

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-116

PROCEDURAL HISTORY

On August 22, 2023, the Office of Superintendent of Public Instruction (OSPI) received and opened a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the **[REDACTED]** 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 22, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on August 23, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On September 9, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent on September 12, 2023. OSPI invited the Parent to reply.

On September 13, 2023, OSPI received additional information from the Parent. OSPI forwarded the information to the District on September 25, 2023.

On September 22, 2023, OSPI received additional information from the District. OSPI forwarded the additional information to the Parent on September 25, 2023.

On September 29, 2023, the OSPI complaint investigator conducted a Zoom interview with the Parent.

On October 2, 2023, the OSPI complaint investigator consulted with OSPI's assistant director of dispute resolution.

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 any interviews.

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on August 23, 2022. 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.

ISSUES

1. Whether the District followed required procedures to implement the Student's individualized education program during the 2022–23 school year?
2. Whether the District followed required procedures during the 2022–23 school year to determine the Student's placement?

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. 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).

Change in 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).

Reevaluation Procedures: A school district must ensure that a reevaluation of each student eligible for special education is conducted when the school district determines that the educational or related services needs, including improved academic achievement and functional performance of the student warrant a reevaluation, or if the parent or teacher requests a reevaluation. A reevaluation may not occur more than once a year, unless the parent and school district agree otherwise, and must occur at least once every three years, unless the parent and school district agree that a reevaluation is unnecessary. 34 CFR §300.303; WAC 392-172A-03015. When a district determines that a student should be reevaluated, it must provide prior written notice to the student's parents that describe all of the evaluation procedures that the district intends to conduct. 34 CFR §300.304; WAC 392-172A-03020. The district must then obtain the parents' consent to conduct the reevaluation and complete the reevaluation within 35 school days after the date the district received consent, unless a different time period is agreed to by the parents

and documented by the district. 34 CFR §300.303; WAC 392-172A-03015. The reevaluation determines whether the student continues to be eligible for special education and the content of the student's IEP. The reevaluation must be conducted in all areas of suspected disability and must be sufficiently comprehensive to identify all the student's special education needs and any necessary related services. 34 CFR §300.304; WAC 392-172A-03020.

IEP Development for a Student with Behavioral Needs: In developing, reviewing and revising each student's IEP, the team must consider the use of positive behavioral interventions and supports and other strategies to address the student's behavior. 34 CFR §300.324(a)(2); WAC 392-172A-03110(2). This means that in most cases in which a student's behavior impedes his or her learning or that of others, and can be readily anticipated to be repetitive, proper development of the student's IEP will include positive behavioral interventions, strategies, and supports to address that behavior. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,475, 12,479 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 38). A functional behavioral assessment (FBA) and behavioral intervention plan (BIP) must be used proactively, if an IEP team determines that they would be appropriate for a child. For a child with a disability whose behavior impedes his or her learning or that of others, and for whom the IEP team has decided that a BIP is appropriate, the IEP team must include a BIP in the child's IEP to address the behavioral needs of the child. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-1 and E-2).

Functional Behavioral Assessment (FBA): An FBA focuses on identifying the function or purpose behind a child's behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP team in developing a BIP that will reduce or eliminate the misbehavior. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-2). The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP, which includes behavioral intervention services and modifications that are designed to address and attempt to prevent future behavioral violations. *Letter to Janssen*, 51 IDELR 253 (OSERS 2008).

Compensatory Education: A state educational agency is authorized to order compensatory education through the special education community complaint process. *Letter to Riffel* 34 IDELR 292 (OSEP 2000). Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 56 IDELR 31, (9th Cir. 2011). There is no requirement to provide day-for-day compensation for time missed. *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994). 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 (9th Cir. 2006). Appropriate relief in the form of compensatory education is "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994).

FINDINGS OF FACT

Background: 2021–22 School Year

1. During the 2021–22 school year, the Student attended the District’s middle school. The Student was eligible for special education services under the eligibility category emotional behavioral disability.
2. The Student’s December 2021 IEP was in place during the 2021–22 school year and required that he receive 150 minutes, once a week of social/emotional special education services, delivered by a special education teacher.

A behavior plan and positive reinforcements were listed as modifications in the Student’s IEP, but a behavior plan was neither included in nor attached to the IEP. There was no reference in the IEP to the IEP team having considered or conducted a functional behavioral assessment (FBA) of the Student.

The Student’s IEP included “regular” transportation.

3. At the end the 2021–22 school year, the Student transferred from the middle school to a District placement at a private day school program (program) for students with social, emotional and/or behavioral challenges.¹

The District conceded in its response to this complaint that it did not revise the Student’s IEP to reflect this change of placement prior to the transfer.

