

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-72**

### **PROCEDURAL HISTORY**

On June 8, 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 Kent 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 June 8, 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 June 24, 2022, the District requested an extension of time to respond to the complaint. OSPI granted the extension to June 29, 2022.

On June 29, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent the same day. OSPI invited the Parent to reply.

On July 13, 2022, OSPI received the Parent's reply. OSPI forwarded that reply to the District on the same day.

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

### **ISSUE**

1. Did the District implement the bus aide/paraeducator portion of the Student's May 28, 2022 individualized education program (IEP)?

### **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 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. 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).

### **FINDINGS OF FACT**

1. At the start of the 2021–2022 school year, the Student was eligible for special education services under the category of autism and attended a District elementary school.

2. On March 29, May 10, and May 19, 2022, the Student's IEP team met, and his IEP was amended. The IEP noted the Parents had concerns about the Student's safety given concerns about elopement, throwing, and climbing. The IEP included goals and services addressing the areas of social/emotional, adaptive, math, reading, written expression, communication, and occupational therapy. Relevant to the issue alleged in this investigation, the IEP included special transportation and the Student would "receive 1:1 adult support while being transported on the bus. A paraeducator will ride with [Student] until the end of the 2021-2022 school year."

The prior written notice, dated May 19, 2022, stated the Student "will receive 1-1 support on the bus, at the request of parents" and the Student "will begin having an aid/paraeducator ride the bus with him (pending hiring of aid/paraeducator) for the remainder of the 2021-2022 school year (until June 20<sup>th</sup>)."

3. The Parent, in her reply to the District's response, stated that she requested the 1:1 bus support at the May 19, 2022 IEP meeting and the support was initially denied. The Parent stated the support was added to the IEP after she had further follow-up with the District, including an email wherein she reiterated her concerns for the Student's safety on the bus and the safety of other students on the bus.
4. In its response to the complaint, the District stated there were additional communications with the Parent following the May 19, 2022 IEP meeting and thus, the IEP was finalized on May 28, 2022. The District noted the prior written notice was updated to include additional information on May 31, 2022.
5. In her complaint, the Parent alleged the District told her that the bus paraeducator would be provided pending hiring and that since May 28, 2022, the Student has not had a paraeducator on the bus with him "despite his continued issues of slapping other students on the bus and taking all of his clothes off." The Parent stated this was an urgent safety concern.
6. On May 28, 2022, the Student's special education teacher/case manager (case manager) emailed the District's assistant director of inclusive education (assistant director) that a paraeducator would be interested in serving as the bus paraeducator for the Student for the rest of the school year.
7. Also, on May 28, 2022, the Student's case manager emailed the Parent and stated that the paraeducator was added to the IEP to support the Student on the bus and that this support would begin as soon as a paraeducator was hired for the position. The plan was for the paraeducator to ride the bus for 30 minutes in the morning and 30 minutes in the afternoon.
8. On June 7, 2022, the assistant director emailed the principal, an educational assistant, and the case manager, stating she had been out since May 27, 2022 and if there were staff available to ride with the bus with the Student, they should do so per the Student's IEP.

The case manager responded and stated she would have the paraeducator start riding the bus with the Student the next day.

9. Also, on June 7, 2022, the case manager emailed the Parent and stated the paraeducator would begin riding the bus with the Student the next day.
10. On June 8, 2022, the District filled the position and the bus paraeducator began riding the bus with the Student. The paraeducator rode the bus with the Student on June 8, 9, 10, 13, 14, 15, and 16, 2022. The District stated that the regular paraeducator was not available on June 17, 2022, so a different paraeducator rode the bus that day.
11. The District noted that the support was delayed by six school days. The District stated the Student rode the bus in the afternoon without the paraeducator for five of the six school days, and was absent one of the six days (June 1, 2022). The District stated that the Student did not miss any specially designed instruction or related services due to the lack of bus paraeducator on those five school days and there is no indication that the Student was absent because of the lack of bus paraeducator.

The District also noted the paraeducator rode with the Student in the afternoon, and that while the support was offered in the mornings, the Parent had chosen to transport the Student to school in the mornings and had been doing this since prior to the May 28, 2022 IEP amendment.

