

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-45

PROCEDURAL HISTORY

On March 30, 2023, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Kent School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On April 4, 2023, 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 April 18 and 24, 2023, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on May 2, 2023.

On April 28, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent on May 2, 2023. OSPI invited the Parent to reply.

On May 4, 2023, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on May 5, 2023.

On May 8, 2023, OSPI requested that the District provide additional information. The District provided the requested information on May 11, 2023. OSPI forwarded the information to the Parent on May 15, 2023.

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

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began with the 2022-2023 school year per the issues alleged in the complaint. These references are included to add context to the issues under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.¹

¹ During this investigation, the Parent submitted documentation related to matters taking place in 2019 that appeared to relate to concerns a District staff person engaged in either unprofessional or inappropriate conduct. As part of a special education community complaint investigation, Washington state regulations limits OSPI's investigation to the year immediately preceding OSPI's receipt of the complaint request. Additionally, allegations of potential inappropriate conduct by district employees should be directed to OSPI's Office of Professional Practices. For the foregoing two reasons, this decision does not make conclusions regarding the alleged 2019 incident.

ISSUE

1. During the 2022–2023 school year, did the District follow proper procedures for implementing the speech and occupational therapy services in the Student’s individualized education program (IEP)?

LEGAL STANDARDS

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. A school district must develop a student’s IEP in compliance with the procedural requirements of the IDEA and state regulations. 34 CFR §§300.320 through 300.328; WAC 392-172A-03090 through 392-172A-03115. It must also ensure it provides all services in a student’s IEP, consistent with the student’s needs as described in that IEP. Each school district must ensure that the student’s IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105.

“When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child’s IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a [child with a disability] and those required by the IEP.” *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

The Office of Special Education Programs (OSEP) has said: “In a situation where the unavailability of school personnel means that IEP services are not made available at the regularly scheduled time...the school district would be required to make other arrangements to provide the services at that time or reschedule the required IEP services in order to meet its responsibility of providing FAPE to that student in accordance with his or her IEP.” *Letter to Balman*, 23 IDELR 646 (OSEP 1995).

Compensatory Education: A state educational agency is authorized to order compensatory education through the special education community complaint process. *Letter to Riffel* 34 IDELR 292 (OSEP 2000). 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).

FINDINGS OF FACT

2021–2022 School Year

1. The Student’s IEP team developed a new IEP for the Student on January 20, 2022. In part, the January 2022 IEP provided the Student with the following specially designed instruction in a *special education setting* through January 20, 2023:

- Speech Language: 30 minutes 6 times a month (to be provided by a speech language pathologist (SLP))

The January 2022 IEP provided the Student with the following related services in a *special education setting* through January 20, 2023:

- Occupational Therapy: 30 minutes 3 times a month (to be provided by an occupational therapist (OT))
2. In April of 2022, according to a January 2023 reevaluation report, the Parent withdrew the Student from the District and intended to homeschool the Student.

2022–2023 School Year

3. The District’s 2022–2023 school year began on September 8, 2022.
4. According to the District, at the start of the 2022–2023 school year, the Student was eligible for special education services under the category of developmental delays, was in the third grade, was homeschooled, and the Student’s January 2022 IEP was in effect.
5. According to the Parent, the District did not provide the Student with his speech and occupational therapy IEP services during the 2022–2023 school year. The complaint request read, in part, “The school is depriving my son [of] receiving his services unless they receive more funding.”
6. The District’s response included an OT service provider log. For September 2022, the OT provider log showed the Student received 25 minutes of occupational therapy, and on one occasion, the “Student [was] not available.”
7. The District’s response included an SLP provider log. According to the SLP provider log, in September 2022, the Student received 10 minutes of speech language therapy.
8. On September 12, 2022, the Parent emailed the principal and the special education teacher, stating, in part, “Student will be in homeschool. However send me his hours to the classes to see what he needs in specialty. I want to still continue those classes.”

The Parent’s September 12, 2022 email was acknowledged by the special education teacher on September 12, 2022, and by the SLP on September 14, 2022.

