

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-53

PROCEDURAL HISTORY

On May 6, 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 Seattle 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 May 10, 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 May 27, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent on May 31, 2022. OSPI invited the Parent to reply.

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

On June 14, 22, and 23, 2022, OSPI determined that additional information would be helpful to the investigation and contacted the District. OSPI received some of the requested information from the District on June 24, 2022. OSPI forwarded that information to the Parent on June 24, 2022.

On June 27, 2022, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on June 30, 2022.

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

ISSUE

1. Did the District properly implement the Student's individualized education program (IEP); specifically, to the extent required by the IEP, did the District:
 - a. Provide the Student with a 1:1 paraeducator beginning on or about January 12, 2022;
 - b. Properly collect data on the Student's needs resulting from the Student's disability from September 2021 through the present; and,
 - c. Provide a special education teacher in September and October of 2021?

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. 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).

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.")

There is no requirement to provide day-for-day compensation for time missed. *Complainants of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994). "There is no statutory or regulatory formula for calculating compensatory remedies. However, generally services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting." *In re: Mabton School District*, 2018-SE-0036.

FINDINGS OF FACT

2021–2022 School Year

1. The District's first day of school was September 1, 2021.
2. 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 eighth grade, and attended a District kindergarten through eighth grade school. At that time, the Student's June 2021 amended individualized education program (IEP) was in effect.

The June 2021 amended IEP provided the Student with the following specially designed instruction during the 2021-2022 school year:

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Special Education							
No	COMMUNICATION	SLP	SLP	90 Minutes / Monthly	Special Education	06/19/2021	10/19/2021

No	READING	Special Education Staff	Special Education Teacher	60 Minutes / 2 Times Weekly	Special Education	06/19/2021	10/19/2021
No	STUDY/ ORGANIZATION SKILLS	Special Education Staff	Special Education Teacher	45 Minutes / 11 Times Weekly	Special Education	06/19/2021	10/19/2021
No	SOCIAL/BEHAVIOR	Special Education Staff	Special Education Teacher	30 Minutes / 5 Times Weekly	General Education	06/19/2021	10/19/2021

The June 2021 amended IEP also included the following accommodation: “data collection daily report to parent weekly (frequency: daily; location: school wide).” The June 2021 amended IEP included the following supports for school personnel: “occupational therapy [consultation] – 200 minutes per year – all school environments”; and “paraprofessionals/paraeducators – daily – general education classroom.”

3. Based on documentation provided to OSPI during this investigation¹, the Student’s schedule from September 1, 2021 through September 27, 2022 was as follows:

- Period 1: *Language Arts*
 - *General education setting;*
 - Taught by a general education teacher, support from paraeducator 2;
 - Met for 50 minutes 5 days a week; and,
 - Unclear if specially designed instruction was provided to the Student during this class period.
- Period 2: *Math*
 - *General education setting;*
 - Taught by a general education teacher, support from special education teacher 1 and paraeducator 1;
 - Met for 50 minutes 5 days a week; and,
 - Unclear if specially designed instruction was provided to the Student during this class period.
- Period 3: *Social Studies*
 - *General education setting;*
 - Taught by a general education teacher²;
 - Met for 50 minutes 5 days a week; and,
 - Unclear if specially designed instruction was provided to the Student during this class period.

¹ On June 14, 2022, OSPI requested detailed information from the District concerning the Student’s various schedules during the 2021–2022 school year—OSPI provided the District with a fill-in-the-blank word document related to the Student’s various schedules. On June 24, 2022, the District provided OSPI with a copy of said document—this document included some, but not all—of the clarifying information requested of the District concerning the Student’s various 2021–2022 schedules.

² There is some scheduling information that suggests special education teacher 1 had some involvement with providing THE Student specially designed instruction during the social studies class prior to her departure on or about September 27, 2021, but the extent of this involvement—areas of specially designed instruction worked on, whether special education teacher 1 provided the specially designed instruction or supervised the same, etc.—is unclear.

- Period 4: *Science*
 - *General education setting;*
 - Taught by a general education teacher, support from paraeducator 2;
 - Met for 50 minutes 5 days a week; and,
 - Unclear if specially designed instruction was provided to the Student during this class period.
- Period 5: PE
 - *General education setting;*
 - Met for 50 minutes 5 days a week; and,
 - Unclear if specially designed instruction was provided to the Student during this class period.
- Period 6: *Coding*
 - *General education setting;*
 - Taught by a general education teacher, support from paraeducator 2;
 - Met for 50 minutes 5 days a week; and,
 - Unclear if specially designed instruction was provided to the Student during this class period.

4. During the 2021–2022 school year, the Student had an “overall attendance rate” of 89.9%.

5. According to the Parent, during the 2021–2022 school year, the District did not “implement...the IEP requirement for daily data collection and weekly data reports [beginning] September 2021 [and continuing through the] present.”

