

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-37**

### **PROCEDURAL HISTORY**

On March 16, 2023, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Kiona-Benton City 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 March 17, 2023, 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 March 28, 2023, the District requested an extension of time to respond to the complaint. OSPI granted the extension to April 10, 2023.

On April 1, 2023, the complaint investigator interviewed the Parent.

On April 10, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent on April 11, 2023.

On April 21, 2023, the complaint investigator interviewed the Parent.

OSPI considered all 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 during the interviews.

### **ISSUES**

1. Whether the District implemented the Student's individualized education program (IEP) in the appropriate setting between January and February 2023?
2. Whether the District followed procedures to amend the Student's IEP if the setting for services was changed in January 2023?

### **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. 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.

"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).

IEP Amendments and Change of Placement: One of the procedural requirements of the IDEA is that a reevaluation must be completed before a significant change of placement is made. *In re: Kent School District*, OSPI Cause No. 2016-SE-0111 (WA SEA 2016). The performance and skill levels of students with disabilities frequently vary, and students, accordingly, must be allowed to change from assigned classes and programs. However, a school may not make a significant change in a student with disabilities placement without a reevaluation. *Student Placement in Elementary and Secondary Schools and Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act* (Office for Civil Rights, August 2010). In determining whether a change in placement has occurred, the district responsible for educating a student eligible for special education must determine whether the proposed change would substantially or materially alter the student's educational program. In making this determination, the following factors must be considered: whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled children to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular activities; and whether the new placement option is the same option on the continuum of alternative placements. *Letter to Fisher*, 21 IDELR 992 (OSEP, July 6, 1994).

Part of the information the IEP team considers when reviewing and revising a student's IEP is the result of the most recent evaluation. When the student's service providers or parents believe that the IEP is no longer appropriate, the team must meet to determine whether additional data and a reevaluation are needed. 34 CFR §300.303; WAC 392-172A-03015.

Prior Written Notice: Prior written notice ensures that the parent is aware of the decisions a district has made regarding evaluation and other matters affecting placement or implementation of the IEP. It documents that full consideration has been given to input provided regarding the student's educational needs, and it clarifies that a decision has been made. The prior written notice should document any disagreement with the parent, and should clearly describe what the district proposes or refuses to initiate. It also includes a statement that the parent has procedural safeguards so that if they wish to do so, they can follow procedures to resolve the conflict. Prior written notice is not an invitation to a meeting. Prior written notice must be given to the parent within a reasonable time before the district initiates or refuses to initiate a proposed change to the student's identification, evaluation, educational placement or the provision of a free appropriate public education. It must explain why the district proposes or refuses to take action. It must describe any other options the district considered, and it must explain its reasons for rejecting those options. 34 CFR 300.503; WAC 392-172A-05010.

## FINDINGS OF FACT

1. At the start of the 2022–2023 school year, the Student was eligible for special education services under the category of specific learning disability (SLD), was in the sixth grade, attended a District middle school, and their October 2021 individualized education program (IEP) was in effect.
2. The District’s school year began on August 30, 2022.
3. The District reported that an annual IEP meeting was held for the Student on October 20, 2022. The team convened and drafted an IEP for the 2022–2023 school year (October 2022 IEP).

The October 2022 IEP stated that the Student was “very shy” and a “hard worker.” The October 2022 IEP noted the Student’s needed services were in reading comprehension and had one goal for reading comprehension. The IEP contained seven accommodations, and the location noted for the accommodations is either the general education classroom, the testing location, or all classrooms. The IEP provided the Student with the following specially designed instruction:

- 51 minutes of reading comprehension, 4 times per week (provided in the general education classroom in a co-taught model)
- 41 minutes of reading comprehension, 1 time per week (provided in the general education classroom in a co-taught model)

The placement option selected on the IEP was 80–100% in general education.

