

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-147

PROCEDURAL HISTORY

On December 14, 2020, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen 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, with regard to the Student's education.

On December 16, 2020, 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 January 4, 2021, the District requested an extension of time to respond to the complaint. OSPI granted the extension to January 12, 2021.

On January 12, 2021, OSPI received the District's response to the complaint and forwarded it to the Parent on January 13, 2021. OSPI invited the Parent to reply.

On January 13, 2021, OSPI received the Parent's reply. OSPI forwarded that reply to the District on January 15, 2021.

On January 15, 2021, OSPI requested that the District provide additional information, and the District provided the requested information on January 21, 2021. OSPI forwarded the information to the Parent on January 22, 2021.

On January 28, 2021, OSPI requested that the District provide additional information, and the District provided the requested information the same day. OSPI forwarded the information to the Parent on January 29, 2021.

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

ISSUE

1. On November 24, 2020, did the District properly implement any and all portions of the Student's December 2019 individualized education program (IEP) that related to providing the Student with a bus monitor while transporting the Student?

LEGAL STANDARD

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 who is eligible to receive special education services. A school district must ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. The initial IEP must be

implemented as soon as possible after it is developed. Each school district must ensure 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).

FINDINGS OF FACT

2020-2021 School Year

1. During the 2020-2021 school year, the Student attended a District elementary school, was in the fourth grade, and was eligible for special education services under the category of intellectual disability.
2. At the start of the 2020-2021 school year, the Student's April 2020 amended individualized education program (IEP) was in effect.

In part, the Student's April 2020 amended IEP provided the Student with the following supplementary aids and services:

- Bus Monitor – 30 minutes 2 times a day (provided by Home District Transportation Services in a *special education setting*)

The Student's April 2020 amended IEP read, in part: "Student requires a bus monitor while riding on the bus (sitting right next to him) both to and from the school to keep Student safe. The bus monitor is necessary to prevent Student from disrobing while on the bus."¹

3. According to the District, in investigating the Parent's complaint, the District's attorney, in part, spoke with the Student's bus monitors and the Student's bus driver on the phone, and "also checked with the District's transportation staff person in order to figure out what happened on November 24, 2020." According to the District, its investigation showed the following:
 - On November 24, 2020, the Student was not provided with a monitor on the morning bus ride – the Student's morning bus monitor called in sick and the District was "not able to get coverage before [the morning] pickup."
 - The Student did not disrobe or exhibit unsafe behaviors on the morning bus ride on November 24, 2020.
 - The Student was provided with an afternoon bus monitor on November 24, 2020, as that position was, as a matter of course, staffed by a different individual.

¹ Other portions of the April 2020 amended IEP detailed that the Student required a 1-to-1 paraeducator in school settings because the Student sought "sensory stimuli by chewing or biting non-food items" and demonstrated "attention seeking and avoidance behaviors...including screaming, pinching, hitting, and pushing work onto the floor."

4. On November 24, 2020, the special education teacher emailed the Parent, stating, in part: "I talked to the Student's bus driver today and it sounds like the monitor was absent [this morning]. Student was fine on the bus ride in [and] he had a good day at school."

On November 25, 2020, the Parent responded, stating, in part:

Thank you for letting me know. If transportation can't have a monitor on the bus I would have liked them to tell me because they are very aware a safety monitor on the bus is a part of his IEP and safety. I would have just taken him to school myself if I would have known there would be no monitor, he was trying to take his jacket off and strip before he got on the bus so I was really worried about him being in the back of the bus and not being able to know what he is doing. I am glad he had a good day though.

5. On January 12, 2021, OSPI received the District's response to the Parent's complaint. In its response, the District "requests that OSPI find that the bus monitor's absence on the morning of November 24, 2020 was not a material failure to implement the Student's IEP."

More specifically, in its response, the District stated:

[The Student] did not disrobe on November 24, 2020, nor did he exhibit unsafe behaviors on the bus...[and], accordingly, the absence of the bus monitor that one morning did not impede the Student's ability to access the transportation in his IEP, or impede his ability to access his education that day.

6. On January 13, 2021, OSPI received the Parent's reply.

I don't agree with the notion in the districts response that just because a monitor was not on the bus that "ONE" time on November 24, 2020 and just because he didn't disrobe on that day and the notion that he ended up not disrobing and the fact that I thanked the special education teacher for letting me know, **is irrelevant** nor does it justify the fact that a safety monitor was not on the bus as a monitor should have been according to his IEP. **THERE IS NO EXCUSE FOR NOT FOLLOWING HIS IEP PLAN FOR JUST ONE DAY AND THINK IT IS JUST OK BECAUSE NOTHING HAPPENED, THEN WHAT WOULD THE POINT BE HAVING AN IEP IF THE DISTRICT IS SAYING IT WAS ONLY ONE DAY A MONITOR WASN'T ON THE BUS. IS THE DISTRICT SAYING IT IS OK TO MAKE ONE MISTAKE? THAT MAKES NO SENSE TO ME AS A MOTHER WHO IS PROTECTING A VULNERABLE CHILD FROM EXPOSING HIMSELF BECAUSE WHAT IF HE DID END UP DISROBING ON NOVEMBER 24, 2020 WHAT THEN? ONE MISTAKE COULD BE FATAL, AND COULD HAVE CREATED MORE EMOTIONAL TRAUMA, AND NOT EVEN ONE TIME IS OK WITH ME, AND SHOULD NOT BE OK TO THE DISTRICT THAT IS RESPONSIBLE FOR MY SON'S CARE ON THEIR WATCH!**

(Emphasis in original).