The District’s response read, in part:

The District acknowledges that a data collection form was not sent to Parent on a weekly basis since September 2021. However, Student’s special education teacher and instructional assistants have collected data on Student’s progress on his IEP goals on a weekly basis. Parent has been provided IEP goal progress reports consistent with Student’s IEP. Student’s teachers have maintained frequent communication with Parent regarding how Student is performing in class. And, Student’s IEP team has met with Parent multiple times to discuss her concerns, how Student is performing, and how to best support Student.

The District, therefore, denies that not providing a data collection form to Parent on a weekly basis since September 2021 [either] impeded Student’s right to a FAPE [or] significantly impeded Parent’s opportunity to participate in the decision-making process.

6. According to the Parent, special education teacher 1 “went on leave sometime in the fall [of 2021 and Parent] never learned how long Student was without a special education teacher.”

According to the District:

Special education teacher 1 was responsible for designing and supervising the specially designed instruction in Student’s IEP, as well as monitoring and evaluating Student’s progress. Special education teacher 1 went on leave on approximately September 27, 2021. While special education teacher 1 was absent during the end of September and October 2021, special education teacher 1’s role was covered by substitutes and special education teacher 2. [During this time,] Student’s SDI [specially designed instruction] was delivered primarily by instructional assistants.

Special education teacher 2 drafted Student's October 2021 IEP and served as the primary staff contact until special education teacher 3 was assigned to serve as Student's case manager.

Special education teacher 3 has been Student's case manager since November 1, 2021.

The District, therefore, denies that Student was not provided with a special education teacher during September and October 2021.

7. On September 23, 2021, special education teacher 1 emailed the Parent, stating, in part: The schedule of the classroom supports has been shifting as kids have had schedule changes and it has been difficult to nail down accurately.

I am supporting Student in math class and he also gets support in that class from paraeducator 1.

...

Paraeducator 1 and I are assessing students to place them in reading, and Student is slated to receive his two periods a week of reading during third hour...He is scheduled in US History third hour and will be pulled out to receive the two periods of reading.

Student will need to change his schedule of PE class 5th hour to join my social skills/study skills class 5th hour to complete his study/organizational skills minutes in a special ed setting.

8. Upon knowledge and belief, beginning on or about October 11 or 13, 2021—and continuing through October 29, 2021—the Student's schedule was as follows:

- **Period 1: Language Arts**
 - General education setting;
 - Taught by a general education teacher, support from paraeducator 2;
 - Met for 50 minutes 5 days a week; and,
 - Student did not receive specially designed instruction in this class.
- **Period 2: Math**
 - General education setting;
 - Taught by a general education teacher, support from paraeducators 3 and 4;
 - Met for 50 minutes 5 days a week; and,
 - Student did not receive specially designed instruction in this class.³
- **Period 3: Reading Intervention & Study/Organization**
 - Special education setting;
 - Taught by paraeducator 1;
 - Met for a total of 50 minutes 5 days a week; and,
 - Student received the following specially designed instruction each time this class met: 25 minutes of specially designed instruction in reading (provided by paraeducator 1); and 25 minutes of specially designed instruction in study/organization skills (provided by paraeducator 1).
- **Period 4: Social Studies (US History)**

³ During this investigation, OSPI asked the District to confirm its understanding that the Student did not receive specially designed instruction during either Language Arts or Math class from October 11–29, 2021, and the District did not correct such an understanding.

- *General education setting;*
- Taught by a general education teacher, support from paraeducator 1;
- Met for 50 minutes 5 days a week; and,
- Unclear if specially designed instruction was provided to the Student during this class period.
- **Period 5: Science**
 - *General education setting;*
 - Taught by a general education teacher, support from paraeducator 1;
 - Met for 50 minutes 5 days a week; and,
 - Unclear if specially designed instruction was provided to the Student during this class period.
- **Period 6: Coding/Computer Science**
 - *General education setting;*
 - Taught by a general education teacher, support from paraeducator 2;
 - Met for 50 minutes 5 days a week; and,
 - Unclear if specially designed instruction was provided to the Student during this class period.

9. An October 12, 2021 email stated THE Student had a “pack” period taught by a general education teacher and one other individual.⁴

10. On October 14, 2021, the Student’s IEP team developed a new annual IEP for the Student. The October 2021 IEP provided the Student with the following specially designed instruction:

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Special Education							
No	COMMUNICATION	SLP	SLP	90 Minutes / Monthly	Special Education	10/15/2021	10/14/2022
No	READING	Special Education Staff	Special Education Teacher	50 Minutes / 5 Times Weekly	Special Education	10/15/2021	10/14/2022
No	STUDY/ ORGANIZATION SKILLS	Instructional Assistant	Special Education Teacher	75 Minutes / 5 Times Weekly	General Education	10/15/2021	10/14/2022
No	SOCIAL/BEHAVIOR	Instructional Assistant	Special Education Teacher	30 Minutes / 5 Times Weekly	General Education	10/15/2021	10/14/2022

The October 2021 IEP also included the following accommodation: “daily data collection form sent to parent weekly (frequency: daily; location: all school settings: general and special

⁴ During this investigation, OSPI asked the District for detailed information on this “pack” period, including, in part: a description of the class; what days it meet, and for how often; what was the second individual’s role in the class; did THE Student receive specially designed instruction during this class; did it first meet beginning October 12, 2021, or had it met earlier than that date; and how long did the Student continue to participate in the “pack” period, e.g., until what date? The District provided no clarifying information in response to these questions.

education).” And, the October 2021 IEP included the following support for school personnel: “occupational therapy [consultation] – 100 minutes yearly – all school environments.”

