special education setting)

- Adaptive Skills: 30 minutes/4 times per week (provided by a special education teacher, in a special education setting)
- Social/Emotional Skills: 45 minutes/5 times per week (provided by a paraeducator, in a general education setting)
- Adaptive Skills: 30 minutes/4 times per week (provided by a paraeducator, in a general education setting)

The Student's LRE placement called for a general education setting of 80–100%.

3. The Student was in District's "integrated program" (IP). According to the District, students primarily assigned to an IP caseload receive SDI addressing the "mild to moderate differences" in their instructional needs. Instructional content varies based on each student's IEP. Services may be provided in any setting, based on the student's IEP.
4. On August 31, 2021, the District held its first day of kindergarten for the 2021–2022 school year.
5. During the 2021–2022 school year, there were multiple emails detailing the staffing shortage in the IP. For example:
  - On September 12, 2021, an internal District email stated, "I am attaching the latest IP schedule after attempting to make sure that our most needy students are getting the minutes they are supposed to have. It still does not cover minutes for all students."
  - On October 29, 2021 an internal District email stated, "So this week we had ZERO IP para subs. From the beginning of the school year, we have had an IP para or sub 41% of the first 46 days of school."
  - On October 30, 2021, the District sent the Parent an email, stating, "We have one 6 hour para for one full time IP teacher...All of the students on the paras schedule are not receiving services when there is no sub."
  - On November 24, 2021, the District sent the Parent an email, stating, "So we'll still be getting IP para subs on Mondays, Wednesdays and Fridays until winter break. After that, I don't know what is expected to happen so I guess we'll have to wait and see."
  - On January 14, 2022, the District sent the Parent an email, stating, "The staffing on the para position is still on a rotation, especially as COVID continues to impact staffing across the district."
  - On January 21, 2022, the District sent the Parent an email, stating, "...this school year has been extremely trying for many reasons related to COVID...You are aware of the para situation that has caused a staffing shortage."
6. On some of the days that there was not an IP paraeducator, other staff members, such as the IP teacher, did the work of the IP paraeducator.
7. On November 19, 2021, the Parent emailed the District and stated, "I am requesting an IEP meeting to review the hundreds of missing IEP minutes for [Student]. At this meeting I expect an accurate count of minutes, copies of records, and schedule for compensatory minutes."
8. On December 1, 2021, the Student's IEP team met to review the Student's service minutes and daily schedule. The prior written notice (PWN) stated that the IP paraeducator had not been consistent in attendance at school since the beginning of the school year. The Parent stated

in an email, "I was not provided the requested information at the meeting and the Student was not scheduled for any compensatory minutes."

9. On April 19, 2022, the Student's IEP team met to discuss the Student's reevaluation. The reevaluation indicated the Student continued to be eligible for special education services, although changed the eligibility category from developmental delay to communication disorders. The reevaluation report recommended the Student receive SDI in speech language and stated the Student no longer required SDI in other areas.
10. On May 3, 2022, the Student's IEP team met to create a new annual IEP based on the Student's April 2022 evaluation. This new IEP changed the Student's SDI to:
  - Speech Language-articulation: 30 minutes/4 times per month (provided by an SLP, in a special education setting)
  - Speech Language-language: 30 minutes/4 times per month (provided by an SLP, in a special education setting)
11. On May 4, 2022, the District acknowledged that it had received the Parent's request for:
  - An independent educational evaluation (IEE); and,
  - "Stay put" rights to ensure that the Student continued to receive adequate services.
12. On May 18, 2022, the Student's IEP team met again, and a PWN, dated May 20, 2022, stated: The team met to develop [Student's] IEP in alignment with [Student's] April 2022 reevaluation. Parent request for an IEE has been granted to review the findings of the April 2022 special education reevaluation. Parent is not in agreement with this IEP due to exclusion of adaptive and social/emotional SDI per reevaluation. Parent is also requesting compensatory education services.
13. On May 20, 2022, the Parent filed special education community complaint (SECC) 22-63. The issues in this complaint were:
  - Did the District follow procedures to monitor and report the Student's individualized education program (IEP) progress during the 2021–2022 school year?
  - Did the District properly amend the Student's IEP in February 2022 to removing adaptive and social emotional services, including whether this decision was made based on sufficient, Student-specific data?
14. On June 17, 2022, the District held its last day of instruction.
15. On June 22, 2022, the District sent a letter to the Parent. The letter, in part, provided: Our records indicate there were a total of 67 school days from 8/26/2021 – 5/18/2022 in which a special education staff member was absent from [Student's] program, possibly impacting a maximum of 7839 minutes (117 hours) Student was entitled to receive pursuant to her IEP. Again, this number is the maximum amount she could have missed assuming other staff did not serve her. As we have discussed, the typical remedy in cases when a school district fails to provide services outlined in an IEP is an offer of compensatory education. Below is a brief summary from OSPI of compensatory educational services:  
  
The purpose of compensatory educational services is to remedy a district's inability to provide a Student with appropriate special education services during the time the Student

is or was entitled to a FAPE. An award of compensatory services seeks to place the Student in the position they would have been in, had the Student not been deprived of special education and related services. Compensatory education is designed to ensure a Student is appropriately educated within the meaning of the IDEA and thus, generally, there is no requirement to provide day-for-day or minute for minute compensation for time missed...

