

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 21-90**

### **PROCEDURAL HISTORY**

On October 28, 2021, 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, with regard to the Student's education.

On October 28, 2021, 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 31, 2021, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on November 1, 2021.

On November 8, 2021, the District requested an extension of time to respond to the complaint. OSPI granted the extension and asked the District to respond by November 19, 2021.

On November 19, 2021, OSPI received the District's response to the complaint and forwarded it to the Parent on November 22, 2021. OSPI invited the Parent to reply.

On November 23, 2021, OSPI requested that the District provide additional information, and the District provided the requested information on December 1, 2021. OSPI forwarded the information to the Parent on December 2, 2021.

On November 30 and December 2, 2021, OSPI received additional information from the Parent. OSPI forwarded that information to the District November 30 and December 2, 2021, respectively.

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

### **ISSUE**

1. Did the District implement the Student's individualized education program (IEP) beginning September 3, 2021, including:
  - a. Providing services in the Student's appropriate placement and least restrictive environment; and,
  - b. Providing one-to-one support if the IEP team agrees this support is necessary?

### **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. 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 disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

Least Restrictive Environment (LRE) & Placement: School districts shall ensure that the provision of services to each student eligible for special education, shall be provided: 1) To the maximum extent appropriate in the general education environment with students who are nondisabled; and 2) Special classes, separate schooling or other removal of students eligible for special education from the general educational environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.114; WAC 392-172A-02050.

Educational placement decisions must be determined annually, or sooner if appropriate, and be made by a group of persons, including the parents, and other persons knowledgeable about the student, the evaluation data, and the placement options that provide a reasonably high probability of assisting the student to attain his or her annual goals, and a consideration of any potential harmful effect on the student or on the quality of services the student needs, based on the student's IEP and LRE requirements. Unless the student's IEP requires some other arrangement, the student must be educated in the school that the student would attend if not disabled. If the student needs other arrangements, placement must be as close as possible to the student's home. 34 CFR §300.116; WAC 392-172A-02060.

## **FINDINGS OF FACT**

### **2021–2022 School Year**

1. The District's 2021–2022 school year began on August 26, 2021 and the Student attended a District middle school and was eligible for special education services under the eligibility category autism.
2. The Student's May 2021 individualized education program (IEP) was in place at the start of the school year, which the District noted was developed prior to the Student's transition to middle school. The IEP noted the Student did not exhibit significant behavioral concerns necessitating a behavioral intervention plan (BIP), although the Student's behavior "does at times impede his learning...as he struggles to start a task and continue to work through it." The IEP included annual goals in the areas of adaptive (attention to task, transitions), social/emotional (social greetings), reading (decoding, comprehension), math (adding coins and bills, telling time, story problems, multiplication), written expression (sentence writing), and speech (receptive language and pragmatics), with progress reporting at the semester. The IEP provided the Student with the following specially designed instruction from July 2 through November 24, 2021, provided by a special education teacher in the special education setting:
  - Adaptive: 252 minutes per week
  - Social/emotional (Concurrent): 252 minutes per week
  - Basic Reading: 252 minutes per week

- Reading Comprehension (Concurrent): 252 minutes per week
- Math Calculation: 252 minutes per week
- Math Problem Solving (Concurrent): 252 minutes per week
- Written expression: 252 minutes per week
- Speech: 30 minutes, 8 times per month (provided by a speech language pathologist (SLP))

The IEP noted the Student would spend 43.2% of his day in the general education setting and receive his special education services, 1,068 minutes per week, in the "Support Center" classroom, which the District noted is a classroom designed to meet the needs of students with disabilities by providing individualized and small group instruction in a smaller classroom size. The District stated the support center classroom had a staffing ratio of one teacher, two paraeducators, and 12 students. The Student also received specialized transportation and extended school year (ESY) services.

3. At the start of the school year, the District stated the support center classroom had an unfilled paraeducator position. The District stated it took active steps to fill the position, but was not immediately successful.
4. On the first day of school, August 26, 2021, the Student was restrained after multiple incidents, including: after refusing to enter the school building and climbing on an outside stairwell wall; after climbing on the railings near the stage; and, while waiting for the bus after the Student ran into the bus and parent (car) pick up area.
5. The District stated in its response that at the start of the school year, the Student began exhibiting significant behavior concerns, including school refusal, bus refusal, elopement, and assaultive behavior. Emails between District staff sent from August 26 to 30, 2021 describe these behaviors, including the challenges getting the Student to exit the bus and enter the school building, elopement, and climbing walls and onto ledges.