4. On January 6, 2023, the superintendent met with other administrators to address large class sizes and crowding in the Student’s middle school. The District noted that the superintendent had previously requested changes at the middle school to address crowded classrooms during the Fall of 2022, but that as of January 2023, no changes had been made at the school.
5. The District stated in its response that, at this time, the educational union contract required that no more than five students on an IEP were allowed in a general education classroom at one time. As a result, the District stated that the administrators were instructed to remove all students eligible for special education services in co-taught general education reading and math classes, by the beginning of the second semester.
6. On January 12, 2023, an administrator met with the Student’s case manager and told the case manager that they had been directed to move all sixth-grade students with IEPs out of co-taught math and/or English classes. This required the Student to move from her co-taught reading and math general education classes and report to the special education classroom for 1st and 2nd period.
7. On January 13, 2023, the administrator called the Student’s Parent to notify her of the schedule changes and the school staff were also notified of the changes. The school staff were told that co-taught students were now to report to the “resource classroom” for their reading and math instruction.

8. On January 17, 2023, the Parent emailed an administrator to clarify that the Student's placement had been changed and to ask for more information on the reason why this had occurred.
9. The District provided documentation that it had many internal discussions about the changes for students in co-taught classes and the related staffing concerns at the middle school. Many school personnel and administrators noted that IEP team meetings would need to be held, prior to making a change of placement for students eligible for special education. The District held a "Labor and Management" meeting to discuss the middle school staffing issues and the co-teaching classroom situation.
10. On January 18, 2023, the District's executive board met to discuss the Parent's complaint related to the placement change for the Student and the related union contract and staffing issues at the middle school.
11. On January 20, 2023, a teacher emailed District administrators about her change of placement concerns related to the removal of some of her students in the co-taught class.
12. On January 24, 2023, the Parent emailed the director of special services (director) to notify her of the schedule changes at the middle school for students with IEPs. The Parent noted that the Student's IEP stated that she would receive instruction in general education setting with support, not in a special education resource room/special education setting. The email stated that there was no IEP meeting prior to the change, and that the Student came home embarrassed and upset for being "singled out in her class." The Parent noted in this email that she did not agree to the change of placement.
13. Also, on January 24, 2023, the director sent the Parent's email to the superintendent and stated that the Parent was correct, and that IEP meetings should have occurred prior to a change of placement being made. In the email, the director stated that, "I know that we are limited to 5 students with IEPs in General Education. My recommendation would be to keep those students who are doing well, if agreed by parent to have students monitored."
14. On February 1, 2023, the superintendent met with the executive school board members to offer a proposed solution to the change of placement concerns at the middle school. The proposed solution was to have teachers go through the IEPs of impacted students, and return the students to their prior classrooms, without an IEP meeting.
15. On February 6, 2023, the Student's case manager and a teacher reviewed all of the middle school students' schedules and the teaching schedules, to ensure that no class had more than five students with IEPs, while ensuring that the IEPs were being implemented in the proper setting and placement.
16. On February 7, 2023, the District finalized a plan to return the impacted students to their general education classrooms with co-teaching services and to restore the proper placements per each students' IEP.

17. On February 9, 2023, the District reached out to the Parent and reported that a schedule change for the middle school was approved by the superintendent and it would ensure IEP compliance.
18. On February 13, 2023, students with IEPs were returned to new general education classrooms and the new schedules, with proper placements per IEPs, were implemented.
19. On March 21, 2023, prior written notices (PWNs) were sent to the parents of students whose placements had changed from a general education setting co-taught class to resource room on January 23, 2023, and then back to the general education setting co-taught class, on February 13, 2023.
20. The Student's Parent received a PWN, dated March 21, 2023, that stated that the Student would be "placed in the original location of special education services in a co-teaching general education setting, as stated in the IEP." The PWN stated the Student was moved from a co-taught general education setting to a resource room from January 23—February 12, 2023. The PWN stated that the Student was returned to a general education classroom on February 13, 2023.
21. The District reported that all the Student's teachers shared that there was a noticeable change in the Student's demeanor and effort that she put into classes after she was "singled out" as an "IEP student" and forced to change classrooms several times in the winter of 2023.