9. On September 22, 2022, the Parent signed a “Declaration of Intent to Provide Home-Based Instruction.”

In an email thread, dated September 22, 2022, the Parent and executive director of learning improvement (director) communicated regarding scheduling certain services for the Student. The director’s September 22, 2022 email to the Parent read, in part, “I have confirmed Student’s services for speech, social-emotional, and occupational therapy are Monday/Tuesday/Thursday from 2:00 PM – 3:05 PM.”

In a separate email to the Parent, dated September 22, 2022, the SLP wrote, in part:
I left a voicemail a few minutes ago with Student's Speech, OT and IEP schedule.

Mondays and Tuesdays (2:00-3:05): Student will receive Speech/Language services from 2:00–2:30. He will transition to the special education teacher to receive IEP services for Social/Emotional until 3:05.

Thursdays (2:00–3:05): Student will receive OT services from 2:00–2:30. He will transition to the special education teacher and receive IEP services for Social/Emotional until 3:05.

There are NO services on Wednesdays or Fridays. His service minutes are met on Mondays, Tuesdays and Thursdays.

The District's response read, in part:

Although Student's services did not begin until late September 2022, the records show this was due to Parent not informing the District that she intended to homeschool Student for the 2022-2023 school year until on or about September 12, 2022, and that once the District was informed, it immediately worked to create and implement Student's service schedule.

10. The District's response included a document entitled, 'District Speech Services,' which appeared to track the Student's progress on speech goals throughout the 2022–2023 school year. According to the 'District Speech Services' document, on September 23, 2022, the SLP "emailed and called Parent regarding schedule."
11. On September 26, 2022, the SLP emailed several District staff members, stating, "Just received confirmation from Parent regarding services for Student." In a separate email to several District staff, dated September 26, 2022, the SLP wrote, "Student is scheduled to begin receiving services today."
12. For October 2022, the OT provider log showed on one occasion, the "provider [was] not available", and on two occasions, the "Student [was] not available." Upon knowledge and belief, the Student received no OT services in October 2022.
13. According to the SLP provider log, in October 2022, the Student received 85 minutes of speech language therapy; the Student was absent on three occasions²; and the SLP was absent on one occasion.
14. On October 17, 2022, the SLP emailed District staff, asking "Has anyone informed Student's family that there will not be services this week due to conference week?"
15. The District's response included a written statement from the OT. It read, in part, "October 28, 2022: Sent Parent email to remind Parent of services and times, due to absences." The District response also included an October 28, 2022 email from the SLP to the Parent, outlining the Student's previously agreed-upon schedule.

² During this investigation, the District stated throughout the 2022–2023 school year, "there were no phone calls or emails [from the Parent] as to why Student was absent or when he was going to be absent."

16. For November 2022, the OT provider log showed on four occasions, the "Student [was] not available." Upon knowledge and belief, the Student received no OT services in November 2022.
17. According to the SLP provider log, in November 2022, the Student received 90 minutes of speech language therapy; the Student was absent on three occasions, and the SLP was absent on two occasions.
18. On November 23, 2022, the school psychologist emailed the Parent, requesting consent to administer certain evaluations to the Student, including, in part, occupational therapy.
19. The District was on break November 24–25, 2022.
20. For December 2022, the OT provider log showed on one occasion, the "provider [was] not available", and on four occasions, the "Student [was] not available." Upon knowledge and belief, the Student received no OT services in December 2022.
21. According to the SLP provider log, in December 2022, the Student was absent on four occasions. Upon knowledge and belief, the Student did not receive any SLP services during December 2022.
22. On December 8, 2022, the SLP emailed the Parent, stating, in part, "Starting January 4, 2023...I can see Student on Thursdays after OP and IEP services. We can keep his schedule on Mondays."
23. According to progress reporting, dated December 16, 2022, the Student mastered three of his four speech therapy goals and made sufficient progress on speech therapy goal 4. The December 16, 2022 progress reporting does not include an entry for the Student's occupational therapy goal.
24. The District was on break December 19, 2022 through January 2, 2023.
25. According to the OT provider log, on January 5, 2023, the "Student [was] not available."
26. According to the SLP provider log, in January 2023, the Student received approximately 180 minutes of speech language therapy, and the Student was absent on two occasions.
27. On January 7, 2023, the District's evaluation group met to complete a reevaluation of the Student.