The emails acknowledged the need for additional adult support for the Student and documented the staffing shortages the District was facing as staff discussed concerns and potential solutions, including the need to set up an IEP meeting.

The District stated the Student's behaviors went beyond what could be addressed under the Student's current IEP, regardless of the unfilled paraeducator position.

6. On August 31, 2021, the Parent emailed the Student's IEP team and stated she would not be sending the Student to school until there was a plan in place to get the Student safely off the bus and in and out of the building. The Parent also stated she wanted to discuss an "alternative placement" as she did not think the school had the resources to support the Student.
7. On September 2, 2021, the Student's IEP team, including the Parent and Student's private board-certified behavior analyst (BCBA), met to discuss the Student's behaviors. The meeting invitation indicated the meeting was to review the Student's current IEP services, least

restrictive placement, and update his emergency response protocol (ERP) to address transitioning on and off the bus.

8. The District stated that following the September 2, 2021 IEP meeting, the Student's behaviors continued, and the District continued to attempt to fill the unfilled paraeducator position.<sup>1</sup>
9. On September 8, 2021, the District's assistant director of inclusive education (assistant director) and Parent spoke on the phone. In an email documenting the call, the assistant director stated he shared the efforts to obtain additional staff, including a dedicated support for the Student. They also discussed the plan for the Student's return to school and the anticipated schedule for the Student once staffing was in place.
10. On September 10, 2021, the District BCBA and the Student's private BCBA collaborated to create an intervention checklist for the Student to help staff address behaviors. The District BCBA also emailed that she would provide targeted coaching to staff supporting the Student.
11. On September 15, 2021, the Parent emailed the Student's IEP team, "checking to see where we are at getting [Student] back to school. He's been out of school for two weeks now."

In response, the assistant director suggested reconvening the IEP team to discuss other options as they currently did not have the staff to support the plan to bring the Student back to school. The assistant director suggested potentially reevaluating the Student to obtain additional information.

12. On September 17, 2021, the assistant director, school psychologist, and principal emailed about a potential reevaluation. The assistant director noted they should connect, stating he was "concerned that we are having discussions around change of placement without implementing [the] current IEP and also aware of our lack of resources, specifically staffing, to do so."
13. On September 23, 2021, the Student's IEP team met to continue discussing how to address the Student's needs. The team agreed to initiate a reevaluation to consider whether a change in placement was needed to address the Student's behaviors. The Student's IEP team also revised the Student's IEP as an interim measure to help ensure the Student's safety while the reevaluation was underway.

The September 23, 2021 IEP amendment provided the Student with an in-home instruction model to "help enable him to build trust with instructors and ease his transition to middle school." The District stated that the IEP team "identified that the goal was to transition the

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<sup>1</sup> Emails between District staff indicated the District was actively trying to recruit additional staff, including paraeducators. Efforts included working with staffing agencies, attempting to contract with providers, determining whether there were available substitutes, prioritizing paraeducator training and testing/certification when paraeducators were hired, and more visibly advertising in the District (e.g., flyers, banners, and yard signs).

Student back to in-person instruction as soon as he was able to engage in successful transitions (e.g., exiting the school bus)."

The goals on the IEP remained the same and the services were amended as follows, with all to be provided by a special education teacher (except speech), in the special education setting:

- Adaptive: 30 minutes per week
- Social/emotional (Concurrent): 30 minutes per week
- Basic Reading: 30 minutes per week
- Reading Comprehension (Concurrent): 30 minutes per week
- Math Calculation: 30 minutes per week
- Math Problem Solving (Concurrent): 30 minutes per week
- Written expression: 30 minutes per week
- Speech: 30 minutes, 4 times per month (provided by a speech language pathologist (SLP))

The Student was to receive 150 minutes per week of instruction and spend zero percent of his time in general education. The IEP noted the Student would receive home instruction, with the goal of transitioning him back to a school environment and increasing service time. The IEP further noted that "Recently at the end of last school year, during ESY and at the start of this year, [the Student] has not been able to attend, refusing to exit the bus" and that this was "likely related to anxiety arising from attending Middle School and multiple transitions."