4. The complaint investigation timeline began August 23, 2022.

2022–23 School Year

5. At the start of the 2022–23 school year, the Student continued to be eligible for special education services and his December 2021 IEP was in place.
6. The program began on August 24, 2022. and the Student began attending the program.
7. Although the District began developing a transportation route for the Student to attend the program on August 12, 2022, it was not in place by August 24, 2022, when the program started. The Parent transported the Student to and from the program until September 6, 2022.

As of September 6, 2022, the District was able to provide transportation to the program from the middle school and back to the middle school. Transportation by the District from home to school in the morning and back home in the afternoon began on September 26, 2022, and continued for the remainder of the school year.

¹ The District stated that the mission of the program is to teach students with social, emotional, and/or behavioral challenges the skills necessary to achieve success at their home schools and communities.

8. The Student's December 2021 IEP, developed when the Student was attending the middle school, was in effect when he entered the program in August of 2022. The IEP stated that the Student was to receive 150 minutes, once a week of specially designed instruction, provided by the special education staff in social-emotional. The IEP indicated that the Student would spend 80–100% of his time in the regular classroom and that his last evaluation had been on December 7, 2020.
9. In its response to the complaint, the District stated that the Student was provided specially designed instruction in social-emotional and provided data and documentation related to instruction in behavior/social-emotional, math, and reading. The District also stated, however, that the Student was not attending the remainder of his day in a general education setting at least between August and December 2022.
10. The District did not have a special education director (director) in August of 2022, when the Student entered the program. It continued to be without a director until November of 2022.

The District noted in its response to this complaint that when the director began working, they "identified an issue with the current IEP not being written to be correctly aligned with the placement."

11. On November 18, 2022, the Student's IEP team, including the director, District team members, program team members, and the Parent, met to review the current IEP and the Student's instructional needs. The team discussed the Student's annual goal progress and placement options. Also discussed was adding a partial day of highly capable and/or STEM programming to meet the Student's academic needs, but due to the need for more information, no action was taken.
12. On December 2, 2022, an IEP meeting was held to create a new annual IEP for the Student. The December 2022 IEP outlined the Student's continued placement at the program for the remainder of the school year. The IEP included special education services, annual goals, and accommodations and modifications in the area of social-emotional. The IEP provided the Student with 30 minutes, 4 times a week of specially designed instruction in social/emotional to be provided by special education staff. The IEP referred to a BIP as a modification; however, again, a BIP was not included in the IEP.

At the December 2, 2022 IEP meeting, the issue of adding highly capable and/or STEM programming to the Student's IEP was discussed, but again, due to a lack of information, no action was taken. There is no evidence that during the remainder of the school year, this programming was added to the Student's IEP.

The Student's December 2022 IEP included "special" transportation.

13. The District stated in its response that following the development of the December 2022 IEP, the IEP was implemented as written and the Student was provided specially designed

instruction in social emotional. The District's response also included data and documentation related to instruction in behavior, reading, and math.

14. During January and February 2023, a group of educators providing instruction to the Student, the Parent, the director, and the middle school principal, continued to investigate other programs and placements that might be appropriate for the Student. However, none of the options considered were determined to be appropriate.
15. In the Spring of 2023, the Parent requested that the Student attend a high school, located in a different school district at the beginning of the 2023–24 school year.
16. In April 2023, the District and the Parent determined that attending the high school would be an option for the Student at the start of the 2023–24 school year.
17. On June 16, 2023, an IEP meeting was held for the purpose of determining the Student's placement for the following school year.

The prior written notice documented that the team refused the Parent's request to have the Student attend a high school at the start of the 2023–24 school year, stating that the high school could not provide the level of support required for the Student to be successful. The prior written notice stated that the Student would return to the program at the beginning of the 2023–24 school year instead of attending the high school.

18. On August 22, 2023, the Parent filed this special education community complaint, objecting to the District's decision to return the Student to the program in the fall of 2023 and other actions, including the District's failure to transport the Student to and from the program and the District's failure to meet the Student's needs as required by his IEP. The Parent also stated that the complaint could be resolved if the Student attended the high school in the fall of 2023.
19. On August 28, 2023, the Student's IEP team, including representatives from the program, representatives from the high school, and the Parent, met to discuss the Student's placement for the 2023–24 school year. The participants, including the Parent, agreed as follows:
 - The Student will start the school year at the high school;
 - The Student will attend a half day (morning) at the high school with resource support and a paraeducator; and,
 - The Student will attend a half day (afternoon) at a regional learning academy.