12. In her reply to the District's response, the Parent stated that it was not reasonable that the bus paraeducator was not provided for six days and stated that she filed the complaint because the IEP stated that the paraeducator support would be provided pending hiring, and hiring a new employee can take months.

The Parent also stated that the Student should have been providing paraeducator support on the bus all year given that he required a 1:1 paraeducator in class due to behaviors, and provided information about the Students behaviors throughout January, February, and March 2022 on the bus.

13. The Student did not attend school on June 20, 2022, which was the District's last day of the 2021–2022 school year.

## **CONCLUSIONS**

**Issue: Individualized Education Program (IEP) Implementation** – The Parent alleged the District failed to provide a paraeducator on the bus since May 28, 2022, after the Student's IEP team added that support to the Student's amended IEP. The Parent stated the Student has not had a paraeducator on the bus with him despite safety concerns.<sup>1</sup>

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<sup>1</sup> OSPI notes the Parent also stated in her reply to the District's response that the 1:1 bus support should have been added to the Student's IEP sooner given safety concerns. This is outside the scope of the complaint investigation as the Parent's complaint alleged the IEP was not being implemented and not that the IEP team failed to consider amending the IEP earlier in the school year. As such, OSPI makes no comment on the development of the IEP amendment.

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 student with a disability and those required by the IEP.

Here, the IEP amendment was finalized on May 28, 2022 and included that the Student would be supported by a 1:1 paraeducator on the bus for the remainder of the 2021–2022 school year. There is no question that this support was not immediately provided. The bus paraeducator did not start riding the bus with the Student until June 8, 2022—meaning the support was not provided for six days, one of which the Student was absent. While the Parent's safety concerns are legitimate, there is no evidence that the failure to provide the bus paraeducator for the five days the Student attended school negatively impacted his education—he attended school and accessed his special education services. Once the paraeducator started on June 8, 2022, the paraeducator support on the bus was provided for the remainder of the school year. Given the short duration the support was not provided and that it did not impact his access to instruction or special education services, OSPI finds that the failure to provide the paraeducator was not a material failure to implement the IEP. OSPI finds no violation.

However, OSPI notes that the District's prior written notice stated the Student "will begin having an aid/paraeducator ride the bus with him (*pending hiring of aid/paraeducator*) for the remainder of the 2021-2022 school year..." (Emphasis added.) Special education regulations require that districts ensure they provide all services in a student's IEP, consistent with the student's needs as described in that IEP. Districts cannot condition the receipt of a special education service on the availability or hiring of staff, as special education services are identified and provided based on individual student need. Thus, the inclusion of this language is a violation. The District will be required to develop and provide the Student's IEP team with written guidance.

### **CORRECTIVE ACTION**

By or before **August 26, 2022** and **September 23, 2022**, the District will provide documentation to OSPI that it has completed the following corrective action.

#### **STUDENT SPECIFIC:**

None.

#### **DISTRICT SPECIFIC:**

##### **Written Guidance**

By **September 16, 2022**, the District will ensure that the following individuals receive written guidance on the topics listed below: special education administrators, the principal, and the Student's 2021–2022 IEP team. The guidance will include examples and discussion of best practices, and address:

- Provision of services based on student need. See WAC 392-172A-03105.
- Requirement to not condition services on staff availability, hiring of staff.

By **August 26, 2022**, the District will submit a draft of the written guidance to OSPI for review. OSPI will approve the guidance or provide comments by September 7, 2022.

By **September 23, 2022**, 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.

### **RECOMMENDATIONS**

OSPI notes that a paraeducator was identified as early as May 28, 2022, who was willing to provide the support, when the Student's case manager emailed the District's assistant director of inclusive education. The assistant director was out between May 27 and June 7, 2022 and did not respond to the case manager encouraging them to move forward with having the paraeducator provide the support until June 7, 2022. Although it is not clear that this was the main cause of the delay, it does appear to be connected. Thus, OSPI recommends the District review this decision with involved staff and clarify lines of communication to prevent similar future occurrences.

Dated this \_\_\_\_ day of July, 2022

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.)