The prior written notice documented that the Student had demonstrated "consistent school refusal behavior" and that the Student would receive home based instruction while undergoing a reevaluation. The notice indicated the District instructor would be working closely with the District BCBA and Student's private, home based BCBA.

14. According to the District, the number of daily minutes of home instruction were "determined based on input from the Parent and school-based IEP team members regarding the Student's capacity to engage in instruction."

According to the Parent, she was "never consulted about the number of minutes of home instruction." The Parent stated she even asked if the Student could have more time via home instruction and the Parent stated the home instruction teacher stated they did not have the staffing or time available to provide additional minutes. The Parent also noted there were several days the instructor was absent and that no substitute was provided, as follows: October 22 and November 8, 15, 19, 22, 24 or 29, 2021.

15. On September 24, 2021, the District BCBA shared the intervention strategies checklist with the teacher who would be providing home instruction for the Student.
16. On September 27, 2021, the Student began receiving instruction at home. Based on emails, the home instruction teacher met with the Student daily for 30 minutes and that they, as of September 29, 2021, had worked on multiplication, writing a story, and drawing.
17. On September 28, 2021, the Parent provided consent for a reevaluation.

18. Also, on September 28, 2021, the Parent emailed the assistant director regarding a nonpublic agency (NPA) she had spoken with and believed would be a good fit for the Student. The Parent stated she wanted to see if that school was an option.

The assistant director responded they could consider the NPA, but that the team needed to go through the process of considering a different placement, which included completing the reevaluation.

19. On October 14, 2021, the District developed and began implementing a plan to transition back to the school building. The plan provided for the Student to come to school, in-person for services two days per week. The District's assistant director provided the services.

The Student's schedule varied, based on the Student's needs, with the Student attending and receiving instruction for two hours per day. Instruction, based on schedules provided by the District, was provided in the areas of reading, social emotional, math, and writing. The District noted that the SLP joined the Student and assistant director once a week, typically during writing time.

20. On October 25, 2021, the Student's IEP team met to review the reevaluation and develop a new IEP for the Student. The IEP noted the Student had behaviors that impeded his learning and the learning of others. The IEP indicated that at the end of the previous school year, the Student began demonstrating difficulty with transitions, which manifested in refusal to exit the bus in the morning or enter the bus in the afternoon and putting himself in unsafe situations at school (elopement, climbing, and laying on the floor during passing periods).

The IEP included annual goals, updated to address the Student's needs and current skill level, in the areas of adaptive (attention to task, transitions, following directives), social/emotional (self-calming strategies, safe behaviors), reading (main idea, decoding unfamiliar words), math (multiplication, word problems), written expression (sentence writing), and speech (listening comprehension, temporal/sequencing concepts), with progress reporting quarterly. The IEP provided the Student with the following specially designed instruction, provided by a special education teacher (except speech) in the special education setting:

- Adaptive: 252 minutes per week
- Social/emotional (Concurrent): 252 minutes per week
- Basic Reading: 252 minutes per week
- Reading Comprehension (Concurrent): 252 minutes per week
- Math Calculation: 252 minutes per week
- Math Problem Solving (Concurrent): 252 minutes per week
- Written expression: 252 minutes per week
- Speech: 30 minutes per week (provided by an SLP)

The IEP also included the following related services:

- 1:1 paraeducator (concurrent): 1,164 minutes per week in the special education setting
- 1:1 paraeducator: 786 minutes per week in the general education setting
- 1:1 paraeducator: 5 hours per week on transportation

The IEP noted the Student would spend 28.8% of his day in the general education setting and receive his special education services for 1,338 minutes per week.<sup>2</sup> The prior written notice documenting the meeting indicated the 1:1 support would be provided by a behavior technician (BT) or a paraeducator and that the Student was unable to access the school environment safely without adult support. The IEP was to be implemented on November 1, 2021.

