

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-166

PROCEDURAL HISTORY

On November 17, 2023, the Office of Superintendent of Public Instruction (OSPI) received and opened a Special Education Community Complaint from an individual (Complainant) regarding a student (Student) attending the [REDACTED] School District (District). The Complainant alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On November 17, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on November 21, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On December 7, 2023, OSPI received the District's response to the complaint and forwarded it to the Complainant on the same day. OSPI invited the Complainant to reply.

OSPI considered the information provided by the Complainant 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 November 18, 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.

ISSUE

1. Between November 18, 2022 and January 4, 2023 did the District follow proper individualized education program (IEP) procedures under WAC 392-172A-03105(4)?

LEGAL STANDARDS

Intra-State Transfer: If a student eligible for special education services transfers from one school district to another school district within Washington state and had an IEP that was in effect in the previous school district, the new school district, in consultation with the parents, must provide FAPE to the student including services comparable to those described in the student's IEP, until the new school district either: (a) Adopts the student's IEP from the previous school district; or (b) Develops and implements a new IEP that meets the applicable requirements in WAC 392-172A-03090 through 392-172A-03110. WAC 392-172A-03105(4).

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).

"There is no statutory or regulatory formula for calculating compensatory remedies. However, generally services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting. It is common in Washington for such one-to-one services to be calculated at half of the total hours missed." *In re: Mabton School District*, 2018-SE-0036.

FINDINGS OF FACT

Background Information

1. The Student is eligible for special education services and in June 2022, another Washington school district conducted a reevaluation of the Student. According to the district:
[The evaluation] detailed that Student first enrolled in school at age 7 years and 3 months with no prior school experience and extremely limited social/emotional/behavioral and academic skills. When he was initially found eligible for special education services, he was placed in a self-contained behavior program for 100% of his school day due to significant health and safety factors. The [district] evaluation team found that Student met the eligibility criteria under Emotional Behavioral Disability. The team noted that this was based on frequent serious behavior that significantly interfered with the learning and safety of Student, others and the learning environment.
2. According to the other district, "at some point after the June 2022 reevaluation, Student relocated from [district] to [a second Washington school district in Eastern Washington]."
3. On April 28, 2022, the eastern Washington district individualized education program (IEP) team developed and implemented an IEP, functional behavioral assessment (FBA), behavioral intervention plan (BIP), and emergency response protocol (ERP) for the Student.

2022–23 School Year

4. The District's 2022–23 school year began on September 6, 2022.
5. At the start of the 2022–23 school year, the Student was eligible for special education services under the category of emotional/behavioral disability, was in the fifth grade, attended a school in an eastern Washington district, and the Student's April 2022 IEP was in effect.

The April 2022 IEP provided the Student with the following specially designed instruction in a *special education setting*:

- Writing: 343 minutes a week (to be provided by special education staff)
- Reading: 344 minutes a week (to be provided by special education staff)
- Math: 343 minutes a week (to be provided by special education staff)
- Behavior: 750 minutes a week (to be provided by special education staff)

The April 2022 IEP provided the Student with the following related services in a *special education setting*:

- Speech and Language Therapy: 80 minutes a month (to be provided by a speech language pathologist)
6. According to the Complainant, in October 2022, the District was informed the Student would be enrolling in the District in the near future.
 7. According to the District:

On November 10, 2022, [Eastern Washington district] amended Student's IEP without reconvening the team, reportedly to add a new ERP to address physical aggression, eloping and unsafe personal behavior. The team also updated Student's BIP to include staff escorts to and from the classroom. Both...these documents appear at least partially duplicative of the ERP and BIP developed in April of 2022.

A November 10, 2022 IEP amendment without reconvening IEP team read, in part, "This IEP amendment revises or modifies [by] add[ing] an [ERP]." A prior written notice, dated November 10, 2022, noted the addition of an ERP, but also stated, "The BIP has been updated to reflect the safety plan for when the Student chooses to leave campus."

The November 2022 amended IEP noted the least restrictive environment for the Student was one wherein the Student spent 0 to 39% of the Student's time in a general education setting; provided the Student, in part, with the following "accommodations/modifications": "setting: provide...small group instruction" and "reduce environmental distractions"; and included two annual behavior goals related to the ability to utilize conflict-resolution strategies and calming techniques, respectively.