A mid-January 2023 prior written notice read, in part:

[Following the January 7, 2023 evaluation meeting], District is proposing to change Student's eligibility category from Developmental Delay to Communication Disorder. He will continue to receive specially designed instruction to target language skills...[There wasn't adequate information available to determine Student's eligibility under the category of Specific Learning Disability...The team requested signed consent for a comprehensive

evaluation, including new testing and updated information. Signed consent was not received and parent verbally stated that she denied consent, therefore this evaluation included a review of existing information.

The January 2023 reevaluation report recommended the Student be provided with the specially designed instruction in speech language, and noted there was "insufficient data [on Student's progress on occupational therapy goals] due to absences."

The January 2023 reevaluation report read, in part:

Parent did not give consent for a re-evaluation after repeated attempts. Thus, the following information includes a record review consisting of previous occupational therapy evaluation and therapy data notes. Due to absences and non-consent for a comprehensive occupational therapy school-based evaluation, the results of this evaluation should be interpreted with caution as it may not accurately reflect Student's current skills and function.

According to the District, "Subsequent [to the January 7, 2023 evaluation meeting] Parent agreed to allow Student to be reevaluated for occupational therapy services, but Parent has been refusing since March 23, 2023 to schedule the reevaluation meeting to determine whether Student again qualifies for occupational therapy services."

28. On January 10, 2023, the SLP emailed several District staff, stating, in part, "Student now has a new speech schedule. He will be coming on Tuesday and Thursday mornings. He will be dropped off at 8:45 AM and picked up at 9:15 AM. I will be the only one to provide services to him."
29. On January 11, 2023, the Student's IEP team met to develop a new IEP for the Student. The January 2023 IEP provided the Student with the following specially designed instruction in a *special education setting* from January 14, 2023 through January 13, 2023: 30 minutes 6 times a month.
30. On January 27, 2023, the school psychologist emailed the Parent, stating, in part, "The OT and I are hoping to work with Student next week to see if he is able to get occupational therapy and academic supports...We would love if he could stay until 10 AM on Tuesday, after his normal sessions with the SLP at 8:45 AM."
31. The OT emailed the Parent on January 30, 2023, stating the OT would be administering an assessment to the Student on January 31, 2023.

In a separate email, dated January 30, 2023, to another District staff person, the OT noted "Student's fine motor skills appear to be age appropriate."

32. On January 31, 2023, the Parent emailed the OT, stating, "It's alright if you...test Student today after speech."

33. According to the SLP provider log, in February 2023, the Student received 120 minutes of speech language therapy, and the Student was late on two occasions.
34. On February 17, 2023, the OT emailed the Parent, noting the OT had been unable to complete certain OT-related assessments "due to the school closure this week secondary [sic] to snow" and asking if the Student was available for OT assessments the "next Wednesday."
35. According to a reevaluation report, dated March 8, 2023, post-mid-January 2023, the Student was administered the following occupational therapy assessments: occupational therapy observations on both February 7 and February 28, 2023; and the "following subtests of the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2): Fine Motor Precision, Fine Motor Integration, and Manual Dexterity."
36. According to the SLP provider log, in March 2023, the Student received 90 minutes of speech language therapy; the Student was absent on two occasions, and the SLP was absent on two occasions.
37. According to the SLP provider log and an SLP "Intervention Record" document, in April 2023, the Student received 30 minutes of speech language therapy, and the Student was absent for approximately four regularly scheduled sessions.
38. According to the Parent, on April 4, 2023: (a) the Student reported to the Parent "that he [had] not [been] seeing the SLP" while at school; and (b) during a visit scheduled a short time prior to April 4, 2023, "Student expressed [he] was doing arm and body stretching with [a District staff person] and did not see his speech therapist."
39. The District was on break April 10–14, 2023.
40. According to the SLP provider log and an SLP "Intervention Record" document, in May 2023, the Student was absent for two regularly scheduled sessions.
41. According to the District, "No evidence supports that Student's frequent absences from the Speech Language and Occupational Therapy services were caused by an IEP implementation issue. Rather, the Parent simply did not bring the Student to school on the days he missed services."