11. On October 21, 2021, paraeducator 2 emailed special education teacher 2, stating, in part:
This school year I've received no information or guidance about taking data for Student or any other Access student on my schedule besides...I am happy to collect data, but I need guidance about the data collection that the SPED teacher wants. This is not something that special education teacher 1 set up before she left.
12. According to emails dated October 28, 2021: (1) there may have been multiple paraeducators in the Student’s math class; (2) paraeducator 2 worked with the Student on some math problems around this time; and paraeducator 3 was at least one of the paraeducators who assisted the Student in math class.
13. Upon knowledge and belief, on or about November 1, 2021, the Student’s third and fourth periods were switched; *Social Studies (US History)* now met during **Period 3** and *Reading Intervention & Study/Organization* met during **Period 4**.⁵
14. On November 2, 2021, special education teacher 3 emailed the Parent, stating, in part, “I will be taking over as the new middle school access teacher for your child.”
15. According to an email thread, dated November 5–6, 2021: paraeducator 1 was scheduled to assist the Student in science class, but the science teacher expressed a sentiment that “it [was] not clear who [was] giving Student support in science”; paraeducator 2 offered to step in and assist the Student, and least on a temporary basis; and someone’s schedule was adjusted “so that paraeducator 1 [could] support Student during science for most of the period.”
16. According to a November 8, 2021 email, beginning that week, the Student received specially designed instruction in communication once a week on Fridays at 3 pm.

In its response, the District stated these meetings lasted 30 minutes and that they were also provided prior to November 8, 2021.

17. Upon knowledge and belief, from November 17, 2021 through the end of the 2021–2022 school year, the Student’s schedule remained the same as that as described above. However, on or about November 17, 2021, a new class was added to the Student’s schedule: “Period 7: Comm Relationship.”⁶

⁵ During this investigation, OSPI asked the District to clarify whether this change in scheduling resulted in any change in specially designed instruction being provided to the Student. The District did not provide OSPI with clarification in response to this request.

⁶ During this investigation, OSPI requested clarifying information from the District regarding the “comm relationship” class, but no such clarifying information was provided.

18. The District's response included a "Student data [tracking]" document (tracking document). With the exception of the Student's communication goal, the tracking document noted the Student's progress on his IEP goals from November 23, 2021 through May 26, 2022. The tracking document included the following instructions for the Student's service providers: "complete data sheet 2 times weekly."

The tracking document included the following number of entries for each goal: **reading goal 1** – 3 entries; **reading goal 2** – 4 entries; **social/behavior 1** – 58 entries⁷; **social/behavior 2** – 31 entries⁸; **social/behavior 3** – 32 entries⁹; **social/behavior 4** – 42 entries¹⁰; **study/organizational skills 1** – 57 entries¹¹; and **study/organizational skills 2** – 53 entries¹².

19. The District was on break November 25–26, 2021.

20. On December 2, 2021, special education teacher 3 emailed the Parent the Student's homework assignments for his various classes. In this same email thread, the Parent asked special education teacher 3 to "remind the IAs that Student is supposed to be getting support around using his planner at the end of each class."

21. In an email thread, dated December 3, 2021, the Parent referenced having reviewed Schoology for information on some of the Student's assignments.

22. In a December 16, 2021 email wherein the Parent expressed concern about implementation of the Student's IEP during the first two months of the 2021–2022 school year, the Parent stated, in part, "I was supposed to be receiving data collection, which would help me understand [in, part, when Student was receiving what services]. I have not – which is another violation of his IEP."

23. The District was on break December 20, 2021 through January 2, 2022.

24. On January 3, 2022, paraeducator 3's employment with the District ended.

25. An email showed that on January 7, 2022, special education teacher 3 worked with the Student during history class.

⁷ 37 were met expectation; 16 were partially met expectation; and 6 were did not meet expectation.

⁸ 6 were met expectation; 17 were partially met expectation; and 8 were did not meet expectation.

⁹ 5 were met expectation; 22 were partially met expectation; and 5 were did not meet expectation.

¹⁰ 1 was met expectation; 38 were partially met expectation; and 3 were did not meet expectation.

¹¹ 26 were met expectation; and 31 were partially met expectation.

¹² 31 were met expectation; 21 were partially met expectation; and 1 was did not meet expectation.