7. On January 28, 2021, OSPI's investigator emailed the District's attorney, asking: "what steps has the District taken to ensure this issue doesn't occur in the future? In other words, what procedures are in place to ensure, if one of the Student's bus monitors calls in sick in the future, that a replacement is found in time for that individual?"

In response, the District's attorney stated:

I spoke with our Transportation Supervisor yesterday about this exact question... The Transportation Supervisor will be meeting with her team to come up with a plan whereby if we're not able to fill the vacancy created by the sick in, we are able to notify mom ahead of time. When I spoke to Parent on the phone last Friday, she indicated that if she's notified of this lack of coverage she'd be willing and able to drive the student to school. Lastly, I should add that no coverage has not been a common occurrence. From what I can see, the Student has had a monitor for hundreds of routes to and from school during the statutory period and one instance of no monitor.

8. On January 28, 2021, the District's attorney provided OSPI's investigator with the following statement from the District's transportation supervisor:

I followed up with a memo to our dispatch team, this student's current drivers and monitors, indicating our role and responsibility to call the mother whenever necessary. While this is a difficult task, I know my team cares greatly for this student's safety will make every effort to comply with this request.

CONCLUSIONS

Issue One: IEP Implementation – The Parent alleged that on November 24, 2020, the District did not properly implement those portions of the Student's December 2019 individualized education program (IEP) that related to providing the Student with a bus monitor while transporting the Student.

A school 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 student'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 Student's IEP that was in effect on November 24, 2020 did state the Student required a bus monitor while riding on the bus. Specifically, the Student's April 2020 amended IEP provided the Student with the following supplementary aid and service: bus monitor – 30 minutes 2 times a day (provided by Home District Transportation Services). The Student's April 2020 amended IEP stated the Student required this supplementary aid and service "to keep the Student safe [and] to prevent Student from disrobing."

From the information provided to OSPI during the course of this investigation, it is clear the Student was not provided with a bus monitor on the morning bus ride on November 24, 2020, because the morning bus monitor called in sick. The Student was provided with a bus monitor on the afternoon bus ride on November 24, 2020, because a different individual fulfilled that role. According to the Student's bus driver, the Student did not disrobe or exhibit unsafe behaviors on the morning bus ride on November 24, 2020.

A district should strive to provide services in conformity with a student's IEP. However, here, the District's failure to provide this supplementary aid and service on one occasion, on one particular

day, does not amount to a material failure to implement the IEP. The Parent appears to argue that the potentially significant repercussions of the District's failure to implement this portion of the Student's April 2020 amended IEP on November 24, 2020 automatically makes that failure material. OSPI acknowledges the potentially significant repercussions of not providing the Student with a bus monitor. For example, the April 2020 amended IEP stated the Student required one-on-one supervision because the Student would occasionally chew or bite non-food items and/or demonstrate "attention seeking and avoidance behaviors...including screaming, [and] pinching."

However, materiality, under the IDEA, is not defined by the potential negative consequences of any individual failure to implement a student's IEP. Rather, materiality is defined as: more than a minor discrepancy between the services provided to a student with an IEP and those required by the IEP. For example, in *Van Duyn v. Baker School District*, the 9th Circuit Court of Appeals² held, in part, that the school district had not materially failed to implement the student's IEP simply because all components of the student's behavior management plan were not implemented with fidelity on each and every occasion they should have been so implemented. In the instant decision, there might have been a material failure to implement the Student's April 2020 amended IEP, had the District repeatedly failed to provide the Student with a bus monitor. But this issue was outside the scope of the Parent's allegation, and to the extent OSPI was provided information in this area, it appears the Student was consistently provided with a bus monitor outside of the morning of November 24, 2020.

To summarize, OSPI finds the District did not materially fail to implement the Student's April 2020 amended IEP and no corrective actions are warranted.³ The District has indicated that it has already started to develop an alternate plan in the event that the Student's bus monitor is not available, and OSPI recognizes the need for this District action.

CORRECTIVE ACTIONS

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

² Legally, decisions by the 9th Circuit Court of Appeals are binding precedent for Washington State special education citizen complaint decisions.

³ Though not relevant to the legal analysis in this decision, OSPI notes the District has taken action to ensure this situation does not occur in the future: the District's transportation supervisor sent a memorandum to her team, reminding them that if one of the Student's bus monitors calls in sick or is otherwise absent, the transportation team needs to contact the Parent and the Parent will transport the Student.

Dated this ___ day of February, 2021.

Glenna Gallo, M.S., M.B.A.
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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.)