

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 19-12

PROCEDURAL HISTORY

On February 25, 2019, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the father (Parent) of a student (Student) attending the Bellevue 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 February 27, 2019, 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 March 21, 2019, OSPI received the District's response to the complaint and forwarded it to the Parent on March 22, 2019. OSPI invited the Parent to reply with any information he had that was inconsistent with the District's information. The Parent declined to reply.

On March 28-29, 2019, the OSPI complaint investigator conducted a site visit to interview the following District staff: special education supervisor; special education teacher; general education teacher; school principal; and director of employee relations.

On April 2, 2019, the complaint investigator conducted a phone interview with the paraeducator.

OSPI considered all of the information provided by the Parent and the District as part of its investigation. It also considered the information received and observations made by the complaint investigator during the site visit/interviews.

ISSUE

1. Did the District implement accommodations in the Student's individualized education program (IEP)?

LEGAL STANDARDS

When investigating an alleged violation, OSPI must identify the legal standard that the District is required to follow and determine whether the District met that legal standard. OSPI reviews the documentation received from a complainant and district to determine whether there is sufficient evidence to support a violation. If there was a violation, there will be corrective action to correct the violation and maintain compliance.

IEP Implementation: At the beginning of each school year, each district must have in effect an individualized education program (IEP) for every student within its jurisdiction who is eligible to receive special education services. 34 CFR § 300.323(a); WAC 392-172A-03105(1). It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform

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

Program Modifications: An IEP must include a statement of the program modifications that will be provided to enable the student to: advance appropriately toward attaining his or her annual IEP goals; be educated and participate with other students, including nondisabled students in educational activities; and participate, if appropriate, in general education classroom, extracurricular, and nonacademic activities. 34 CFR §300.320(4); WAC 392-172A-03090(1)(d).

FINDINGS OF FACT

2017-2018 School Year

1. During the 2017-2018 school year, the Student was a seven-year-old kindergartener who attended a District elementary school and was eligible to receive special education services under the category of autism.
2. On May 22, 2018, the District held a meeting to conduct an annual review of the Student's individualized education program (IEP) and develop a new annual IEP. The IEP included annual special education goals in the following areas:
 - Scissor skills
 - Writing
 - Answering comprehension questions
 - Intelligibility
 - Self-regulation
 - Turn Taking
 - Sight Words
 - Transitions

The Student's IEP included the following accommodations and modifications to be provided in the specified setting:

- Adult proximity (general education setting)
- Allow use for fidget objects (all settings)
- Clear for understanding of task instructions (all settings)
- Monitor sensory needs (all settings)
- Predictable daily routine (all settings)
- Provide visual support to help structure verbal responses (all settings)

The Student's IEP also provided the following support for school personnel: 3:1 adult support in the general education setting.¹

¹ The District acknowledged that the "3:1 adult support" was not a staff support but should have been listed under IEP accommodations.

The IEP provided the following specially designed instruction in the special education setting from June 4, 2018 to June 3, 2019:

- Social/Emotional: 30 minutes, 1 time a week (provided by a paraeducator)
- Adaptive: 90 minutes, 1 time a week (provided by a special education teacher)
- Motor: 30 minutes, weekly (provided by an occupational therapist/physical therapist)
- Communication (concurrent): 30 minutes, 1 time a week (provided by a speech/language pathologist)²
- Communication (not concurrent): 30 minutes, 1 time a week (provided by a speech/language pathologist)

The Student's IEP further stated that the Student's behavior impeded his learning or the learning of others. The IEP stated:

Although at times [Student] does participate in behaviors related to body regulation that impedes his learning, it typically does not impede the learning of others. Sensory and small motor activities are helpful to support positive behavior. Instruction in a smaller setting, using a 3-drawer, and token charts are also effective strategies.

3. On June 22, 2018, the District's 2017-2018 school year ended.

2018-2019 School Year

4. At the beginning of the 2018-2019 school year, the Student attended a District elementary school and continued to be eligible for special education services under the category of autism.
5. On August 30, 2018, the District's 2018-2019 school year began.
6. On October 22, 2018, the Student's mother sent an email to the Student's general education teacher, special education teacher, and principal, stating that the paraeducator informed the mother that the Student had pulled down his pants while at recess. The email stated, "I asked what [the paraeducator] did and she said it happened so fast and she was busy with another student so she ignored the behavior." The mother requested a meeting to talk about the Student's progress and "how the accommodations in his IEP are being provided."

On the same day, the Student's special education teacher replied in an email to the Student's mother, stating she was going to talk with the paraeducator about what happened and informed the mother when she would be available to meet with her.

7. On October 23, 2018, the Student's mother emailed the special education teacher to confirm a meeting on November 1, 2018.
8. On November 1, 2018, the Student's mother emailed the special education teacher, general education teacher, and principal to inform them that the Student's mother was unable to attend the meeting. In addition, the Parent described an incident which the Parent observed

² A concurrent service is a service being provided in conjunction with another service.

the Student's classmates teasing the Student. The mother stated the school could either address her concerns in an email or reschedule the meeting.

On the same day, the principal replied via email to the mother and stated:

...This is something that we have identified as a need and are addressing building-wide. Our bullying prevention units were a first start to the conversations with students as some of the videos show students being targeted because of their difference. Additionally we had a staff meeting yesterday where we discussed using books to have conversations about the experiences our students are having. Also, [general education teacher] and [school counselor] will be sharing information on a 'Circle of Friends' opportunity to help our greater community know what makes our [school] students special and hopefully building a more collaborative and understanding community.

