

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-95**

### **PROCEDURAL HISTORY**

On June 22, 2023, the Office of Superintendent of Public Instruction (OSPI) received and opened a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Kiona-Benton City School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On June 22, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on June 23, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On July 6, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent the same day. OSPI invited the Parent to reply.

On July 6, 2023, OSPI requested that the District provide additional information, and the District provided the requested information the same day. OSPI forwarded the information to the Parent on July 7, 2023.

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

### **ISSUE**

1. In September and October of 2022, did the District properly implement those portions of the Student's individualized education program (IEP) that related to speech services?

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

In the event a student is not present at school the general rule is that if the school district makes IEP services available to the student at the normally scheduled time, the school district is not obligated to make other arrangements to provide services if the disabled student is absent from school at that time for reasons other than his or her participation in school-sponsored activities. *Letter to Balkman*, 23 IDELR 646 (OSERS 1995). In those instances where a student with an IEP does not receive certain IEP services because of participation in school-related activities, the school district generally will be responsible for making alternative arrangements for providing IEP services. *Id.*

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, (9<sup>th</sup> Cir. 2011). There is no requirement to provide day-for-day compensation for time missed. *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9<sup>th</sup> 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. It is common in Washington for such one-to-one services to be calculated at half of the total hours missed." *In re: Mabton School District*, 2018-SE-0036.

### **FINDINGS OF FACT**

1. At the start of the 2022–23 school year, the Student was eligible for special education services under the category of specific learning disabilities, was in the tenth grade, attended a District high school, and the Student's January 2022 individualized education program (IEP) was in effect.

The January 2022 IEP provided the Student with the related service of speech and language, 20 minutes 3 times a month, in a special education setting.

The annual speech and language goal in the January 2022 IEP was, "When given two sentences, Student will use a conjunction to combine the sentences, improving expressive language from 2/10 opportunities to 8/10 opportunities."

2. The District's 2022–23 school year began on August 30, 2022.
3. From the beginning of the school year through November 2022, speech therapist 1 was scheduled to work with the Student.
4. In its response, the District stated, "[Speech] services were scheduled for Friday[s] during 6<sup>th</sup> period beginning at 1:10 PM."
5. The Student's attendance profile provided the following information for the Fridays in September and October 2022:
  - September:
    - 2nd: Absent
    - 9th: Absent
    - 16th: Present
    - 23rd: Present
    - 30th: Present
  - October:
    - 7th: Absent

- o 14th: No school for any students
- o 21st: Present
- o 28th: Absent for "school related" reasons<sup>1</sup>

6. The District's response read, in part:

September 16th, 23rd, and 30th could have been scheduled speech service days...The District agrees to schedule three speech service 20 minute sessions to compensate for the 3 sessions missed [in] September 2022.

...

There were four Fridays in October of 2022. The Student was absent all Fridays in October, missing all scheduled speech service times.

7. From November 2022 through April 2023, speech therapist 2 worked with the Student.
8. A November 2022 progress report included the following information for the Student's performance on the January 2022 communication goal, "There is limited data available on Student's progress toward her communication goal, as she missed many sessions due to her foot/ankle injury."
9. The Student's IEP team developed a new IEP for the Student on December 19, 2022.

The December 2022 IEP reported the Student's progress on the previous communication goal as:

Student can give examples of sentences with conjunction words with 60% accuracy and is practicing how to use conjunction words by adding more detail to a sentence. When provided with two sentences, Student can combine the two sentences using a conjunction with 70% accuracy.

The December 2022 IEP provided the Student with the related service of communication, 20 minutes 3 times a month, in a special education setting.

The December 2022 IEP included the following communication goal, "When given two sentences or given sentence topics/vocabulary to create her own sentences, Student will combine sentences using appropriate conjunctions to convey detailed ideas when speaking and writing, improving her expressive language skills from 60% to 80%."

10. Communication-related progress reporting data, dated January 25, 2023, read, in part: "Sufficient progress: Student is making excellent progress with her communication goal and is able to use appropriate conjunctions to combine two sentences when speaking and writing with at least 75% accuracy."
11. Communication-related progress reporting data, dated March 24, 2023, read, in part: "Mastered: Student has made excellent progress and can independently use conjunctions to combine sentences to convey detailed ideas with greater than 80% accuracy."

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<sup>1</sup> During this investigation, the District stated it lacked knowledge of the specific school activity that took place on October 28, 2022.