26. The Student's IEP team amended the October 2021 IEP on January 11, 2022. The January 2022 amended IEP included the same specially designed instruction service matrix as that found in the October 2021 amended IEP, though it now included the following supplementary aids and services: a 1:1 instructional assistant (IA) for 517 minutes weekly in the special education setting and 1:1 instructional assistant for 1,208 minutes weekly in the general education setting.

The January 2022 IEP included the same date collection accommodation and occupational therapy consultation as the previous IEP.

The prior written notice for the January 2022 amended IEP read, in part:

The reason the team proposed providing additional support in the form of a 1:1 was because Student was not getting his work done with the support that he previously had with a split IA. If an IA was not with him for the whole classroom session, he would not get his work done and did not understand the concepts being taught in the classroom. When an IA was sitting with Student for the whole session with frequent prompts, he would get his work done and understood the concepts being taught.

27. According to the Parent, the District initially recruited a paraeducator for the Student, in accordance with the January 2022 IEP, with a posting identifying the role "as a temporary 'substitute' job without benefits, making it unattractive to applicants, even though Student's need for a 1:1 paraeducator is not temporary."

The District's response read, in part:

The District posted a job listing for the 1:1 paraeducator position, but unfortunately did not receive any qualified applicants. As a result, the District provided Student with the 1:1 support through existing paraeducators, teachers, and other school staff members. Student has received paraeducator support in his general education classes. Student receives his SDI in reading in a special education setting for one period per day. That SDI is delivered 1:1 by Student's special education teacher, so Student receives the necessary support from his teacher.

28. According to emails, on or about January 21 or 31, 2022, the District posted the position for a 1:1 for the Student. The emails showed the position was posted as either a substitute position or a "recurring substitute" position.

29. According to emails, during the week of February 7, 2022, special education teacher 3 helped the Student, at least on occasion, in math class, as paraeducator 1 was out for the week.

30. According to a February 8, 2022 email thread, the Student did have access to some shared paraeducator support during his science class.

31. On February 10, 2022, special education teacher 3 emailed the Parent, stating, in part:

I make sure to go through his planner during 4th period to make sure that he has his homework entered. I also have instructed my IAs that are supporting him in class to help him fill his planner out at the end of class so that he knows what needs to be completed. My IAs are checking in with Student as much as they can to ensure that he's focused on

the lesson to help make sure that he understands the concepts being taught. My hope is that we get the 1:1 position filled so that Student can have someone next to him, helping him stay on task, which in turn would help him to understand the material.

32. According to emails dated February 17–18, 2022, the Student did have access to shared paraeducator support in math class.
33. In an email dated February 18, 2022, paraeducator 2 emailed special education teacher 3 an update on a reading assignment paraeducator 2 and the Student recently worked on.
34. The District was on break February 21–25, 2022.
35. On March 1, 2022, special education teacher 3 emailed the Parent an “IEP quarterly progress report.”
36. According to emails dated March 17, 2022, on or about that date, the substitute paraeducator job posting was “dropped” from the relevant website. It appears it was re-added on or about March 25, 2022.
37. On March 23, 2022, special education teacher 3 emailed paraeducator 1, stating, in part:
2nd and 4th period, Student is your focus student. Some supports that would be helpful for him during class are:
 - Make sure that he has needed supplies out at the beginning of class
 - Check laptop and calculator in if they are distractions
 - Give prompts when transitions to new concepts are coming up or if class is starting to work independently
 - If Student stops working, check in, he may need help with a challenging concept
 - Set up an incentive plan with Student for independent work and task completion. Ex. If you are able to complete this problem, multiple problems, this worksheet, etc. you will get 5 minutes of computer or calculator time at the end of class
 - Make sure that Student takes relevant notes in class when peers are taking notes
 - I've found success with Student in my reading group and US history with these strategies. The key is consistency/predictability in your plan with him. Over the days/weeks that you work with him, you'll start to notice improvements with time on task and task completion.
 - If you have questions or need to brainstorm ways on supporting Student, let me know and we can sit down to work some things out
 - At the end of class, make sure that Student fills his planner out with what his homework is if he completed his work in class have him check it off in his planner

...

I realize that we are spread thin and that we have to make difficult decisions for supports, but our job is to provide SDI and support to students on our caseloads. Other students can be aided only once our legal obligations are met. We hope that this is only a temporary solution until we find a 1:1 for Student, but we do not have a time frame as to when this will happen.

