

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-120

PROCEDURAL HISTORY

On October 3, 2022, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Bethel School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On October 3, 2022, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On October 20, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent on October 21, 2022. OSPI invited the Parent to reply.

On November 4, 2022, OSPI received the Parent's reply. OSPI forwarded that reply to the District on November 8, 2022.

On November 18, 2022, OSPI determined that additional information would be helpful to the investigation and contacted the District. OSPI received part of the requested information from the District on November 22 and 29, 2022. OSPI forwarded that information to the Parent on November 29, 2022.

On November 30, 2022, OSPI determined that additional information would be helpful to the investigation and contacted the District. OSPI received part of the requested information from the District on November 30, 2022. OSPI forwarded that information to the Parent on November 30, 2022.

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

SCOPE OF INVESTIGATION

Any information included from events prior to the 2022–2023 school year is mentioned for informative, background purposes only.

ISSUE

1. Since the start of the 2022–2023 school year, did the District follow proper procedures for implementing those parts of the Student's individualized education program (IEP) that related to transportation?

LEGAL STANDARDS

IEP Implementation: 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. 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. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 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 [child with a disability] and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

Compensatory Education: A state educational agency is authorized to order compensatory education, as appropriate, through the special education Community complaint process. 34 CFR §300.151(b)(1); WAC 392-172A-05030. The state educational agency, pursuant to its general supervisory authority, has broad flexibility to determine appropriate remedies to address the denial of appropriate services to an individual child or group of children. *Letter to Lipsitt*, 181 LRP 17281 (2018). 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); *See also, Letter to Lipsitt*, 181 LRP 17281 (2018) ("The purpose of a compensatory services award is to remedy the public agency's failure to provide a child with a disability with 'appropriate services' during the time that the child is (or was) entitled to a free appropriate public education and was denied appropriate services.")

FINDINGS OF FACT

2021–2022 School Year

1. At the start of the 2021–2022 school year, the Student was eligible for special education services under the category of autism, was in the eleventh grade, and attended a District high school.
2. The Student's home is located within a gated community. During the 2021–2022 school year, the District sent a bus directly to the Student's home to pick the Student up for school.
3. The Student's IEP team developed a new IEP for the Student on February 9, 2022. The February 2022 IEP included "transportation" as a separate service matrix and noted the Student required "special transportation."

Summer 2022

4. According to the District's response, in mid-to-late August of 2022, postcards were mailed to students' parents regarding bus stop locations for the 2022–2023 school year, and according

to these postcards, the Student's morning bus stop location for the 2022–2023 school year was different than it had been for the 2021–2022 school year—for the 2022–2023 school year, the Student's morning pick up location was to be located outside the gate of the Student's residential community.

2022–2023 School Year

5. The District's first day of school was September 6, 2022.
6. At the start of the 2022–2023 school year, the Student continued to be eligible for special education services and attended a District high school. At that time, the Student's February 2022 IEP was in effect.
7. According to both parties, the Parent drove the Student to school every morning between September 6 and October 4, 2022.^{1 2 3}

¹ Documentation shows the Student was not transported on a District bus during this time, in part, because: at the start of the school year, there was a communicative misunderstanding between the District and the Parent regarding the Student's morning pick up location; according to the District, "even when the bus driver is given the gate code, the bus driver cannot reach the code input box and cannot leave the vehicle with other children in order to access the code input box"; there was a second access point that had a gate that was supposed to open earlier than the gate at the main entrance, but oftentimes, the gate for this second access point was not actually open when the bus arrived in the morning; the existence of "multiple speed bumps" in the residential community; the District had "a long-standing process [whereby it did] not use remotes [to open gates to residential communities]"; and on October 4, 2022, the bus did come to the Student's house, but the "Student had a wheelchair [and] this accommodation was not on his transportation request therefore the driver did not have the appropriate space to accommodate the wheelchair."

² On September 26, 2022, the Student's respite care provider emailed multiple District staff, stating, in part, "The bus has failed to pick him up everyday;" and on October 1, 2022, the principal emailed two different special education directors, stating, in part, because of the morning transportation issue, "Student has not been in school...The Student has not been picked up at all this school year."