21. The prior written notice, dated October 29, 2021, indicated the IEP team updated and added new goals to the IEP, added 1:1 support, and considered placing the Student out of District or at an NPA. The notice indicated the team declined to place the Student at an NPA because “the school team is currently working with a BCBA to collect the necessary data” and complete a functional behavioral assessment (FBA) to “determine the level of need that [Student] requires in the school environment, in addition to the most appropriate [least restrictive environment] to meet [the Student’s] needs.” The notice indicated the team determined it needed more data before placing the Student in a more restrictive educational setting. The notice recorded that the team considered a diagnostic placement while completing the FBA and BIP, and that this was also rejected as the team felt it could complete the FBA, BIP, and ERP without placing the Student in a more restrictive placement for the purposes of collecting data. Although, the notice recorded that the team agreed the Student’s educational needs were not being met currently at the middle school. The notice also documented that the Parent expressed concern about the amount of time the Student had been receiving home instruction and that the Parent “indicated that they may provide a letter dissenting to the current placement decision.”

A follow up meeting was scheduled for November 8, 2021. The notice indicated that until the team could meet on November 8, the Student would continue to receive services at home Monday, Wednesday, and Friday with in-person services on Tuesday and Thursday.

22. On October 28, 2021, OSPI received the Parent’s complaint, in which the Parent alleged the Student was not provided a safe, appropriate learning environment and that he did not receive any special education services between September 3 and 24, 2021. The Parent stated the District acknowledged the Student needs a 1:1 paraeducator, but stated the District does not have sufficient staffing to provide a paraeducator.
23. On October 29, 2021, the assistant director emailed the Parent a copy of the October 25, 2021 IEP. The assistant director noted that at their next meeting, they could continue discussing the IEP, and discuss “an updated FBA, BIP and ERP as needed.”
24. On October 31, 2021, the Parent emailed the assistant director and stated:
- I also want to clarify, on page 21 [of the IEP], it says, ‘Recently (at the end of last school year, during ESY and at the start of this year), he has not been able to attend...’ He did

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<sup>2</sup> OSPI notes the Student’s total minutes of specially designed instruction equate to 1,038 minutes per week. It is not clear if the 1,338 is a typo or how that number was calculated. OSPI recommends the Student’s IEP team review this and see if the IEP needs to be adjusted.

attend school in the spring of 2021, in the support center classroom at [elementary school]. After returning to in-person school after a year of remote learning at home, he did have difficulty transitioning on & off the bus, so I drove him to school. We discussed this at the transition meeting prior to summer 2021.

I do strongly object to any further delays to returning [Student] to the classroom. You have had eight weeks to formulate a plan to return him to school. The IEP team has already agreed that he needs a one-on-one aide at all times for him to return safely to school. I have been told that you do not have an aide available, so you are obligated to provide an alternate placement for him in the least restrictive environment so that he can receive the services outlined in his IEP. I am extremely disappointed that the district has declined our request for out-of-district placement and continues to deny him services.

Please attach these comments to the finalized IEP.

25. On November 8, 2021, the Student's IEP team met to review the FBA, discuss the Student's BIP and programming.

The documentation provided in the complaint included documentation indicating that the FBA was underway, including observations at school, recommendations based on observations, other data collection, and input from the Parent. Additional documentation provided by the Parent included a BIP developed by the IEP team and updated ERP.

26. After November 8, 2021, the Student continued to attend school, in-person two days a week and received home instruction three days per week.

27. The District noted in its response that the Student's IEP did not include 1:1 support prior to the October 25, 2021 IEP amendment; however, the District stated the position was not scheduled to be staffed until November 29, 2021. Thus, the District stated it would make and provide OSPI a copy of a compensatory education offer to the Student to account for the failure to implement the BT between November 1 and 29, 2021.

28. On November 24, 2021, the assistant director emailed the Parent and other members of the IEP team regarding the Student's schedule in the coming weeks, as follows, summarized:

- Week of November 29: Home instruction Monday and Wednesday; At school instruction Tuesday, Thursday, and Friday (approximately 2.5 hours per day)
- Week of December 6 and 13: Home instruction Wednesday; At school instruction Monday, Tuesday, Thursday, Friday (approximately 3 hours and 15 minutes)
- December 20, 2021 through January 2, 2022: Winter Break
- Week of January 3: Full day at school, Monday through Friday

29. On November 30, 2021, the Student's paraeducator/BT began work.

30. During the period at issue in this complaint, the District noted the following in its response related to the issues under investigation and potential corrective actions:

- September 1 and 24, 2021: The Parent kept the Student at home "due to a combination of District staffing issues and increased Student behaviors." The District proposed providing the



Student with 1/3 of the minutes of specially designed instruction he missed during this period, or 1,424 minutes of compensatory education.