For example, the Student's science teacher reported that the Student has not done well this quarter and did not put in the effort that she had previously demonstrated in the first semester. The history teacher stated that changing schedules effected the Student and noted that the Student made an A in the first quarter and a C in the third quarter. The history teacher reported that the Student struggled for a few weeks after the schedule change and noted the Student "seemed sad" as the Student was very shy and was "unnerved by change."
22. The Student's special education teacher reported that it is often very difficult for students to enter middle school, particularly with a learning disability, and that the frequent schedule changes this school year "set the Student up for failure." The special education teacher reported that the Student told her that the Student now "feels stupid because my classmates now know I am not one of the smart kids, and that I need extra help at school." The special education teacher stated that the Student is not the same person that she was at the beginning of the school year and stated that the Student's effort and confidence have "lowered dramatically." The special education teacher stated that the Student asks if her schedule will change again every week and the Student has reported fear and anxiety that her schedule will change again.
23. The Student's progress reports for her IEP goals show that the Student made sufficient progress on each IEP goal for each period of reporting during the 2022–2023 school year.
24. The District acknowledged it improperly changed the Student's placement and failed to implement the IEP as written, and proposed the following corrective actions:

- "Completed Prior written notice to parents of students that were removed from co-teaching location of service to resource room and then back to co-teaching during the time frame of January 23 – February 13, 2023. Completed March 21, 2023."
- "Provide training to all special education case managers to inform on writing and implementing a legally defensible IEP."
- "Staff registered for August 14, 2023 training / Julie Weatherly."
- "Coordinate a training for special education staff, principals and district administrators with ESD 123 Special Education Director or recommended trainer on the requirements of the IEP process when a change of any kind is recommended that will change the content of the IEP. May 2023."
- "Special Education Staff Meeting to review complaint, process, and review requirements for changing content of an IEP. Staff Meeting held March 22, 2023."

## CONCLUSIONS

**Issue One: IEP Implementation** – The Parent alleged the District did not implement the Student’s individualized education program (IEP) in the appropriate setting between January and February 2023.

A school district must develop a student’s IEP in compliance with the procedural requirements of the IDEA and state regulations. A school district must also ensure that it provides all services in a student’s IEP, consistent with the student’s needs as described in that IEP.

In this case, the District tried to balance the legal requirements of its union contract, related to class size in the middle school and the teaching responsibilities for general education teachers, along with its student specific requirements under the IDEA. OSPI recognizes the many legal obligations that the District must comply with for staffing and personnel matters, and notes that these obligations can and often do intersect; however, the IDEA does not allow for staffing quotas that undermine the special education legal requirement that IEPs be implemented. OSPI has issued statewide guidance for districts on this topic, that specifically addresses the requirements for the provision of special education to students with disabilities, which cannot be bargained or contracted away. This guidance states that each student’s needs and IEP components are unique, and that arbitrary, district-wide limits set on students’ participation within a general education classroom may deny students a FAPE.<sup>1</sup> As such, the District should not have negotiated for only five IEP students in each general education classroom, as state and federal law prohibits districts from using a predetermined ratio of students with disabilities in general education classrooms and because the setting for services and placement is an IEP team decision. And, as illustrated in this investigation, this negotiated limit resulted in the District improperly changing the placement of several students and failing to implement the IEPs of several students when those students were moved out of a general education class, not based on the IEP team’s decision making and student-specific needs, but rather on the negotiated number of students with IEPs in a general education class.

The District conceded that it did not properly implement the Student’s IEP between January and early February of 2023, and offered proposed corrective action to remedy the noncompliance,

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<sup>1</sup> See OSPI BULLETIN NO. 047-18 SPECIAL EDUCATION (June 12, 2018).

including training. OSPI finds the District's proposed corrective actions appropriate. As the District also reported substantial harm to the Student after the classroom changes, the District will be required to provide the Student with compensatory education and consider whether the Student requires additional supports to address the negative impact of the schedule changes. The Student was to receive 245 minutes of specially designed instruction in reading comprehension per week. Because the Student did continue to make progress on her IEP goals, despite the placement change, the District will be required to provide the Student with one week's worth of specially designed instruction (245 minutes) as compensatory education.