38. On or about March 23, 2022, paraeducator 2 assisted the Student with an assignment related to science class.
39. On or about March 31, 2022, the Parent was informed via email the paraeducator position for the Student was "posted as a permanent position as of today."
40. On April 1, 2022, paraeducator 2 emailed an attendance specialist, stating, in part, "I am covering 4th Period for special education teacher 3, who is out sick. Special education teacher 3 has one student in his 4th period class, Student. Student is present. I don't have an attendance sheet so that is why I am emailing you."
41. The District was on break April 11–15, 2022.
42. According to the Parent, as of May 6, 2022 (the date the Parent filed her complaint with OSPI), a 1:1 paraeducator had still not been provided to the Student.
43. The District's response included progress reporting for the goals in the October 2021 IEP. The information for the Student's **communication goal** (inferencing) read, in part:

Progress of Goals:	1	2	3	4
Date of Review:	11/05/2021	01/31/2022	04/20/2022	06/08/2022
Progress:	NA	1	2	

Comments:

11/2021: Student's IEP was completed too recently to demonstrate any measurable progress.

1/2022: Much of the time in speech this quarter was spent discussing conventional rules of conversation, particularly with regard to inquiring about others. Student requires minimal to moderate prompting to ask after a peer or teacher in the therapy setting, but he is very good at using the questions that were previously modeled to formulate his own questions.

4/2022: Student effectively provides two plausible reasons for a character's actions with 50% accuracy.

6/2022: Student's sparse attendance of speech sessions has made it difficult to measure progress with regard to his ability to make inferences.

The information for the Student's **reading goal 1** (inferences) read, in part:

February 28, 2022: Student has made some progress toward his goal of making inferences and drawing conclusions based on implied information from text. He still needs structured support to make inferences when reading the text but is able to draw an inference with 2-5 prompts from an adult. Student is able to independently make inferences on 40% of observed opportunities.

June 2022: Student has made significant progress toward his goal of inferencing. He is usually able to make inferences to U level texts. He usually struggles with inferences regarding subjects that he's less familiar with. 65% accuracy on inferences for V level texts.

The information for the Student's **reading goal 2** (cause and effect) read, in part:

February 2022: Student has made some progress toward his goal of distinguishing between cause and effect during reading. He has similar progress to his inferencing skills and usually needs 2-5 prompts from an adult and is able to accurately identify the cause and effect on 40% of observed opportunities independently.

June 2022: Student has made some progress toward his goal of cause and effect. He is able to distinguish between cause and effect on subjects that he's more familiar with more easily. If it's a subject that he's less familiar with, he will frequently say, 'I don't know' and needs additional prompting to help him to distinguish the cause and effect. 60% of observed opportunities.

The information for the Student's **social/behavior 1** (attend to task) read, in part:

February 2022: Student has made some progress toward his goal of attending to the given task for 30 minutes. It depends on the particular task for how successful Student is able to attend independently. If Student does not have a computer or calculator in front of him, he is usually able to attend to the task for 15-20 minutes. That being said, many tasks require Student to have a computer to work on. When Student needs to work on a computer for a task, he will work for around 5 minutes before engaging in preferential tasks (calculator, google maps). If an adult is working with Student, he usually needs significant prompting but is able to complete most tasks with his peers.

June 2022: Student has made significant progress toward his goal of attending to the task. Student is able to attend to the task actively with a computer for 30 minutes on 40% of observed opportunities with occasional prompts from adult for redirects.

The information for the Student's **social/behavior 2** (peer social skills) read, in part:

February 28, 2022: Student has made some progress toward his goal conversational turns when given a partner or a small group activity. If the activity does not involve numbers or British variations of spelling, Student is able to respond in 3/5 conversational turns on topic. If there are numbers or British variations of spelling in the text, Student will often get sidetracked and will be off topic for a few minutes before joining back with the group conversation.

June 2022: Student has made some progress toward his goal of conversational turns when given a partner or a small group activity. He has not been getting distracted by conversations that involve British variations of spelling or numbers but with frequently disengage from the conversation with peers after 3 or fewer conversational turns. He will usually need a prompt from an adult to continue the conversation with a peer.

The information for the Student's **social/behavior 3** (social cues) read, in part:

February 28, 2022: Student has made some progress with identifying appropriate/inappropriate responses to social cues. Although he is not independent at this skill, he has shown flexibility in his thinking when given situations and talking through whether or not it's an appropriate response. Student typically takes 4-5 prompts to determine the social cue with an adult.

June 2022: Student has made some progress with identifying appropriate/inappropriate responses to social cues. He continues to need support in talking out whether or not

something was an appropriate response in a video or hypothetical situation. He usually takes 3 prompts to determine the social cue with an adult.

The information for the Student's **social/behavior 4** (on topic responses during unstructured conversations) read, in part:

February 28, 2022: Student has made some progress toward his goal of providing an on-topic response during an unstructured conversation with a peer or an adult. Student usually has an easier time with keeping on topic responses with adults. If the conversation does not involve numbers or things that have to do with spelling, Student will usually stay on topic 3/5 observed opportunities. If the conversation involves numbers or has something to do with spelling, he will usually have an on topic response on 1/5 observed opportunities.