³ Documentation does show District staff did communicate with the Parent during this time regarding attempting to solve the morning transportation issue. For example, according to the District: on September 6, 2022, a transportation representative spoke with mom and clarified the new location for the morning bus pick up; on October 5, 2022, the executive director "called Parent to confirm Student had made it to school and [to] offer compensation for the days Parent drove Student to school"; and on October 12, 2022, the executive director and the director of operations "met with Parent to discuss her concerns [and to] brainstorm...a list of possible remedies." Additionally, while the emails provided to OSPI are not explicit on this issue, it appears a request from the District's transportation that the Parent speak with her homeowners association in relation to ensuring the gate at the second access point was consistently open prior to the bus' scheduled arrival each morning was likely communicated to the Parent in or around late September 2022, and on or about October 3, 2022, a special education director had a conversation with the Parent regarding the transportation concerns.

According to emails, the solution to the morning transportation concern included, at least in part: (a) the District utilizing a bus that was able to accommodate the Student's wheelchair; and (b) usage of a second access point to the residential community that had a gate that was supposed to open earlier than the gate at the main entrance.

8. According to the District's 2022–2023 school calendar, September 6 through October 4, 2022 represents approximately 20 school days. According to the Parent's reply, though, the morning transportation challenge led to an "interruption of [Student's] education every day for 18 days."
9. According to the Parent's reply, "On those days [District did not provide morning] transportation services, I had to [transport Student] to school and, on these days, Student did not] arrive [until] between 10:30 am and 11:30 am. [And] many times Student [did not arrive until] during lunch."

In its response, the District stated that on those days wherein the Parent transported the Student in the morning, the Student usually missed "the [first] two class periods."

10. According to the Student's 2022–2023 schedule, the Student's first two periods were English language arts and life skills, respectively.
11. In its response, the District stated, in part: the District "does not dispute the Student is entitled to transportation as a related service and as part of his IEP"⁴; and there was "a denial of transportation services for a short period of time."

To remedy this violation, the District proposed the following in its response:

[C]ompensatory education at a ratio of 1:1 for the two class periods [missed each morning wherein the Parent transported the Student].

...

Mileage reimbursement for the miles the Parent incurred driving the Student to and from school.

Development of a communication protocol to ensure the error does not occur again and an offer of training to staff involved with the Student's transportation and the new protocols and communications with parents when problems do arise.

12. According to the District, from September 6 through October 4, 2022: (a) the Student's "1st-period class was held from 7:57 - 9:03 AM and Student's 2nd-period [class was] held from 9:08 - 10:16 AM"; (b) the "exact arrival time [of Student was not] recorded for each date"; and (c) "during the Student's first two periods of the school day, Student receives a total of 104

⁴ On September 26, 2022, the District's respite care provider emailed several District staff, stating, in part, "Student has to have door-to-door services. He cannot walk and wait at the gate"; and on October 1, 2022, the principal emailed two different special education directors, stating, in part, "Student requires door-to-door pick-up with a wheelchair lift bus."

minutes (54 minutes for each class period) of combined reading, writing, and math specially designed instruction.”

The District further clarified:

Our students in this particular program get dropped off and picked up at the back close to their classroom so there may have been times that the attendance clerk did not have knowledge of the "actual" time the student arrived and did not arrive. So, in essence, I will defer to the 18 days as the parent has indicated and will [consider] comp ed [in relation to] this information.

13. According to the Student’s “Attendance Profile”, the Student missed 1st and 2nd period on approximately nine occasions between September 6 and October 4, 2022.⁵

CONCLUSIONS

Issue 1: IEP Implementation: Transportation – The Parent alleged, since the start of the 2022–2023 school year, the District has not followed proper procedures for implementing those parts of the Student’s individualized education program (IEP) that relate to transportation.

A district must ensure it provides all services in a student’s IEP, consistent with the student’s needs as described in that IEP. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child’s IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a child with a disability and those required by the IEP.