8. According to the District, "In...late November 2022, Student was returned to the care of his father, who lived in [District]."
9. According to the District, there was a "Best Interest Determination" meeting on November 16, 2022, and at that meeting, it was discussed the Student was likely to be placed at a neighboring school district "for services in conjunction with [an organization supporting youth in foster care]". A November 16, 2023 email from the District's family coordinator that reflected the foregoing understanding.
10. According to the District:
 - The District's director joined a subsequent, November 18, 2022 meeting, wherein "the other agency participants indicated Student would not be attending [neighboring school district] and would instead be enrolled in the District."
 - On November 18, 2022, the District received "a school notification form and [an indication] the plan was to enroll Student with the District that day [and] the District explained did not have a self-contained behavior program, nor did it have available trained staff to provide the escorts and supervision...necessary." (A November 18, 2022 email from the DCYF supervisor to the family coordinator supports this understanding.)

11. According to the Complainant, the Student was enrolled in the District on Friday, November 18, 2022, and on that same day, the District convened a “best interest meeting” regarding the Student, and the District “determined [it] would look at options [at other school districts] and reach out to other districts to see about their ability to accept Student due to his IEP.”

According to the Complainant, at least one of the “options” that was considered was a regional behavior program¹, as the Student “was referred [to this institution] on November 22, 2022.” The District also stated it “reached out to [neighboring district] to determine if they would be able to accept an out-of-district placement.”

12. On November 22, 2022, the District’s associate program director stated she had “submitted an application to [regional behavior program] and reached out to [neighboring district] to determine if they would...accept an out-of-district placement.”

13. On November 30, 2022, based on emails, the regional behavior program informed the District that the Student was still on the waiting list and there was no estimated timeline for a start date due to staff availability.

14. On December 5, 2022, the director emailed a DCYF representative, stating, in part, “District does not have a [program] similar [to that required by Student’s IEP] available” and, “I am also trying to find a teacher who is interested in providing a few hours of support to Student each week while we try to find a program for him.”

15. According to the Complainant, on December 12, 2022, the District “reported they did not have the resources to have the Student at school.”

16. On December 14, 2022, the director emailed DCYF representatives a message that was similar in nature to her email message, dated December 5, 2022, regarding the lack of District program.

17. A December 16, 2022 email from the foster care organization case manager read, in part, “I will work to enroll Student in the second week of winter break.”

18. A December 16, 2022 email from the director read, in part, “[Another nearby district] [does] not currently have capacity for another student.”

19. A December 29, 2022 email from the Complainant expressed frustration the Student was not receiving any services while the District looked for a suitable placement for the Student. Said

¹ According to its website, the “programs serve elementary, middle, and high school students experiencing significant social, emotional, and behavioral difficulties. The goal is to have students develop sufficient internal discipline so that little external reinforcement is required. In addition to the behavior management system, social and emotional goals are taught daily. Specific instruction enables students to learn problem-solving, decision-making, and social skills. In addition, there is a strong emphasis upon the academic instruction that is individually determined.” <https://www.nwesi.org/discovery/>

email read, in part, "My hope is for this person to see that Student's behaviors are not to the extent they were in his prior placement."

20. On January 3, 2023, the District was informed that the Student had been removed from his home and placed in the care of a foster parent.

A separate January 3, 2023 email, authored by the director read, in part, "As we [had] discussed, we...were ready to provide 1:1 support for this Student starting today. [But now] parent no longer resides in [District]."

21. According to the District, as of "January 6, 2023, the Student [had] reportedly [been] enrolled in [a different Washington district]."

22. In mid-January 2023, a McKinney Vento foster care liaison authored an email that stated the Student was enrolled in a different Washington school district. And the liaison was trying to gather relevant IEP docs to show to the new school district.

23. The District's response read, in part:

The District admits that between November 18, 2022 and December 16, 2022 it did not follow proper IEP procedures under WAC 392-172A-03105(4).

...

The District admits that it did not adopt Student's IEP from [previous district] when he reportedly was to be enrolled into the District on the afternoon of November 18, 2022, nor did it develop and implement a new IEP from November 18, 2022 through December 16, 2022.

...

The District proposes providing Student with 35 hours of compensatory education, which is one third of the 105 hours of SDI and related services Student would have received during the 17.5 school days he did not attend in the District between November 18, 2022 and December 16, 2022. The type and nature of these compensatory education services would be agreed-upon by Student's then-current legal guardian and the District and would be provided prior to the start of the 2024-25 school year by appropriately qualified special education staff and/or District contractors at a schedule and location mutually agreed upon between Student's then-current legal guardian and the District.

...

The District proposes to develop written procedures regarding the requirements of WAC 392-172A-03105(4) for a student following their transfer into the District. Such procedures would be developed and submitted to OSPI for review and approval by OSPI on or before January 19, 2024, and once approved, such procedures would be added to the District's special education procedure manual.

CONCLUSIONS

Issue: IDEA Transfer Procedures – The Complainant alleged the District did not follow proper IDEA transfer procedures under WAC 392-172A-03105(4).