The District stated the team also considered the following:

- Full day placement in the general education environment: "The team determined this would not meet the Student's social, emotional, behavioral, or sensory needs and would create a number of barriers to success";
- Placement in the districts self-contained behavior support program: "The team determined this would create social and emotional challenges for the Student whose social and emotional needs require more individualized support";

- Full day placement with resource room support: “The team determined this would not provide the academic instruction the student requires, which could be provided more individually through [regional learning academy]”;
- Continued placement at program: “The team determined this would not provide an inclusive environment for the student and would not provide more intensive academic instruction, which the Student is capable of accessing”; and,
- Half day placement at program and half day placement in learning academy: “The team determined the commute would be a barrier for the Student.”

20. Since the beginning of the 2023–24 school year, the Student has attended the high school and the learning academy as outlined in a plan agreed to by the District and the Parent.

21. There is no evidence—such as consideration of a reevaluation—that to date, the District has considered whether or not the Student’s transfer from the program to the high school constituted a significant change of placement.

CONCLUSIONS

Issue 1: IEP Implementation – The Parent alleged that the District did not follow the required procedures to implement the Student’s IEP during the 2022–23 school year.

At the beginning of each school year, each district must have in effect an 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.

IEP Implementation as Written

When the Student entered the program in August of 2022, the Student’s IEP outlined that he would receive 150 minutes, once a week of social/emotional special education services, delivered by a special education teacher. The District stated and the data and documentation provided supported that the Student was provided specially designed instruction in social-emotional. The District also provided data and documentation related to general instruction in math and reading. The District also stated, however, that the Student was not attending the remainder of his day in a general education setting at least between August and December 2022.

The District was without a special education director until November 2022. It is probable that the absence of a special education director for the first two and a half months of the school year had an impact on the implementation of the Student’s IEP, as the District noted that the director began working, they “identified an issue with the current IEP not being written to be correctly aligned with the placement.”

A BIP for the Student was listed in his IEPs as one of several modifications; however, a BIP was not included in either IEP. For the Student, whose behavior impedes his learning and for whom the IEP team has decided that a BIP is appropriate, the IEP team *must* (emphasis added) include a BIP

in the IEP to address the child's behavioral needs.² The lack of a BIP in the Student's IEP, undoubtedly impacted its implementation. The lack of these behavioral tools in the Student's IEPs raises the question of whether the development of both IEPs was proper and thus whether the Student's behavior modifications and accommodations were implemented.

Additionally, during the 2022–23 school year, the District was responsible for providing the Student with transportation to and from the program.³ Although the District began developing a transportation route for the Student to attend the program on August 12, 2022, it was not in place by August 24, 2022, when the program started. The Parent had to transport the Student to and from the program until September 6, 2022, when the District was able to provide partial transportation to and from the program. Transportation from the Student's home to the program in the morning and home in the afternoon began on September 26, 2022, and continued for the remainder of the school year. While the Parent did have to transport the Student, it does not appear the lack of District provided transportation caused the Student to miss any school.

OSPI finds that the District did not implement the Student's IEP in the Student's least restrictive environment (implementation in the general education setting), implement a BIP, and provide transportation at the start of the school year. Notably, though, the District did provide the Student's specially designed instruction. Overall, though, OSPI finds that the District did not follow required procedures to implement the Student's IEP as written during the 2022–23 school year and finds a violation.

As corrective action, the District will be required to offer and provide the Parent reimbursement for transportation (if it has not already). OSPI notes that a state educational agency is authorized to order compensatory education through the special education community complaint process and that compensatory education is a form of equitable relief and the IDEA does not require services to be awarded directly to the student. Here, as the Student's specially designed instruction was provided and the Student's current schedule and placement facilitates participation in general education, OSPI does not find that compensatory education for the Student is appropriate. Rather, given the references to the BIP, but lack of BIP implemented, the District will be required to hold an IEP meeting to determine whether an FBA is warranted and develop a BIP.

Issue 2: Determination of Placement – The Parent alleged that the District did not follow the required procedures during the 2022–23 school year to determine the Student's placement.

The District conceded that it did not follow proper IDEA procedures by developing an IEP to reflect his change of placement from the middle school to the program at the beginning of the 2022–23 school year. At the end of the 2021–22 school year, the Student transferred from the District's middle school to the program, a private day school at a separate location. The mission of the

² See, *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-1 and E-2).

³ OSPI notes the Student's December 2021 IEP did not include special transportation; however, the totality of the information indicates that given the District's placement of the Student at the program, it agreed to provide transportation.

program is to teach students with social, emotional, and/or behavioral challenges the skills necessary to achieve success at their home schools and communities. Prior to the start of the program in August 2022, the District needed to 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. There is no evidence that the District considered these factors or made the necessary determination prior to the change in placements or at the start of the school year.

Given the factors to be considered, the Student's transfer from the middle school to the program should have been considered by the District to determine if it was a significant change of placement under IDEA. Furthermore, if it was a significant change of placement, a procedural requirement of IDEA requires that a student be reevaluated *prior* (emphasis added) to the student's transfer from one placement to another. Although the District did not reevaluate the Student before he left the middle school in the spring of 2022, the District's responsibility to reevaluate him continued if a reevaluation was determined necessary.