Here, the documentation provided to OSPI during this investigation shows, in part: the Student’s February 2022 IEP was in effect at the start of the 2022–2023 school year and the February 2022 IEP provided the Student with specialized transportation. From September 6 through October 4, 2022, the Parent drove the Student to school most every morning; in other words, during this time, the District did not provide the Student with transportation in the morning, and the District acknowledged it was responsible for a “a denial of transportation services [being provided to the Student] for a short period of time.” And finally, according to the Parent’s reply, the morning transportation challenge led to an “interruption of [Student’s] education every day for 18 days”⁶; on those 18 days wherein the Parent transported the Student, the Student usually missed

⁵ OSPI notes, though: based on emails, it is possible the Student missed 1st and 2nd period on more than nine occasions between September 6 and October 4, 2022.

⁶ Attendance documentation shows, between September 6 and October 4, 2022, the Student missed the first two periods approximately nine times. But during this investigation, the District clarified, “The District further clarified, “Our students in this particular program get dropped off and picked up at the back close to their classroom so there may have been times that the attendance clerk did not have knowledge of the "actual" time the student arrived and did not arrive. So, in essence, I will defer to the 18 days as the parent has indicated and will base the comp ed offer off of this information.”

Student's first two classes; and the Student's first two periods were English language arts and life skills, respectively.

On the basis of the foregoing, OSPI finds a material violation to implement the transportation portions of the February 2022 IEP between September 6 and October 4, 2022. Therefore, compensatory education is warranted.

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 she would have been, but for the district's violations of the IDEA.

Here, the District offered compensatory education "at a ratio of 1:1 for the two class periods" missed each morning wherein the Parent transported the Student. And according to the District, "during the Student's first two periods of the school day, Student receives a total of 104 minutes (54 minutes for each class period) of combined reading, writing, and math specially designed instruction"; and "students in this particular program get dropped off and picked up at the back close to their classroom so there may have been times that the attendance clerk did not have knowledge of the 'actual' time the student arrived and did not arrive. So, in essence, I will defer to the 18 days as the parent has indicated and will [consider] comp ed [in relation to] this information."

Accordingly, OSPI determines the following is an appropriate compensatory education remedy for this violation: 31 total hours of compensatory education, to be split amongst academic specially designed instruction in reading, writing, and math, as determined most appropriate by the Student's IEP team.

As additional corrective actions, OSPI endorses two of the District's other proposals for corrective actions: reimbursement to the Parent for the days between September 6 through October 4, 2022 the Parent drove the Student to school in the morning; and "development of a communication [and implementation] protocol to ensure the error does not occur again."

CORRECTIVE ACTIONS

By or before **December 21, 2022** and **April 7, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Compensatory Education

By or before **December 21, 2022**, the District and the Parent will develop a schedule for providing the following compensatory education to the Student: 31 total hours of compensatory education, to be split amongst academic specially designed instruction in reading, writing, and math, as determined most appropriate by the Student's IEP team.

The District will provide OSPI with documentation of the schedule for services by or before **December 21, 2022**.

The compensatory education will occur in either a small group or one-on-one setting and be provided by a certificated special education teacher. The instruction will occur outside of the District's school day and may occur on weekends or during District breaks. Because of the COVID-19 pandemic, the compensatory education may be provided remotely.

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 with at least 24 hours' notice of the absence, the District does not need to reschedule. *The services must be completed no later than **April 7, 2023**, including those needing to be rescheduled.*

No later than **April 7, 2023**, the District shall provide OSPI with documentation that all of the compensatory education has been completed. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled by the District 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 **April 7, 2023**.

Reimbursement of the Parent for Transportation Between September 6 and October 4, 2022

The District will reimburse the Parent for those mornings the Parent transported the Student between September 6 and October 4, 2022. The District must provide reimbursement for round trip mileage at the District's privately-owned vehicle rate. By or before **December 21, 2022**, the District must provide OSPI with documentation showing completion of the same.

DISTRICT SPECIFIC:

Communication and Implementation Protocol for Students Requiring Specialized Transportation

By or before **December 21, 2022**, the District will develop a communication and implementation protocol for students who require specialized transportation.

By or before **December 21, 2022**, the District will ensure that the following individuals are provided with a copy of said protocol: special education administrators, the principal, the assistant principal, and special education-certified staff, at the school that the Student was enrolled in during the 2022–2023 school year. The protocol will include at least two examples.

By **December 21, 2022**, the District will submit documentation that all required staff received the protocol. 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 2nd day of December, 2022

Dr. Tania 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.)