

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-97**

### **PROCEDURAL HISTORY**

On August 26, 2022, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from an attorney (Complainant) representing the parent (Parent) of a student (Student) attending the Highline School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On August 30, 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 September 14, 2022, the District requested an extension of time to respond to the complaint. OSPI granted the extension to September 23, 2022.

On September 23, 2022, OSPI received the District's response to the complaint and forwarded it to the Complainant on September 26, 2022. OSPI invited the Complainant to reply.

On September 26, 2022, OSPI requested additional information from the Complainant, and the Complainant provided the requested information and their reply on October 6, 2022. OSPI forwarded the information to the District on October 7, 2022.

On September 26, 2022, OSPI requested that the District provide additional information, and the District provided the requested information on October 10, 2022. OSPI forwarded the information to the Complainant the same day.

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

### **ISSUE**

1. 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 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 [student with a disability] 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, (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 1994). The award of compensatory education is a form of equitable relief and the IDEA does not require services to be awarded directly to the student. *Park ex rel. Park v. Anaheim Union School District*, 464 F.3d 1025, 46 IDELR 151 (9<sup>th</sup> Cir. 2006).

## **FINDINGS OF FACT**

### **Background**

1. The Student is eligible for special education services under the category of other health impairment.
2. The Student has received education services in the home setting since March 2019 due to his medical conditions. The complaint indicated the Student cannot access instruction via remote learning due to his developmental delay, and that when it has been attempted, the Student refuses to engage with a screen.

### **2021–2022 School Year**

3. The District's first day of school for the 2021–2022 school year was September 2, 2021.
4. At the start of the 2021–2022 school year, the Student was eligible for special education services under the category of other health impairment and attended a District elementary school, and his April 2021 individualized education program (IEP) was in effect.
5. The Student's April 2021 IEP noted the Student had been participating in "a home-based program for the past two school years due to health concerns and being susceptible to illness." The IEP included goals in adaptive (independent work skills, asking for help), social/emotional/behavioral (greetings), reading (vocabulary), math (pre-math concepts), and written language (name recognition).

The IEP provided the Student with the following specially designed instruction, provided in a special education setting, by a special education teacher in the special education setting: 50 minutes per week in each reading, math, written language, adaptive, and social emotional.

The IEP also included related services in communication (30 minutes per month), physical therapy (30 minutes quarterly), and occupational therapy (60 minutes per month). The IEP

indicated the Student spent 1,760 minutes in school, with 84.3% of his time in the general education setting.<sup>1</sup> However, the placement page of the IEP indicated the Student's placement was a "homebound" placement.

6. Per the Student's IEP, the District noted the Student receives approximately 4.5 hours per week of services.
7. Prior to the start of the 2021–2022 school year, the Parent emailed the District's director of special education (director) and asked what the school year would look like for the Student. The director responded that the District was providing homebound services virtually and not sending staff into homes. The director suggested they have a call to discuss options. The Parent replied and stated that virtual did not work well for the Student, and stated she wanted to discuss options.
8. Throughout September 2021, the director and Parent continued to email, discussing that the District needed the medical reason the Student could not access school in-person and about scheduling a meeting with the Student's team to determine how services could be provided. Emails also indicated the District was working on contracting with an agency for tutoring staff and then they could schedule a meeting to discuss how to implement services.
9. On October 4, 2021, the director emailed the Parent and stated they had hired an agency tutor who would be able to start the following week, and that the school team would schedule a meeting to plan for instruction.
10. Emails and documentation in the complaint and District's response provided the following information about tutoring for the Student during the 2021–2022 school year:
  - **October 1 and 4, 2021:** District communicated and confirmed that tutoring services would start the following week.
  - **October 8, 2021:** Tutor located, but tutor fell through and did not provide instruction.
  - **October 12, 2021:** District communicated ongoing efforts to find a tutor.
  - **October 13, 2021:** Parent agreed to a plan where the Student would receive in-person instruction in a portable at the school. However, this plan was not implemented.
  - **October 22, 2021:** Tutor located and assigned to work with the Student at home. The tutor provided the Student instruction—three days a week, for 1.5 hours per day.
  - **February 2, 2022:** the tutor left her position at the tutoring agency.
  - **February 2021:** A plan where the Student would receive in-person instruction in a portable at the school was discussed. However, this did not work out because prior to starting, the District's mask requirement was lifted and it was not safe for the Student to be at school in-person due to the risk of infection.
  - **April 2022:** A new tutor located; however, the tutor had previously worked with the Student and had previously engaged in "unsafe behavior that put [Student's] health and risk" and who had, "had difficulty providing [Student] with the instruction outlined in his IEP." Parent had previously requested this tutor no longer work with the Student but agreed because this tutor was the only one available.