12. On or about April 24, 2023, speech therapist 3 began working with the Student.
13. On May 30, 2023, the Parent emailed the case manager, expressing concern the Student had not received the appropriate amount of speech therapy minutes during the 2022–23 school year, and requesting an accounting of the same.

On June 1, 2023, speech therapist 2 emailed the Parent, stating she had “reviewed the notes from the previous speech therapist to provide you with...information on session dates.” Speech therapist 2’s email identified sessions that took place in November and December of 2022, and January, February, March, April, and May of 2023. Speech therapist 2’s email did not identify any sessions as having taken place in either September or October 2022. Attached to speech therapist 2’s email was a copy of progress reporting for the Student.

14. Communication-related progress reporting data, dated June 9, 2023 read, in part:  
Mastered: We have worked on increasing metalinguistic skills to identify and use conjunctions. This includes using context clues, word structure, and past knowledge to determine meaning of conjunctions. This helps Student to be independent in future activities and use her metalinguistic skills in a variety of contexts rather than only structured activities.

## **CONCLUSIONS**

The Parent alleged the District did not properly implement those portions of the Student’s individualized education program (IEP) that related to speech services in September and October of 2022.

When a 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.

Here, the January 2022 IEP provided the Student with the related service of speech and language, 20 minutes 3 times a month. According to the District, “[Speech] services were scheduled for Friday[s] during 6<sup>th</sup> period beginning at 1:10 PM.”

### *September 2022*

In September 2022, the Student was absent on two Fridays and present for three Fridays, but received no speech services on those Fridays. This represents a material failure to implement the Student’s IEP, and certain 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.

In its response, the District proposed providing the Student with a total of 60 minutes of speech as compensatory education. OSPI finds that compensatory education proposal to be appropriate under the IDEA; to account for September 2022, the District will be required to provide the Student with a total of 60 minutes of speech as compensatory education.

#### *October 2022*

In October 2022, there were four Fridays: October 7th the Student was absent; October 14th there was no school for any student; October 21st the Student was present; and October 28th the Student missed a scheduled 20-minute speech session because of a "school related" event. In October 2022, the Student did not receive any speech related services.

In regard to October 7th, the Office of Special Education and Rehabilitative Services (OSERS) has stated, in the event a student is not present at school, the general rule is that if the school district makes IEP services available to the student at the normally scheduled time, the school district is not obligated to make other arrangements to provide services if the student with a disability is absent from school at that time for reasons other than his or her participation in school-sponsored activities. Accordingly, due to the Student's absence on the first Friday, the District was not obligated to reschedule these 20 minutes of speech services to the Student. (Thus, reducing the amount of speech time owed to the Student for the remainder of October 2022 to a total of 40 minutes.) OSPI does not find a violation of the IDEA in relation to October 7th.

Regarding October 14th, a pre-scheduled, one-day school holiday does not represent a sufficient reason for not providing IEP services to the Student. The Student's speech services could have been rescheduled for another school day that week.

Regarding October 21st, the Student was present at school, and presumably, should have received some speech services on this day.

Finally, regarding October 28th, the Student missed a scheduled speech session because of a "school related" activity. OSERS has stated, in those instances where a student with an IEP does not receive certain IEP services because of participation in school-related activities, the school district generally will be responsible for making alternative arrangements for providing IEP services. Here, the email documentation provided to OSPI did not reveal an effort by District staff to reschedule the 20-minute speech session the Student would have received on October 28th. Accordingly, as the Student was not provided an opportunity to receive 2/3 of the speech services in her IEP during the month of October, this represents a violation of the IDEA.

To account for the speech sessions missed on October 14, 21, and 28, 2022, the District will be required to provide the Student with 40 minutes of speech services.

#### **CORRECTIVE ACTIONS**

By or before **September 29, 2023** and **November 17, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

## **STUDENT SPECIFIC:**

### **Compensatory Education**

By or before **September 29, 2023**, the District and Parent will develop a schedule for 1 hour 40 minutes of compensatory speech services.

Unless otherwise agreed to by the District and Parent, services will be provided by a related service provider. Services may be provided in a 1:1 setting or a group setting, if appropriate. Services will be provided outside the District's school day and can be schedule on weekends, over District breaks, or before or after school. The compensatory services can be provided through a District summer program, if that program will provide specially designed instruction in the Student's areas of service. The District will provide OSPI with documentation of the schedule for services by or before **September 29, 2023**.

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 17, 2023**.

By or before **November 17, 2023**, 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 17, 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 1st day of August, 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.)