

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-190**

### **PROCEDURAL HISTORY**

On December 20, 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 Tacoma 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 December 20, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on December 21, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On January 3, 2024, the District requested an extension of time to respond to the complaint and OSPI granted that request, asking the District to respond by January 12, 2024.

On January 25, 2024, OSPI received the District's response to the complaint<sup>1</sup> and forwarded it to the Parent on January 25, 2024 OSPI invited the Parent to reply.

On February 6, 2024, OSPI received the Parent's reply to the District's response and forwarded a copy to the District the same day.

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

### **ISSUE**

1. Whether, during the 2023-24 school year, the District implemented the Student's individualized education program (IEP), specifically 1:1 paraeducator support.

### **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

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<sup>1</sup> OSPI reminds the District that WAC 392-172A-05030 requires that "the school district or other agency...respond in writing to the OSPI with documentation of the investigation, no later than seventeen calendar days after the date of receipt of the complaint." OSPI has the discretion to grant short extensions; however, expects district to respond by the extension date, if granted.

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 (9<sup>th</sup> Cir. 2007).

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, (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).

### FINDINGS OF FACT

1. At the start of the 2023–24 school year, the Student was eligible for special education services under the category of autism, was in the first grade, attended a District elementary school, and their February 2023 IEP was in effect.
2. The Student's February 2023 IEP included annual goals in reading, communication, math, written expression, speech language, adaptive/self-help, and social/emotional behavioral, with progress reporting at the trimester. The Student's February 2023 IEP provided the Student with the following specially designed instruction in a *special education setting*:
  - Math: 15 minutes /5 times a week (provided by a special education teacher)
  - Reading: 20 minutes/ 5 times a week (provided by a special education teacher)
  - Written Expression: 20 minutes/ 5 times a week (provided by a special education teacher)
  - Social/Emotional/Behavioral: 15 minutes/5 times a week (provided by a special education teacher)
  - Social/Emotional/Behavioral: 30 minutes/1 time a week (provided by a speech language pathologist and/or speech language pathologist assistant (SLP/SLPA))
  - Speech Language Pathologist: 30 minutes/times a week (provided by and SLP)
  - Communication: 20 minutes/5 times a week (provided by a special education teacher, monitored by an SLP)
  - Communication: 20 minutes/5 times a week (provided by an education support specialist, monitored by an SLP)
  - Adaptive/self-help: 15 minutes/5 times a week (provided by a special education teacher)
  - Adaptive/self-help: 15 minutes/5 times a week (provided by an education support specialist)

In addition, the Student's February 2023 IEP provided supplementary aids and services listed as "additional adult support," delivered by a service provider listed as "education support professional," in the amount of 390 minutes daily.<sup>2</sup>

3. On October 12, 2023, the District sent a meeting notice to the Parent for an IEP meeting to discuss the 1:1 support plan, scheduled for October 18, 2023, referencing a concern and request from the Parent.

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<sup>2</sup> OSPI notes the "education support professional" is also referred to as a paraeducator throughout the documentation and this decision.