June 2022: Student has made some progress toward his goal of on topic responses during unstructured conversations. While Student will frequently keep to himself with peers, he will occasionally talk with other peers when it's about math or one of his other classes. He will usually try to move the conversation to one about skiing or how to get a calculator to make an error. With an adult, Student will engage in unstructured conversations briefly and will usually deflect by saying, "I don't know" or try to change it to a preferred conversation topic. 30% of on topic responses.

The information for the Student's **study/organization skills 1** (keeping track of assignments) read, in part:

February 2022: Student has made some progress toward his goal of recording his assignments in his planner. He will sometimes record his due assignments in his planner during each period with support from an adult, but will always fill his planner out during his reading period. Student is not independent on this skill but with guidance from an adult, he will fill his planner out.

June 2022: Student has made significant progress toward his goal of recording his assignments in his planner. He fills his planner out daily in his study skills/reading class with his teacher. He also fills out his planner in the general education setting for two of his classes with adult prompting. 70% of observed opportunities. I recommend that Student has a similar goal as this one but focused around him independently filling his planner out without prompting once he meets this goal.

The information for the Student's **study/organization skills 2** (note taking skills) read, in part:

February 28, 2022: Student has made some progress toward his goal of taking notes when required in his classroom. He is not yet independent in his note taking skills because he typically gets distracted by google maps and calculators. With a brief prompt, Student will take notes appropriately and usually needs one prompt per slide to get back on task. Student does not need support during the action of taking notes when a PowerPoint slide is presented but usually gets off task when there is a transition to a new slide.

June 2022: Student has made significant progress toward his goal of taking notes when required in his classroom. If he is told what notes to take from the board, Student will transcribe the notes independently for each slide. Student needs a prompt to continue his note taking after each slide.

44. On June 13, 2022, OSPI received the Parent's reply. It read, in part:

Paraeducator 5 never appeared on any of Student's support schedules and never took any data or notes on his performance. Also, paraeducator 3 obviously didn't provide the 1:1 support required by the January IEP because she left the school district's employment in January, according to page 7 of the February 2022 Personnel Report...The three other IAs on the list, paraeducators 1, 2 and 4, have jobs that require working with other students besides Student.

...

It has been devastating for Student to spend the entire year without the 1:1 aide that everyone agreed he needed. This was his last year to get ready for high school. He is nowhere near ready. In fact, the last IEP progress report in April shows there was no 'significant' progress on any of the nine goals as of February, and eight of the goals were left blank for March and April. That's not the kind of progress report I would expect to see if Student had the full-time 1:1 support his IEP requires. He still comes home not knowing what his homework is or how to do it.

...

I also disagree there was no harm from the complete failure to provide the weekly reports on daily data collection that were required by the IEP. Student receives private therapy from a Board-Certified Behavior Analyst. The data from school was needed for the BCBA to generalize skills and support what Student was working on at school. Also, I needed the data to understand what kind of help Student needed from me, and to make decisions about his school planning.¹³

...

The BCBA has a long history of attending IEP meetings and advocating for Student's needs at his K-8 school. I am confused by [District attorney's] statement that the IEP team never determined that Student needs BCBA services. That's a private program covered by Student's insurance and it's not part of the IEP, so there would not be any reason for the IEP team to 'determine' whether Student needs it. The district knows that the home program supports the school program. [District attorney] is correct that I asked for the weekly reports, and if she had been at the IEP meetings she would know that the IEP team agreed they would be helpful to Student without any argument. I wanted the weekly reports not just for the BCBA but also for my own understanding of Student's performance at school, so I would know how to help him. Student is not able to tell me the details of his struggles at school.

...

As it is, I can't tell anything useful from the [data tracking document] which I saw for the first time in...the district's response. There are very few data points, and no dates for either the data collection or the staff notes.

...

The same is true for the missing teacher, special education teacher 1. Her disappearance, just a couple of weeks into the school year, was harmful to Student. In fact, special education teacher 1 was the only person assigned to support Student in Social Studies class, according to the support schedules. So, her absence left Student without help in a core academic class. Also, she was supposed to supervise Student's IAs. You can see that didn't happen.

¹³ In its response, the District stated, "Student's IEP team never determined that Student required BCBA services [and] the weekly reports to the Parent were included in the Student's IEP based on the Parent's request."

...

Any compensatory education that is provided Student must occur during the summer. Student's is fully booked with after-school activities, including therapy and recovery services.

45. The District's final day of school was June 17, 2022.

CONCLUSIONS

Issue 1: IEP Implementation – The Parent alleged the District did not properly implement three portions of the Student's individualized education program (IEP), specifically that the District did not: (a) provide the Student with a 1:1 paraeducator beginning on or about January 12, 2022; (b) properly collect data on the Student's needs resulting from the Student's disability from September 2021 through the present; and (c) provide a special education teacher in September and October of 2021.

A district must provide 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.

Special Education Teacher in October 2021: Here, the documentation is relatively sparse¹⁴ in terms of the nature of special education teacher 1's involvement with the Student prior to her departure in late September 2021, as well as which staff, if any, stepped into special education teacher 1's role.