- September 27 to October 29: The Student was provided with home-based instruction consistent with his IEP, as well as in-school services two days per week based on the transition plan.

The District also stated:

During the time period at issue, some members of the IEP team expressed their belief that a private placement would be the best way to resolve the matter...These expressions were well intentioned, but inconsistent with the process required by the IDEA in two respects. First, a significant change in placement should not be made unless supported by an evaluation...The Student's reevaluation needed to be completed prior to making a decision to place him in a private school. Second, placement is determined by content of the IEP and with the goal that a student be educated in the least restrictive environment (LRE). A private placement is not appropriate when [a free appropriate public education] FAPE can be provided in the neighborhood school...Some evaluation team and IEP team members concluded that a temporarily unfilled position in the Student's program necessitated private placement...This belief is inconsistent with placement being determined by Student need and LRE.<sup>3</sup> The District believes the IEP team members would benefit from additional training on this issue.

The District proposed providing the Student's IEP team members with additional training regarding IEP development procedures and changes of placement.

## CONCLUSIONS

**Issue: Individualized Education Program (IEP) Implementation:** The Parent alleged the District failed to provide the Student special education services after September 3, 2021 because it did not have sufficient staffing to provide a 1:1 paraeducator and could not otherwise provide a safe, appropriate learning environment for the Student.

At the beginning of each school year, a district must have in effect an IEP for each eligible student and provide all services consistent those IEPs. Special education services should be provided in a student's least restrictive environment—in other words—services should be provided in the general education environment to the maximum extent appropriate. Decisions to change a student's LRE and placement must be made by the group of persons, including the parents, and

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<sup>3</sup> "Following the October 25, 2021 IEP meeting, the school psychologist drafted a [prior written notice] that reflected the belief that the Student required a different placement in part due to the temporary staffing issue...The draft [notice] was written in a way that could be misunderstood to indicate that the IEP team uniformly supported this change, but was overruled by a non-team member 'District Behavior Coordinator.' This is not the case. [District BCBA] is the person referenced as the 'District Behavior Coordinator,' and he is...a member of the IEP team. He articulated at the meeting that other steps should be completed before moving forward with a significant change in placement. These steps included the addition of 1:1 support, to which the team agreed, and the completion of a [FBA] and [BIP], which were then in progress. The [notice] was revised to more accurately reflect the reasons the Student's placement was not changed to a private school."

other persons knowledgeable about the student, the evaluation data, and the placement options that provide a reasonably high probability of assisting the student to attain his or her annual goals.

#### September 1–24, 2021

At the start of the 2021–2022 school year, the Student’s May 2021 IEP was in place. The IEP provided the Student with a total of 1,068 minutes of specially designed instruction in adaptive, social/emotional, reading, math, written expression, and speech (all provided in the special education setting). The May 2021 IEP did not contain 1:1 paraeducator support. At the start of the school year, the Student began exhibiting significant behaviors, including elopement, climbing, school refusal, bus refusal, and assaultive behaviors. The District acknowledged the Student’s IEP was not meeting his needs and that the Student needed additional adult support, which the District could not, at that time provide, due to staffing shortages. On August 31, 2021, the Parent emailed the District and stated she would not send the Student to school until there was a plan in place to address his needs. The Student was out of school and received no special education services between September 1 and 24, 2021. The District was responsive to the Parent’s concerns, holding IEP meetings on September 2 and 23, 2021 to discuss the Student’s behaviors and needs, developing behavior intervention checklists, actively working to hire staff, and considering the need for a reevaluation. However, the District acknowledged it was unable to implement the Student’s IEP. OSPI finds a violation.

The District proposed providing the Student with a third of the minutes of missed instruction, 1,424 minutes, as compensatory education. OSPI finds this to be an equitable remedy and accepts the District’s proposed corrective action.