If a student eligible for special education services transfers from one school district to another school district within Washington state and had an IEP that was in effect in the previous school district, the new school district, in consultation with the parents, must provide FAPE to the student including services comparable to those described in the student's IEP, until the new school district either: (a) Adopts the student's IEP from the previous school district; or (b) Develops and implements a new IEP that meets applicable requirements.

Here, the Student enrolled in the District on November 18, 2022.

At the moment of transfer, the Student had an IEP, a BIP, and an ERP in effect, each developed by the Student's previous school district. Those documents noted, in part, the Student had needs resulting from the Student's disability in the areas of physical aggression, elopement, and unsafe personal behavior. For example, in part, the November 2022 amended IEP noted the least restrictive environment for the Student was one wherein the Student spent 0 to 39% of the Student's time in a *general education setting*, provided the Student, in part, with the following "accommodations/modifications": "setting: provide...small group instruction" and "reduce environmental distractions"; and included two annual behavior goals related to the ability to utilize conflict-resolution strategies and calming techniques, respectively.

At a "best interest meeting" on November 18, 2022—which was attended, in part, by both District and DCYF staff—and as was reflected in a December 5, 2022 email authored by the director, the District determined it did "not have a [program] similar [to that required by Student's IEP] available"; in its response, the District stated the Student required a "self-contained behavior program."

Following the Student's enrollment, the District did make certain efforts to provide the Student with IEP services. For example, on or about November 22, 2022, the associate director submitted it application for the Student to the regional behavior program. The associate director also asked a neighboring school district whether it would accept an out-of-district placement. The District also planned for providing the Student with some instructional services via a 1:1 paraeducator beginning January 3, 2023.

Before those services could be implemented, though, the District was informed—on or about January 3, 2023—the Student had been removed from his father's home and placed with a foster parent. A January 3, 2023 email read, in part, "[The new adult responsible for caring for the Student does not] reside in [District]." Subsequently—in mid-January 2023—the Student was enrolled in a different Washington state school district.

The fact is, though, that between November 18, 2022 and January 3, 2023, the District did not provide the Student with IEP services. This does not represent proper procedures under WAC 392-172A-03105(4). The District did not provide FAPE to the Student via comparable services. Similarly, it did not adopt the Student's IEP from the previous district or develop and implement its own IEP. Accordingly, OSPI finds a violation of the IDEA. And some compensatory education is warranted.

A state educational agency is authorized to order compensatory education through the special education community complaint process. 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. There is no requirement to provide day-for-day compensation for time missed. Generally, services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting.

Here, November 18, 2022 through January 3, 2023 represents approximately 3.5 weeks of school. Under the November 2022 amended IEP, the Student would have received approximately the following IEP services during said period:

- Writing: 20 hours
- Reading: 20 hours
- Math: 20 hours
- Behavior: 44 hours
- Speech and Language Therapy: 80 minutes

As compensatory education, the District will be required to provide the Student with one-half of the above-stated services:

- Writing: 10 hours
- Reading: 10 hours
- Math: 10 hours
- Behavior: 22 hours
- Speech and Language Therapy: 40 minutes

OSPI will also require the District to develop written procedures regarding the requirements of WAC 392-172A-03105(4) for a student following their transfer into the District.

CORRECTIVE ACTIONS

By or before **January 26, 2024, February 9, 2024, February 16, 2024, March 15, 2024, June 7, 2024, September 6, 2024, and October 18, 2024**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Compensatory Education

By or before **January 26, 2024**, the District and adult currently responsible for the Student's care will develop a schedule for the following, non-concurrent compensatory education:

- Writing: 10 hours
- Reading: 10 hours
- Math: 10 hours
- Behavior: 22 hours
- Speech and Language Therapy: 40 minutes

Unless otherwise agreed to by the IEP team, 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. 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 **January 26, 2024**.

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 **October 18, 2024**.

The District must provide OSPI with an update on the amount of compensatory services provided to the Student by providing documentation on **March 15, 2024, June 7, 2024, and September 6, 2024** 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 18, 2024**, 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 adult currently responsible for the Student's care for the cost of providing transportation for these services. If the District reimburses the adult currently responsible for the Student's care 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 18, 2024**.

DISTRICT SPECIFIC:

Written Guidance

By **February 16, 2024**, 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, etc., at the school that the Student was enrolled in during the 2023–24 school year. The guidance will include examples and discussion of best practices.

- Topic 1: the requirements of WAC 392-172A-03105(4) for a student following their transfer into the District.

By **February 9, 2024**, the District will submit a draft of the written guidance to OSPI for review. OSPI will approve the guidance or provide comments by February 14, 2024.

By **February 16, 2024**, 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.

Dated this 11th day of January, 2024

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.)