As best OSPI can determine¹⁵: prior to her departure, special education teacher 1 worked with the Student in math class and possibly social studies; it is not clear what specially designed instruction was worked on in math class; and based on a September 23, 2021 email, prior to her departure,

¹⁴ According to the Office of Special Education and Rehabilitative Services, "it would not be inconsistent with the IDEA...for a State to use a 'preponderance of the evidence' standard in making independent determinations as to whether a public agency violated a requirement of Part B of the IDEA." *Letter to Reilly*, 64 IDELR 219 (OSERS 2014). Merriam-Webster's Dictionary of Law defines the phrase "preponderance of the evidence" as "the standard of proof...in which [a] party [wishing to establish a factual premise] must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not." MERRIAM-WEBSTER'S DICTIONARY OF LAW 377 (1996).

¹⁵ On June 27, 2022, OSPI asked the District to collaborate in scheduling an interview of both special education teacher 2 and 3. OSPI also asked for the math and social studies teachers to respond to OSPI's investigator via email. Both of the foregoing requests were to get greater clarity on the nature of special education teacher 1's involvement with the Student prior to her departure, as well as which staff, if any, stepped into her shoes after that departure. (In terms of the response OSPI received: on June 29, 2022, the District's attorney informed the OSPI's investigator that special education teacher 2 was available for an interview on either July 7 or 8, 2022. The complaint decision deadline is July 5, 2022).

special education teacher 1 established a schedule for the Student such that the Student was able to access specially designed instruction in reading.

In terms of who may have stepped into special education teacher 1's shoes after she left: based on an October 28, 2021 email, as well as scheduling information, it appears multiple paraeducators continued to work with the Student in math class, in some relation to specially designed instruction; and it does not appear there were any special education staff and/or paraeducators present in the Student's social studies class.

As detailed below, the Student was able to make "significant" progress on **reading goal 1**, **social/behavior 1**, and **study/organization skills 1-2** throughout the 2021-2022 school year. But the Student did not make as significant progress in the following goals: **reading goal 2**; and **social/behavior 2-4**.

It appears some specially designed instruction was provided and paraeducators provided some support. However, based on the relative paucity of data in relation to special education teacher 1's work with the Student in September 2021, and the impact of her departure, OSPI cannot conclude that—whatever portions of the IEP that were to be implemented by special education teacher 1—were materially implemented during October 2021 (after special education teacher 1 left but before special education teacher 3 took over as the case manager in early November 2021). Accordingly, OSPI finds a violation and some compensatory education is warranted.

A state educational agency is authorized to order compensatory education, as appropriate, through the special education community complaint process. Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. There is no requirement to provide day-for-day compensation for time missed. There is no statutory or regulatory formula for calculating compensatory remedies. Generally, services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting.

Again, as stated above, based on a September 23, 2021 email, prior to her departure, special education teacher 1 established a schedule for the Student such that the Student was able to access specially designed instruction in reading, and the Student generally made progress in reading. But the Student did not make as significant a rate of progress—when looking at the academic year as a whole—in certain social behavior goals. Therefore, the compensatory education order will focus on social behavior. Under both the June 2021 amended IEP and the October 2021 IEP, the Student was to receive approximately 10 hours of SDI in social behavior a month. Late September through early November 2021 represents approximately four weeks of instruction. As the compensatory education will take place in a one-on-one setting, the District will be required to provide the Student with 2.5 hours of specially designed instruction in social behavior.

1:1 Paraeducator: The January 2022 amended IEP was the first IEP in place during the 2021–2022 school year that provided the Student with a 1:1 paraeducator. The prior written notice for the January 2022 amended IEP explained, in part:

The reason the team proposed providing additional support in the form of a 1:1 was because Student was not getting his work done with the support that he previously had with a split IA. If an IA was not with him for the whole classroom session, he would not get his work done and did not understand the concepts being taught in the classroom. When an IA was sitting with Student for the whole session with frequent prompts, he would get his work done and understood the concepts being taught.

Here, the Student was provided with shared paraeducator support in spring 2022. But while the District did make efforts in spring 2022 to hire a 1:1 paraeducator for the Student, these efforts were not successful, and no 1:1 paraeducator was consistently provided to the Student through the end of the 2021–2022 school year. Thus, the District failed to implement the IEP as written and this represents a material violation to implement the IEP.

Here, according to the Parent, the Student’s ability to progress on IEP goals was limited because of the lack of a 1:1 paraeducator: “It has been devastating for Student to spend the entire year without the 1:1 aide that everyone agreed he needed. This was his last year to get ready for high school. He is nowhere near ready.” According to progress reporting, the Student was still able to make “significant” progress on **reading goal 1, social/behavior 1, and study/organization skills 1–2**. But the Student did not make as significant progress in the following goals: **reading goal 2; and social/behavior 2–4**. Therefore, it is in these latter three goal areas that compensatory education is warranted and should focus on.