#### September 27–November 1, 2021

On September 23, 2021, the Student’s IEP team met to continue discussing a plan to meet the Student’s needs and address his behaviors. The team agreed to initiate a reevaluation to gather additional data and consider whether a change in placement was warranted. The IEP team also agreed to revise the Student’s IEP in the interim to provide him with instruction in the home for 30 minutes a day (150 minutes a week), which began September 27, 2021. The District stated 30 minutes per day was “determined based on input from the Parent and school-based IEP team members regarding the Student’s capacity to engage in instruction;” however, the Parent disagreed, stating she was not consulted. The Parent stated she asked the home instruction teacher if the Student could have more instruction time and the teacher stated they did not have the staffing or time available to provide additional minutes. The Parent noted the instructor was absent and no substitute was provided on October 22, 2021.<sup>4</sup>

On October 14, 2021, the District developed and began implementing a plan to transition the Student back to the school building. After the plan began, the Student continued to receive 30 minutes a day of home instruction three days a week and two hours per day, two days per week

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<sup>4</sup> The Parent also stated the instructor was absent and no substitute provided on November 8, 15, 19, 22, 24 or 29, 2021. These dates will be addressed by the next section of the conclusions.

of instruction at school (330 minutes per week total). The District's assistant director of inclusive education provided the instruction at school.

OSPI notes that the amount of instruction provided during this time period was a significant decrease from his previous IEP: 1,068 minutes a week to between 150 and 330 minutes a week. It is not clear that this decision was entirely Student driven and OSPI finds it likely that the staffing challenges and schedules drove the decision to provide 30 minutes daily, to some degree, although the Student's capacity for work was also a consideration. Yet, the District did not complete a reevaluation prior to drastically reducing the minutes of instruction the Student was to receive. The District had initiated a reevaluation; and, the documentation indicates that while staffing continued to present a challenge, the District was taking active steps to recruit and hire additional staff. OSPI recognizes that the District was actively trying to address the challenges and meet the Student's needs, and at the same time, the decrease in the amount of instruction had an overall impact on the Student. Thus, OSPI finds the District did not properly amend the Student's IEP because the decision to reduce the minutes was not supported by Student specific-data supporting such a reduction, and given the likely impacts of non-Student specific factors (scheduling and staffing). OSPI finds a violation.

The District will be required to provide compensatory education, based on the Student's original May 2021 IEP (providing 1,068 minutes per week), as this was the IEP that would have been in place. The Student was provided 150 minutes per week for three weeks (a difference of 918 minutes per week or 2,754 minutes total) and 330 minutes per week for two weeks (a difference of 738 minutes per week or 1,476), meaning the Student was not provided approximately 4,230 minutes of specially designed instruction. OSPI finds that providing a third of the missed minutes to be an equitable remedy, and thus the District will provide 1,410 minutes of compensatory education in addition to the above ordered minutes.

#### November 1–December 17, 2021

On October 25, 2021, the Student's IEP team met to review the Student's reevaluation and develop a new IEP for the Student. The IEP increased the Student's minutes of specially designed instruction to 1,038 minutes per week<sup>5</sup> and added full time 1:1 support provided by a behavior technician (BT) or paraeducator. The IEP was to be implemented November 1, 2021; however, the District noted that the Student's 1:1 support position would not be staffed until the end of November, and therefore the District recognized it would be responsible for additional compensatory education. Thus, during this time period, the Student's October 2021 IEP was in place, but the District continued to provide services at home Monday, Wednesday, and Friday with in-person services on Tuesday and Thursday until November 30, 2021 (as described above, this equates to 330 minutes per week of instruction). On November 30, 2021, the Student's

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<sup>5</sup> Again, OSPI notes the Student's total minutes of specially designed instruction equate to 1,038 minutes per week in the October 2021 IEP (when OSPI calculated the minutes). However, the IEP states 1,338 minutes per week and it is not clear if the 1,338 is a typo or how that number was calculated. OSPI recommends the Student's IEP team review this and see if the IEP needs to be adjusted. For purposes of the corrective actions OSPI will use 1,038.

paraeducator/BT began, and the District proposed the following schedule to gradually increase the Student's time at school:

- Week of November 29: Home instruction two days per week, 30 minutes per day; At school instruction three days, approximately 2.5 hours per day (510 minutes total)
- Week of December 6 and 13: Home instruction one day, 30 minutes per day; At school instruction four days, approximately 3 hours and 15 minutes (810 minutes per week total)
- December 20, 2021 through January 2, 2022: Winter Break
- Week of January 3: Full day at school, Monday through Friday

Given that the District amended the Student's IEP on October 25 but did not fully implement this IEP beginning November 1, and does not have a schedule that fully implements the IEP until January 2022, OSPI finds a violation as this represents a material failure to implement the October 2021 IEP. The District will be required to provide the following additional compensatory education minutes and updated information on the Student's November/December 2021 schedule and minutes accessed.