**Issue Two: IEP Amendment** – The Parent alleged the District did not follow IDEA procedures to amend the Student's IEP in January of 2023.

One of the procedural requirements of the IDEA is that a reevaluation must be completed before a significant change of placement is made. The performance and skill levels of students with disabilities frequently vary, and students, accordingly, must be allowed to change from assigned classes and programs. However, a school may not make a significant change in placement for a student with disabilities without a reevaluation. Additionally, a prior written notice must be given to the parent within a reasonable time before the district initiates or refuses to initiate a proposed change to the student's identification, evaluation, educational placement, or the provision of a free appropriate public education. It must explain why the district proposes or refuses to take action. It must describe any other options the district considered, and it must explain its reasons for rejecting those options.

The District also conceded that it did not follow the IDEA's regulatory requirements prior to changing the Student's placement in January of 2023. It did not reevaluate the Student or convene the IEP team to amend the IEP prior to changing the Student's placement. The District also only sent one prior written notice subsequent to the two placement changes that occurred in winter of 2023. The prior written notice was sent over a month after the second change of the Student's classroom and placement occurred, on March 21, 2023. While OSPI appreciates that the District sought to document the change and inform parents of such, this does not meet the requirements of *prior* written notice. As such, the District is also found out of compliance for this allegation and the District will conduct training and as the violation impacted multiple students, the District will be required to hold IEP meetings for all impacted students.

### **CORRECTIVE ACTIONS**

By or before **May 26, 2023, June 9, 2023, July 7, 2023,** and **September 8, 2023,** the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

##### **Compensatory Education**

By or before **May 19, 2023,** the District and Parent will develop a schedule for 245 minutes of compensatory education in reading comprehension.

Unless otherwise agreed to by the District and the Parent, services will be provided by a certified special education teacher. 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. 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 **May 26, 2023**.

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 **August 31, 2023**.

By or before **September 8, 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 **September 8, 2023**.

### **IEP Meeting**

By or before **May 31, 2023**, the Student's IEP team, including the Student if she would like to attend, will meet to discuss whether the Student requires additional supports to address the negative impact of the schedule changes, including whether counseling support is needed to address anxiety and general education tutoring.

By or before **June 9, 2023**, 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; c) the IEP if amended; and d) any other relevant documentation.

### **DISTRICT SPECIFIC:**

#### **Training**

The District, in cooperation and collaboration with a non-District employee (e.g., the ESD or other trainer), will develop and conduct a training on the below topics. The District will provide the trainer with a copy of this decision, SECC 23-37.

The following District staff will receive training: District special education administrators principals, assistant principals, and special education certified staff (teachers). The training will cover the following topics:

- Implementing IEPs;
- Change of Placement;
- Prior written notice.



The training will include examples. The District may choose to use the training module on "Prior Written Notice the Special Education Process". The training module has been developed by OSPI special education division and eLearning for Educators in Canvas, an online learning management system. Access to the training module in Canvas can be found here <https://www.evergreen.edu/elearningforeducators/>.

By or before **May 26, 2023**, 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 **June 9, 2023**, the District will submit a draft of the training materials for OSPI to review. OSPI will approve the materials or provide comments by June 14, 2023.

By **June 30, 2023**, the District will conduct the training regarding the topics raised in this complaint decision.

By **July 7, 2023**, 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.

### **IEP Meetings**

By or before **June 30, 2023**, the District shall convene the IEP teams for all impacted middle school students whose placement was changed incorrectly in January of 2023, to determine if any compensatory education or additional services are needed to address the improper change of placement and failure to implement the IEP as written.

By or before **July 7, 2023**, the District will provide OSPI with the following documentation: a) any relevant meeting invitations, b) a prior written notice, summarizing the IEP team discussions and decisions; and c) any other relevant documentation.

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 8th day of May, 2023

Dr. Tania May  
Assistant Superintendent of Special Education  
PO BOX 47200  
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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.)