Noting Student's educational record, Student was found eligible for special education services in 2019 under the category of Developmental Delay requiring specially designed instruction in the areas of adaptive, social emotional and speech and language. During the time period at issue, Student made adequate progress in these qualifying areas. A reevaluation in April 2022 found Student no longer requires specially designed instruction in the areas of adaptive and social emotional skills.

Although staff attendance records indicate Student's full IEP minutes may not have been delivered during the 2021-22 school year, IEP records indicate compensatory services are not required to place Student in the position she would have been in had the full IEP been implemented through the whole school year. However, in recognition of the challenges presented by this school year and the desire to support Student's continued success, the District is willing to provide Student with 39 hours of compensatory services addressing speech and language, which is her only area of which specially designed instruction is required. The district proposes to provide these services on a mutually agreeable schedule outside of Student's regular school hours.

16. The District gave the Parent until July 1, 2022, to accept the offer of 39 hours of compensatory education services. The deadline was subsequently extended to July 15, 2022. The Parent never accepted the offer.
17. On July 26, 2022, OSPI issued a decision and found no violations in SECC 22-63.
18. On September 20, 2022, the Parent filed the present complaint, requesting, among other things, an investigation into the IEP minutes actually served to the Student, and compensatory education equal to the IEP minutes that were not served.
19. On November 3 and 7, 2022, the Student's IEP team met to amend the Student's IEP. A draft of the IEP indicated the Student will receive SDI in speech language, adaptive, and social emotional moving forward.

## **CONCLUSIONS**

**Issue One: IEP Implementation** – The Parent requested an investigation into the IEP minutes actually served to the Student during the 2021–2022 school year, alleging that the Student's IEP was not fully implemented. The Parent requested compensatory education equal to the IEP minutes that were not served.

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 child with a disability and those required by the IEP.

Throughout the 2021–2022 school year, the COVID pandemic caused serious staffing issues within the District, including within the integrated program (IP) that served the Student. In emails sent on September 12 and October 30, 2021, the District acknowledged that it could not provide IP students’ service minutes when IP staff was absent. On June 22, 2022 the District wrote a letter to the Parent that stated, “there were a total of 67 school days from 8/26/2021 – 5/18/2022 in which a special education staff member was absent from [Student’s] program.” The District acknowledged that the Student’s IEP likely was not fully implemented. OSPI notes that as 67 days is equal to over one-third of the school year, this presents a material failure to implement the Student’s IEP. Based on these facts, OSPI finds a violation regarding the implementing of the Student’s IEP services during the 2021–2022 school year.

On June 22, 2022, the District offered the Parent 39 hours of compensatory education to compensate for the Student’s missed IEP services from August 31, 2021 through May 18, 2022.<sup>1</sup> The District arrived at 39 hours of compensatory services by doing the following calculation:

- The Student was scheduled to receive 585 minutes per week of special education services, or 117 minutes per day.
- 117 minutes per day for 67 days equals 7,839 minutes.
- 7,839 minutes divided by 60 minutes per hour equals 117 hours.
- 117 hours multiplied by one-third equals 39 hours.

However, OSPI notes there is an error in the District’s calculation: 7,839 minutes divided by 60 minutes per hour equals approximately 130 hours, a third of which is 43 hours. OSPI finds that 43 hours is an equitable remedy, given that the services will be provided in a 1:1 setting, wherein progress can generally be achieved more quickly, while the original services were to be provided in a classroom/group setting.

The District will provide the Student with 43 hours of 1:1 compensatory education according to a mutually agreeable schedule outside of the Student’s regular school hours.

### **CORRECTIVE ACTIONS**

By or before **December 19, 2022, March 1, 2023, April 3, 2023, May 1, 2023, and June 30, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

##### **Compensatory Education**

By or before **December 12, 2022**, the District and Parent will develop a schedule for 43 hours of compensatory education, divided as follows:

- Speech Language: 6 hours

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<sup>1</sup> OSPI notes the District disagreed that the Student required compensatory education, in part because her April 2022 reevaluation indicated the Student had made significant progress that warranted removing several services areas from her IEP. However, based on a draft IEP, it appears some of these services are being added back to the Student’s IEP.

- Social/Emotional Skills: 25 hours
- Adaptive Skills: 12 hours

Unless otherwise agreed to by the District and Parent, services will be provided by a certified special education teacher or related service provider. Services may be provided in a 1:1 setting or a group setting, if appropriate. Services will be provided outside the District's school day and can be schedule on weekends, District breaks, or before or after school. The District will provide OSPI with documentation of the schedule for services by or before **December 19, 2022**.

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 or provider with at least 24 hours' notice of the absence, the session does not need to be rescheduled. The services must be completed no later than **June 23, 2023**.

The District must provide OSPI with an update on the amount of compensatory services provided to the Student by providing documentation on **March 1, 2023, April 3, 2023, and May 1, 2023** of the compensatory services provided to the Student at that point. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled or missed by the Student. By or before **June 30, 2023**, the District must provide OSPI with documentation that it has completed compensatory services for the Student.

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 30, 2023**.

**DISTRICT SPECIFIC:**

None.

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 16th day of November, 2022

Dr. Tania May  
Assistant Superintendent of 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.)