During this period, the Student's IEP provided for 1,338 minutes per week and as such, the Student was not provided or not scheduled to be provided the following:

- November 1-29: 2,832 minutes not provided
- November 29-December 3: 528 minutes not provided
- December 6-17: 456 minutes not scheduled to be provided

This represents a total of 3,816 minutes not provided. Similar to above, OSPI requires the District to provide a third of the missed minutes, or 1,272, with an opportunity for recalculation if the Student's December 2021 schedule is not provided as outlined.

### Change in Placement

The IEP team also determined the Student did not need a change of placement, specifically to a nonpublic agency (NPA) as requested by the Parent. The prior written notice documenting the October 25, 2021 IEP meeting stated the team declined to place the Student at an NPA because the team was working with a BCBA to collect additional data, conducting a functional behavioral assessment (FBA), and would be developing a behavioral intervention plan (BIP) and updating the Student's emergency response protocol (ERP) as necessary. The prior written notice documented that the team rejected placing the Student in a more restrictive placement while collecting additional data, although the team agreed the Student's educational needs were not currently being met (while he was not fully back in-person at school and while not receiving the additional adult support). The notice indicated the Parent disagreed with the placement decision. An email following the IEP meeting indicated the Parent objected to the delays in returning the Student to the classroom, the lack of services for the Student, and the Parent stated the District was "obligated to provide an alternate placement for [the Student] in the least restrictive environment" since there was no paraeducator/BT available. The District did state that some members of the IEP team expressed that a private placement was needed for the Student due to the temporary lack of staff; however, the District noted that while well intentioned, the staff statements were inconsistent with the process required by the IDEA with respect to changing a student's

placement—namely that a reevaluation needed to be conducted and that the IEP team determines placement. The District stated that IEP team members would be provided additional training. OSPI finds that the District here followed procedures to considering a change in placement, including that the District conducted a reevaluation and the IEP team met, discussed, and made a decision with respect to placement. OSPI finds no violation with respect to placement, but encourages the District to provide the additional training it outlined in its response to this complaint.

### **CORRECTIVE ACTIONS**

By or before **January 12, 2022, April 15, 2022, July 15, 2022, September 1, 2022, and November 22, 2022**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

##### **Compensatory Education**

By or before **January 7, 2022**, the District and Parent will meet to plan and develop a schedule for the provision of 4,106 minutes rounded to 68 hours of compensatory education, divided between the areas on the Student's current IEP. During this conversation, the District and Parent will review the proposed December 2021 schedule and document whether this schedule was provided or if there were changes. By or before **January 12, 2022**, the District will provide OSPI with the schedule for compensatory education services and documentation of the number of minutes of instruction provided in December 2021. OSPI will review the December 2021 schedule and determine if the amount of compensatory education ordered needs to be modified.

Unless otherwise agreed to by the District and Parent, 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 of the District's school day, including extended days, weekends, and District breaks.

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 **November 15, 2022**.

The District must provide OSPI with an update on the amount of compensatory services provided to the Student by providing documentation on **April 15, 2022, July 15, 2022, and September 1, 2022** 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 **November 22, 2022**, 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 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 **November 22, 2022**.

**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.

**RECOMMENDATION**

The District stated that IEP team members would be provided additional training related to placement procedures. OSPI encourages the District to provide the additional training it outlined in its response to this complaint.

OSPI also notes there may be a typo in the October 25, 2021 IEP with respect to the number of weekly minutes (the IEP lists 1,338 while OSPI calculated 1,038). OSPI recommends the Student's IEP team review the IEP and adjust or amend if necessary.

Dated this \_\_\_ day of December, 2021

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