Regarding the goal areas the Student made less progress on, the January 2022 amended IEP provided the Student with approximately 4 hours of specially designed instruction in reading each week, and approximately 2.5 hours of specially designed instruction in social/behavior each week. January 12, 2022 through the end of the 2021–2022 school year represents approximately 20.5 weeks. So during this time, the Student should have received approximately 82 hours of specially designed instruction in reading, and 50 hours of specially designed instruction in social/behavior.

Because: (1) the Student was provided with shared paraeducator support in spring 2022; (2) the Student was able to make some progress on some goals, including some reading and social/behavior goals; and (3) the compensatory education will be provided in either a one-on-one or small group setting, the following is an appropriate compensatory education remedy: 20.5 hours of specially designed instruction in reading, and 12.5 hours of specially designed instruction in social/behavior.

Weekly Data Collection: Here, each of the Student’s IEPs (June 2021 amended, October 2021, and January 2022 amended) included the following accommodation: “data collection daily report to parent weekly (frequency: daily; location: school wide).” The documentation shows: at least from November 23, 2021 through May 26, 2022, weekly data on the Student’s goal progress was gathered—see tracking document; but in its response, the District acknowledged “a data collection form was not sent to Parent on a weekly basis since September 2021.”

The Parent stated this accommodation served two principal purposes: (1) to support the Student's private BCBA therapy¹⁶; and (2) to better inform the Parent of the Student's progress on IEP goals, so the Parent could fully participate in IEP decisions.¹⁷

The District stated this accommodation did not relate to providing a free appropriate public education (FAPE) to the Student, as it existed largely for the benefit of the Student's private BCBA therapies, which was a service the IEP team had not determined the Student needed. (During this investigation, the Parent appeared to acknowledge as much, stating, in part, "[The private BCBA therapy was] a private program covered by Student's insurance and it's not part of the IEP, so there would not be any reason for the IEP team to "determine" whether the Student needs it.)

To the extent there is confusion on this accommodation, for example, whether it relates to FAPE for the Student, and if so, what the purpose of the accommodation is (for example, to help the Student progress on IEP goals, or to better ensure the Parent's participation in IEP discussions), OSPI encourages the parties to resolve this confusion and determine whether the Student requires the accommodation to receive a FAPE. On this matter, OSPI notes the following:

- If this accommodation does not relate to the Student's ability to progress on IEP goals (FAPE), then it should not be in the IEP. For example, an eligible student receives a FAPE when he or she receives, at public expense, an educational program that meets state educational standards, is "**provided in conformance with an IEP**" designed to meet the student's unique needs and includes whatever support services necessary for the student to benefit from that specially designed instruction. WAC 392-172A-01080 (emphasis added); *see also, generally*, WAC 392-172A-03090.
- If this accommodation relates, at least in part, to the Student's ability to progress on IEP goals, then it should be in the Student's IEP.

In terms of implementation, for four reasons, OSPI does not find a failure to materially implement this portion of the IEP: (1) the Parent's acknowledgment during this investigation that this accommodation related, at least in principal part, to the Student's private BCBA therapies—a service the IEP team had not determined the Student needed for FAPE; (2) emails show that, generally, service providers regularly communicated with the Parent regarding the Student's assignments and progress via email; (3) on March 1, 2022, special education teacher 3 emailed the Parent an "IEP quarterly progress report"; and (4) it is somewhat significant, even if minimally

¹⁶ Elsewhere in her reply, though, the Parent argued the private BCBA therapy was directly related to the Student's IEP goals. For example, she stated, in part, "The District knows...the home program supports the school program."

¹⁷ The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child. This is an active role in which the parents (1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; (2) participate in discussions about the child's need for special education and related services and supplementary aids and services; and (3) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,472, 12,473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 5).

so, that the District did complete the weekly data tracking—it just did not regularly provide the same to the Parent.

Again, OSPI does not find a material IEP implementation violation on this issue, but encourages the parties to resolve any existing ambiguity on the need for this accommodation.

CORRECTIVE ACTIONS

By or before **July 22, 2022, October 21, 2022, and January 20, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Compensatory Education

By or before **July 22, 2022**, the District and Parent will develop a schedule for providing the following compensatory education to the Student: 15 hours of specially designed instruction in social behavior, and 20.5 hours of specially designed instruction in reading.

The District will provide OSPI with documentation of the schedule for services by or before **July 22, 2022**.

The compensatory education will occur in a 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 **January 20, 2023**, including those needing to be rescheduled.*

On **October 21, 2022**, the District will provide OSPI with an update on the provision of compensatory education to the Student. Said update will clearly state: how much specially designed instruction, by subject area, has been provided to the Student as of that date.

No later than **January 20, 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 **January 20, 2023**.

DISTRICT SPECIFIC:

None.

The District will submit a completed copy of the Corrective Action Plan (CAP) Matrix documenting the specific actions it has taken to address the violations and will attach any other supporting documents or required information.

Dated this ____ 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.)