The Student's December 6, 2022 IEP reflected that at the beginning of the 2022–23 school year, the Student's placement changed from the middle school to the program. However, the District did not address the continuing requirement that the Student's change of placement to the program may have been a significant change of placement that required a reevaluation of the Student and consideration of an FBA.

A prior written notice, dated December 2, 2022, stated that the Student would be transitioning to another district at the end of 2022–23 school year to attend high school. This was confirmed in April of 2023 by the Parent and the District. However, a prior written notice, dated June 6, 2023, stated that the Student should continue attending the program rather than begin high school in the fall of 2023. On August 22, 2023, the Parent filed a community complaint, objecting to several of the District's actions, including its decision that the Student return to the program in the fall, the District's failure to transport the Student to and from the program, and the District's failure to meet the Student's needs as required by the IEP. On August 28, 2023, the Parent, the IEP team and representatives from the program and the high school agreed that at the beginning of the 2023–24 school year, the Student would attend high school. Thereby resolving the primary concern raised by the Parent in the complaint.

OSPI finds that the District did not follow required procedures during the 2022–23 school year to determine the Student's placement, determine whether a significant change in placement had occurred, and consider whether a reevaluation was needed. The District will be required to consider whether a reevaluation of the Student is needed now to inform his current needs and will be required to provide staff written guidance on changes of placement.

CORRECTIVE ACTIONS

By or before **November 3, 2023, November 17, 2023, December 8, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Reimbursement

By or before **November 3, 2023**, the District will provide—if it has not already—the Parent with instructions and the necessary forms to obtain a reimbursement for the dates she drove the Student to school at the start of the 2022–23 school year. The District will copy OSPI on this communication.

If the District has already provided reimbursement, it will provide OSPI documentation of the reimbursement by or before **November 3, 2023**.

IEP Meeting

By or before **November 10, 2023**, the Student's IEP team, including the Parent and the Student if appropriate, will meet. At the meeting, the IEP team must address the following topics:

- Whether an FBA is needed.
- Development of a BIP.
- Whether a comprehensive reevaluation needs to be initiated to inform the Student's current needs and current placement.

By or before **November 17, 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) a list of people, including their roles, who attended the meeting; d) the IEP if amended; and e) any other relevant documentation.

OSPI will review the prior written notice and if further reevaluation is to occur, OSPI will determine if any additional documentation and review deadlines are needed per this corrective action plan.

DISTRICT SPECIFIC:

Written Guidance

By **December 1, 2023**, the District will ensure that the following individuals receive written guidance on the topics listed below: special education administrators, the principal, the assistant principal, and special education certificated staff (teachers), and school psychologists, in the District. The guidance will include examples and discussion of best practices.

- Procedures for change of placement.
- Best practices for determining whether a reevaluation is needed prior to a change in placement.

By **November 3, 2023**, the District will submit a draft of the written guidance to OSPI for review. OSPI recommends the District review and utilize OSPI's [TAP 5](#) and in particular Appendix A,

Frequently Asked Questions. OSPI will approve the guidance or provide comments by November 17, 2023.

By **December 8, 2023**, the District will submit documentation that all required staff received the guidance. This will include a roster of the required personnel. This roster will allow OSPI to verify that all required staff members received the guidance.

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.

RECOMMENDATION

OSPI notes that the District had discussed whether the Student should receive highly capable and/or STEM programming at the program during the 2022–23 school year. No action was taken on this, and it does not appear the Student accessed instructional programming in those areas. OSPI recommends the Student’s IEP team continue to explore this if it is a need of the Student and if it would support his secondary transition planning and future goals now that he is moving into high school.

Dated this 16th day of October, 2023

Dr. Tania May
Assistant Superintendent of Special Education
PO BOX 47200
Olympia, WA 98504-7200

THIS WRITTEN DECISION CONCLUDES OSPI’S INVESTIGATION OF THIS COMPLAINT

IDEA provides mechanisms for resolution of disputes affecting the rights of special education students. This decision may not be appealed. However, parents (or adult students) and school districts may raise any matter addressed in this decision that pertains to the identification, evaluation, placement, or provision of FAPE to a student in a due process hearing. Decisions issued in due process hearings may be appealed. Statutes of limitations apply to due process hearings. Parties should consult legal counsel for more information about filing a due process hearing. Parents (or adult students) and districts may also use the mediation process to resolve disputes. The state regulations addressing mediation and due process hearings are found at WAC 392-172A-05060 through 05075 (mediation) and WAC 392-172A-05080 through 05125 (due process hearings.)