4. On October 18, 2023, the District sent a prior written notice to Parent, indicating a meeting had been held to address Parent concerns and discuss a 1:1 paraeducator support plan when the assigned 1:1 support was absent. The prior written notice described the proposed actions to address absent 1:1 support in the following:
  - "Sub rotations for paras, similar to rotation for teachers": as considered and rejected because the elementary school does not have additional paras available that are not supporting student safety/supervision;
  - "Certificated sub position posted instead of a sub para posting for hire": considered and rejected because the current bargaining agreement does not allow for certificated staff to fill classified positions; and,
  - "An additional para[educator] hired to support the special education caseload": considered and not rejected nor approved and a District staff was tasked to check and get back to the team.
5. On November 28, 2023, the Student's general education teacher emailed the Parent and outlined the extent to which the school was able to provide the Student's 1:1 support. The teacher indicated that the 1:1 hired was absent for over three weeks on an army reserve assignment and that a long-term substitute was needed. The coverage for the Student's 1:1 for the 18 days referred to in the email, according to the District general education teacher, was covered by multiple school staff with anywhere from three to five adults filling in per day, including the general education teacher herself stopping lessons for all students to support the Student, and indicating that on some days, the Student was given busy work to allow the teacher to teach the rest of the class. The email indicated that there are times that the Student does not have an aid, and the door to the classroom must remain closed and the teacher is "in a constant state of anxiety anticipating whether he (Student) is going to run out of the room or not...I am fearful of him leaving the room and me not knowing right away."
6. On December 2, 2023, the Parents sent an email to the District director of student services (director) to express concerns that the Student's IEP was not being implemented as written.
7. On December 4, 2023 the director responded to the email and expressed shared frustration and offered to meet. The District shared the action steps they have taken to fill the 1:1 position, including posting with the District substitute office; selecting a candidate who later declined; working with a staffing agency to provide coverage at the elementary, citing transportation barriers to filling the position; and providing a consultant to the elementary to assess teacher workload and need.
8. The District response included the Student's progress reports. For the most current reporting period, December 8, 2023, the following progress was reported for the Student goal areas:
  - "Insufficient progress" was listed for reading goal with reference to inconsistent staffing as a contributing factor.
  - Math progress was listed as "sufficient progress," and cited inconsistent staffing and expectations that contribute to difficulties in engagement and showing what Student knows.
  - The communication progress report was incomplete.
  - "Insufficient progress" was listed for adaptive/self-help goals, citing that Student would elope from the classroom if a paraeducator was not available and that work completion was a struggle, requiring "a lot of adult support".

- “Insufficient progress” was reported for the Student’s social emotional/behavioral goal, citing inconsistency in staffing and expectations as a cause.
9. The District provided copies of emails from December 2023 regarding hiring efforts, including:
    - December 4: Email announcing the 1:1 position for the Student’s elementary had been posted.
    - December 11: Email that two candidates were sent to the hiring committee.
    - December 18: Update that the interviews would be scheduled for after winter break.
  10. On January 2, 2024, the Parent emailed the director to express continued frustration that a 1:1 aid was not hired for the Student and asked what the process was to fill a position.
  11. The District provided, in its response, other information related to paraeducator support. An email, dated March 20, 2023, with a visual schedule and morning routine for the Student, stated that the District school did not know who was specifically covering the Student’s 1:1 until the morning of, and that the substitute would check in with the case manager to get information for the day.
  12. The District provided a list of District staff, and their titles, working with the Student. There is not a 1:1 educational support professional listed.
  13. The District stated in its response that the Student had access to 1:1 additional adult support in the general education setting and that there were no other students with IEPs that included 1:1 additional adult support in the Student’s first grade classroom.

The District denied that it violated the IDEA and stated it has not materially failed to implement the Student’s IEP, citing an OSPI technical assistance paper guidance which, per the District response, stated that “districts have the responsibility to determine the paraeducator assigned to the student, and the specific paraeducator providing support may change throughout the day, as long as the ratio identified in the IEP remains consistent”. The District stated that while it was desirable to have support provided consistently by the same adult, OSPI has recognized that a district can satisfy their obligation when the adult-to-student ratio specified in the IEP is met. The District also referenced an email, dated November 28, 2023, from District general education teacher indicating that the school has deployed up to five adults a day to ensure the Student had access to support, therefore providing the correct ratio of support.

14. In a February 6, 2024 reply provided by the Parent to the District response, the Parent referred to the Student’s IEP and the IEP team determination that the Student required a paraeducator, referred to in the District as an “education support professional”. The Parent emphasized that “nearly halfway into the school year, [Student] has made little to no progress toward most of his IEP goals, according to the progress report provided by the District,” and that he showed regression in all areas except math.

## CONCLUSIONS

**Issue One: Paraeducator Support** – The Parent alleged that the District violated the IDEA when it failed to provide 1:1 IEP paraeducator support to the Student for the 2023–24 school year.

School districts must have in effect, at the beginning of each school year, an IEP for every student within their jurisdiction, who is eligible for special education services. The school district must ensure that it provides all services in a student's IEP, consistent with the 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, dated February 2023, included 1:1 paraeducator support, 6.5 hours per day. Additionally, the Student's service minutes in the IEP indicated two specific goal areas where the paraeducator was responsible for delivering specially designed instruction. Records reviewed in the investigation indicate that beginning in March 2023, difficulties filling the position existed. On October 12, 2023, the District sent a meeting notice to the Parent for an IEP meeting to discuss 1:1 support plan, scheduled for October 18, 2023, referencing a concern and request from the Parent. The prior written notice documenting the meeting described the proposed actions to address when the 1:1 paraeducator was absent, which were all considered and rejected except for the possibility of an additional paraeducator hired to support the special education caseload, which was considered and not rejected nor approved, with District staff tasked to follow up. Through December, there were continued challenges hiring for the 1:1 position and the Parents sent an email to the District director of student services to express concerns that the Student's IEP was not being implemented as written. The District director of student services responded to the email and expressed shared frustration and offered to meet. The District shared the action steps they have taken to fill the 1:1 position, without success, and shared District emails that support efforts and the process.