CONCLUSIONS

Issue 1: IEP Implementation: Speech and Occupational Therapy Services – The Parent alleged the District did not follow proper procedures for implementing the Student's speech and occupational therapy services during the 2022–2023 school year.

A district must ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the

child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a child with a disability and those required by the IEP.

Based on the Student's January 2022 IEP, from September 8, 2022 through January 13, 2023, the Student should have received 3 hours a month of speech language therapy and 1.5 hours a month of occupational therapy; and beginning January 16, 2023, the Student should have received 3 hours a month of speech language therapy. During the 2022–2023 school year, the Student received far less speech and occupational therapy than was required under the January 2022 and January 2023 IEPs; but the principal reason the Student missed certain speech and occupational therapy was because the Student was not present for regularly scheduled sessions. In other words, with few exceptions—see immediately below—the District was prepared to provide the Student with speech and language and occupational therapy in accordance with the schedules established on September 22, 2022, December 8, 2022, and January 10, 2023. But the Student was not made available to access the same. The documentation provided to OSPI during this investigation did not clarify the reason for the Student's repeated absences. The foregoing, then, does not represent a material IEP implementation failure.

This investigation did, though, reveal one IEP implementation concern: throughout the 2022–2023 school year, the occupational therapist was not present for two regularly scheduled sessions and the speech language pathologist was not present for five regularly scheduled sessions; and the documentation provided to OSPI during this investigation does not show the District made efforts to specifically reschedule these sessions. A district must be prepared to provide all services in a student's IEP, even if a student has demonstrated repeated absences. For example, the Office of Special Education Programs (OSEP) has stated:

[In] a situation where the unavailability of school personnel means that IEP services are not made available at the regularly scheduled time...the school district would be required to make other arrangements to provide the services at that time or reschedule the required IEP services in order to meet its responsibility of providing FAPE to that student in accordance with his or her IEP.

The District's failure to attempt to reschedule the specific sessions wherein service providers were not available, then, does represent a material failure to implement the January 2022 and January 2023 IEPs, and compensatory education is warranted.

A state educational agency is authorized to order compensatory education 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.

Here, the scheduling communications and respective service provider logs show when the Student met for speech and occupational therapy, the Student often received approximately a half hour of each service. Accordingly, as compensatory education, the District will be required to provide the following to the Student: 1 hour of occupational therapy (2 missed sessions multiplied by 30 minutes); and 2.5 hours of speech therapy (5 missed sessions multiplied by 30 minutes).

CORRECTIVE ACTIONS

By or before **June 2, 2023** and **September 22, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Compensatory Education

By or before **May 31, 2023**, the District and the Parent will develop a schedule for providing the following compensatory education to the Student: 1 hour of occupational therapy, and 2.5 hours of speech therapy. The District will provide OSPI with documentation of the schedule for services by or before **June 2, 2023**.

The compensatory education will occur in a one-on-one setting and be provided by a speech language pathologist and occupational therapist. The instruction will occur outside of the District's school day and may occur on weekends or during 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 with at least 24 hours' notice of the absence, the District does not need to reschedule. The services must be completed no later than **September 22, 2023**, including those needing to be rescheduled.*

No later than **September 22, 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 **September 22, 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.

RECOMMENDATION

During this investigation, the District informed OSPI that Spanish was the Parent's primary language. Accordingly, OSPI recommends the District provide all scheduling communications to the Parent in both English and Spanish.

Dated this 19th day of May, 2023

Dr. Tania May
Assistant Superintendent of Special Education
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THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

IDEA provides mechanisms for resolution of disputes affecting the rights of special education students. This decision may not be appealed. However, parents (or adult students) and school districts may raise any matter addressed in this decision that pertains to the identification, evaluation, placement, or provision of FAPE to a student in a due process hearing. Decisions issued in due process hearings may be appealed. Statutes of limitations apply to due process hearings. Parties should consult legal counsel for more information about filing a due process hearing. Parents (or adult students) and districts may also use the mediation process to resolve disputes. The state regulations addressing mediation and due process hearings are found at WAC 392-172A-05060 through 05075 (mediation) and WAC 392-172A-05080 through 05125 (due process hearings.)