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<sup>1</sup> The complaint indicated this was inaccurate as the Student receives instruction via a 1:1 tutor in the home setting.

- **April 25, 2022:** New tutor began, and issues emerged, according to the complaint, with the tutor not wearing a mask, not washing her hands, and coming to work sick.
- **April 29, 2022:** The District and Parent mutually decided to end the tutor's assignment.
- **May 16, 2022:** A different new tutor began working with the Student, but was reassigned the following day.
- **May 19-23, 2022:** Agency staff assigned and tutored the Student until May 23, 2022.
- **June 6, 10, and 13, 2022:** The Student received instruction in-person at school because the District located a portable that was not used during the school day, lessening the risk of infection. The District response stated that between May 31 and June 13, 2022, the Student was provided services at school two days per week.

11. The District was on winter break from December 20–31, 2021.

12. On March 23, 2022, the Student's IEP team updated his IEP. The Student's special education services remained the same. The IEP indicated the Student required recovery services in adaptive, social/emotional, reading, math, and writing. The IEP noted the Student continued to receive services through a home-based program. The IEP also indicated the Student was eligible for extended school year (ESY) services.

The IEP included present levels, indicating the Student made little or no progress on many of his goals and indicated all of the previous goals would be continued, although a few with updated baselines (math and writing). The IEP included goals in adaptive (independent work skills, asking for help), social/emotional/behavioral (greetings), reading (vocabulary), math (pre-math concepts), and written language (name recognition).

13. The District's school year ended on June 16, 2022.

14. The District, in its response, stated it did "not dispute that services were not delivered consistently to the [S]tudent." The District noted that unfortunately, "locating a service provider willing to go to the home was challenging despite ongoing efforts to do so."

15. The Complainant, in her reply to the District's response, noted the Student did not receive most of his related services during the school year. The Complainant stated the Student received some physical therapy, in-person, two days a week from May 31 to June 13, 2022; however, "these services were provided concurrent with the delivery of special education services, so it is difficult to determine exactly how many physical therapy minutes were delivered."

### **Summer 2022**

16. The Student was provided summer services by District staff, in the Student's home for three days a week from July 5 through August 5, 2022. The Complainant clarified that this was three 90-minute sessions of tutoring per week.

17. The Complainant noted in her reply to the District's response that the summer services were categorized as recovery services, but that the Student's IEP indicated he was eligible for ESY and therefore, it was unclear whether the summer services were recovery services or ESY.

18. The Parent stated, regarding the summer services and tutor:

She is incredible and has done such a good job with [Student]. For example, she helps him with social interaction by using our pets as other students and she helps him interact with them. It is amazing to see the progress that [Student] can make when he receives quality tutoring. It also is frustrating to see what he has been missing out on during the most recent school year.

19. On July 27, 2022, the Student's IEP team met and developed the Student's IEP. According to the prior written notice, the team updated the services matrix to reflect that all services are received at home. The IEP included updated present levels and goals, based on data from recovery services. The IEP included the following specially designed instruction and related services, all to be provided in a special education setting:

- Communication: 30 minutes monthly (provided by an SLP)
- Physical Therapy: 30 minutes quarterly (provided by a PT)
- Occupational Therapy: 30 minutes, twice monthly (provided by an OT)
- Math: 15 minutes, 3 times weekly (provided by a paraeducator, monitored by a special education teacher)
- Reading: 15 minutes, 3 times weekly (provided by a paraeducator, monitored by a special education teacher)
- Written Language: 15 minutes, 3 times weekly (provided by a paraeducator, monitored by a special education teacher)
- Social/Emotional Behavior: 10 minutes, 3 times weekly (provided by a paraeducator, monitored by a special education teacher)
- Adaptive Behavior: 10 minutes, 3 times weekly (provided by a paraeducator, monitored by a special education teacher)
- Reading: 30 minutes, 2 times monthly (provided by a special education teacher)
- Math: 30 minutes, 2 times monthly (provided by a special education teacher)
- Written Language: 30 minutes, 2 times monthly (provided by a special education teacher)
- Social/Emotional Behavior: 15 minutes, 2 times monthly (provided by a special education teacher)
- Adaptive Behavior: 15 minutes, 2 times monthly (provided by a special education teacher)

The IEP indicated the Student received 281 minutes per week of instruction, and the IEP noted the Student "receives his special education services at home. A majority of his services will be provided by what is listed as a paraeducator but could also be a tutor or other district staff. The special education teacher will create and provide the programming and schedule for the para/tutor."