Overall, the investigation shows the Student's 1:1 support was not consistently provided. Primarily, this seems to be a particular concern during a period when the Student's 1:1 paraeducator was absent for approximately three weeks and a long-term substitute was needed. The District attempted to mitigate the lack of support by having other District staff cover the position and provide the Student support. For example, the general education teacher noted in a November 2023 email that the support was provided by multiple school staff with up to five adults filling in per day. The District correctly noted that OSPI guidance has stated that 1:1 paraeducator support refers to an adult-to-student ratio, and that multiple people can provide 1:1 support. However, in this case, meeting that ratio does not necessarily end the analysis.

In determining whether there was a material failure to implement the IEP, OSPI notes it is important to consider what the IEP team characterized the Student's need as. While the District stated that the Student "had access to 1:1 additional adult support in the general education setting", OSPI notes that the 1:1 paraeducator on the Student's IEP was providing more than just additional support. In the case of the Student, paraeducator support is included in the Student's IEP as a full-time 1:1 service or support and the paraeducator delivered some of the specially designed instruction.

The investigation shows that the lack of consistent 1:1 paraeducator, even if some adult support was provided, appeared to have a negative impact on the Student. The Student's general

education teacher indicated that she had to, at times, stop lessons for all students to support the Student, that on some days, the Student was given busy work to allow the teacher to teach the rest of the class, and that there were heightened concerns about the Student eloping from the classroom during this period. The Student's progress reporting also showed that the Student had made largely "insufficient progress" (except on his math goal, noted as "sufficient progress") and importantly, the comments on the progress reporting indicated that inconsistent staffing and relatedly inconsistent expectations was a contributing factor in the Student's insufficient progress.

Typically, 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. Here, the District's failure to consistently provide 1:1 paraeducator support for the Student, in accordance with the existing IEP, is documented from March 2023 through January 2024, and does not indicate a one-time failure, despite District efforts to cover 1:1 support, utilizing up to five adults a day. Despite the District's efforts to hire, the inconsistent implementation of the 1:1 support negatively impacted the Student's access to instruction and ability to make progress. Thus, OSPI finds that the Student's 1:1 support was not materially implemented and OSPI finds a violation.

OSPI finds that compensatory education is an appropriate remedy in this instance. 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. Given that compensatory education is an equitable remedy, OSPI finds that it is appropriate to base the compensatory education on the service areas that the 1:1 paraeducator was supposed to be delivering—100 minutes of communication and 75 minutes of adaptive/self-help—during the three-week period the Student's 1:1 was out and a consistent long-term substitute not provided. This acknowledges the fact that the District was actively trying to hire and accounts for the fact that the District mitigated the impact to a degree by providing other District staff to fill in for support. Thus, the District will provide 300 minutes of communication and 225 minutes of adaptive/self-help as compensatory education.

### **CORRECTIVE ACTION**

By or before **March 8, 2024** and **June 7, 2024**, the District will provide documentation to OSPI that it has completed the following corrective action.

#### **STUDENT SPECIFIC:**

##### **Compensatory Education**

By or before **March 8, 2024**, the District and Parent will develop a schedule for 300 minutes of communication and 225 minutes of adaptive/self-help compensatory education.

Services will be provided by a certified special education teacher or related service provider. Services will be provided in a 1:1 setting. 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 **March 8, 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 **May 31, 2024**.

By or before **June 7, 2024**, the District must provide OSPI with documentation that it has completed compensatory services for the Student. 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.

The District either must provide the transportation necessary for the Student to access these services or reimburse the Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must provide reimbursement for round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **June 7, 2024**.

**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 13th day of February, 2024

Dr. Tanya May  
Assistant Superintendent of Special Education  
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**THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT**

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