### **2022–2023 School Year**

20. The Complainant also provided an update about the Student's services so far during the 2022–2023 school year, noting the Student "has continued to receive limited services." The Complainant stated:

He has received tutoring on September 13, September 15, September 29 for 45 minutes per session and October 5 for about 60 minutes. The District has indicated that it is hiring staff to tutor [Student], but it has not yet given a start date for this staff person. Also, as noted above, [Student] did receive approximately 60 minutes of physical therapy on September 27.

## CONCLUSIONS

**Issue: IEP Implementation** – The Complainant alleged the District failed to implement the Student’s IEP during the 2021–2022 school year. The Complainant summarized that the Student received educational instruction from October 22, 2021 to February 2, 2022, from April 25–29, and on May 16 and June 6, 10, and 13, 2022. During the remainder of the school year, the Student received no instruction.

A 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.

The Student’s IEP provided him with 250 minutes of specially designed instruction weekly in reading, math, written language, adaptive, and social/emotional; 30 minutes communication and 60 minutes occupational therapy monthly; and 30 minutes physical therapy quarterly. The District acknowledged the Student’s IEP wasn’t implemented consistently throughout the 2021–2022 school year, in large part due to the challenges of locating a service provider to work in a homebound placement.

The District’s school year consisted of approximately 36 instructional weeks (excluding breaks). Based on the documentation in the complaint, the Student received instruction for approximately 13 weeks of the school year (October 22, 2021 through February 2, 2022 and a handful of other days). This means that for approximately 23 weeks of the school year, the Student received no educational instruction, which equates to 5,750 minutes (95.8 hours) of missed instruction. The Student did not receive his communication and occupational therapy services—a total of 300 minutes (5 hours) of communication and 600 minutes (10 hours) of occupational therapy missed; and the Student received some physical therapy and therefore likely missed approximately 90 minutes (1.5 hours) of physical therapy.

OSPI finds this is a material failure to implement the Student’s IEP and that compensatory education is warranted. Given the significant amount of instruction missed, the District will be required to provide 96 hours of academic compensatory services, split between the Student’s service areas (reading, math, written language, adaptive, and social/emotional); 5 hours of communication; 10 hours of occupational therapy; and 1.5 hours of physical therapy. Additionally, as the Complainant reported that the Student is still not receiving consistent services, the Student’s IEP team will be required to meet to discuss the plan for ensuring the consistent

provision of services during the 2022–2023 school year and whether any additional compensatory education hours for the 2022–2023 school year are warranted.

### **CORRECTIVE ACTIONS**

By or before **November 4, 2022, January 6, 2023, May 26, 2023, August 31, 2023,** and **October 13, 2023,** the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

##### **IEP Meeting**

By or before **October 28, 2022,** the Student's IEP team will meet to discuss the plan for ensuring the consistent provision of services during the 2022–2023 school year. This discussion will include when the staff person being hired to serve as the Student's tutor will start, any contingency plans for providing the Student services if staff are absent or fall through, how related services will be provided, and whether any additional compensatory education hours are needed to address services missed at the start of the 2022–2023 school year.

By or before **November 4, 2022,** the District will provide OSPI with the following documentation: a) any relevant meeting invitations, b) a prior written notice, summarizing the IEP team's discussion and decisions; and c) any other relevant documentation.

##### **Compensatory Education**

By or before **October 28, 2022,** the District and Parent will develop a schedule for 112.5 hours of compensatory education, divided as follows:

- 96 hours split between math, reading, writing, adaptive, and social emotional/behavioral
- 5 hours of communication
- 10 hours of occupational therapy
- 1.5 hours of physical therapy

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, over District breaks, or before or after school.<sup>2</sup> The compensatory services can be provided through a District summer program, if that program will provide specially designed instruction in the Student's areas of service. The District will provide OSPI with documentation of the schedule for services by or before **November 4, 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

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<sup>2</sup> OSPI notes that in his homebound placement, the Student receives fewer minutes of instruction than a full school day. Thus, the compensatory education services should be outside the Student's "school day" but could be during the District's school day. If the District and Parent have questions, please contact OSPI.

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 **October 10, 2023**.

The District must provide OSPI with an update on the amount of compensatory services provided to the Student by providing documentation on **January 6, 2023, May 26, 2023, and August 31, 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 **October 13, 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 **October 13, 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 17th day of October, 2022

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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.)