9. Later on November 1, 2018, the mother and special education teacher exchanged emails, scheduling a meeting for November 11, 2018.
10. On November 11, 2018, according to the District, the special education teacher met with both of the Student's Parents to discuss changing the Student's special education schedule. According to the schedule, special education services provided by the special education teacher would now be implemented in the morning. The special education teacher also provided the Parents with a detailed explanation of the service minutes and accommodations provided in the areas of adaptive behavior and social/emotional behavior, including the schedule and how the support ratio of three students to one staff was maintained. For example, in the general education classroom, the teacher stated the Student received support from a paraeducator who was working with two students (two to one support).
11. On November 28, 2018, the special education teacher sent the mother an email, stating that the Student's schedule was changed and a social/emotional check-in was added to his daily point sheet. In addition, a student teacher who was a licensed social worker would be available in the afternoons to help support the Student.
12. On December 11, 2018, the mother emailed the general education teacher and the special education teacher and stated the Student had been on "sensory overload lately." The mother informed them that she had put the Student's headphones in his backpack and requested staff offer the headphones throughout the day, which may "sooth him and allow him to focus." The mother also requested that the Student stay in the classroom during afternoon recess with the student teacher.

On the same day, the special education teacher replied to the mother and stated:

We will offer the headphones throughout the day. [Student teacher] is supporting another student at the afternoon recess and will not be in the [classroom]. If [Student] seems anxious/overstimulated, we can offer an alternative with a different adult.

13. On January 7, 2019, a new teacher was assigned to the Student's general education classroom.

14. On January 15, 2019, the Parent emailed the school counselor, the special education teacher, and the principal, stating, "I'd like to request that [Student's] needs be assessed and that his IEP be revised and updated if needed. Beyond sending this email, what do we need to do to officially request that?"

On the same day, the special education teacher emailed the Parent and stated, "[Student's] IEP is due to be reviewed in May. At that point we will meet as a team and collaboratively update the document to reflect his goal progress and needs. However, I'd like to arrange a meeting so we can discuss your concerns as a team. Please let me know which days/times work best for you."

The Parent emailed back and stated, "Our request is to have that review take place sooner than May." The counselor responded by email to the Parent, explaining the evaluation process and the IEP process and then asked if the question pertained to the evaluation or the IEP. The father responded, "...We're interested in an evaluation in the near future." The counselor again responded in an email, stating that although the three-year evaluation was not due until June 19, 2020, the IEP team could meet to discuss conducting the reevaluation sooner.

15. On January 16, 2019, the Parent emailed the counselor the following response:

Our concerns are two-fold:

- 1) Are the required assistance and accommodations laid out in his IEP being effectively and sufficiently provided? Based on our conversations previously, we don't know how this could be true based on the staffing situation at [school] right now. I'd like to better understand how things like [Student's] IEP accommodations and his rights under [free appropriate public education] FAPE and IDEA are being met. At this point, based on what we heard at our meeting at [school] I'm very concerned.
- 2) We also think [Student] needs more intensive assistance at school, which is why I think a re-evaluation and then a likely update to his IEP is needed. If we wait until June, any identified changes would not be implemented until next year...And yes, the meeting to discuss the IEP sounds like a good immediate step.

16. On January 17, 2019, the counselor emailed the Parent back, suggesting the school psychologist attend the next IEP meeting.

17. According to the complaint, the Parent alleged that, on January 18, 2019, the paraeducator "physically assaulted [the Student] and an order was placed by the school for her to have no physical or verbal contact with [Student] for the remainder of the school year." The incident was originally reported by the general education teacher to the principal. According to the District, the incident was investigated and was unsubstantiated. The District also stated the paraeducator was reassigned to another school in January 2019.

18. On January 22, 2019, the Parents withdrew the Student from the District.

Interviews

Special Education Supervisor³

19. In an interview with the special education supervisor, the supervisor was asked how the District ensured staff were informed of their responsibilities under an IEP. The supervisor reported that the District's procedure is to disseminate the IEP to relevant staff by providing a copy of the "IEP at a Glance" document, although teachers could request a copy of the entire IEP. The special education teacher provides the paraeducators with a list of each student's accommodations and modifications. The special education teacher also provides the paraeducator "what they needed to know" if the paraeducator is providing specially designed instruction to a student. The assistant principal supervises the paraeducators. To ensure that services are provided, the case manager visits the classroom frequently to determine if the IEPs are being implemented and if there are any staff training needs. The school principal also conducts regular classroom "walk throughs" and formally observes the classroom teacher twice a year. In addition, two instructional coaches check for progress monitoring, including data collection.
20. According to the supervisor, the District implemented their procedures for staff to be informed of their responsibilities under the Student's IEP and the Student's IEP was implemented as written.

General Education Teacher

21. In an interview with the general education teacher, the teacher stated she began teaching the Student's general education classroom on January 7, 2019. The District provided her with a list of the eligible students and a "brief description of the strengths and needs." She was given a copy of the Student's IEP.
22. The Student's special education teacher also asked the general education teacher how the Student was doing in the general education classroom. When asked by the investigator how the Student was performing, the teacher stated the Student was having a "hard time" in the classroom. The Student "never settled down" and the teacher "could not have a conversation with him." The Student would also throw tape and yell if he did not get his juice. According to the teacher, the paraeducator was with him "99% of the time." On one occasion, the teacher observed the paraeducator being "rough and firm" with the Student and reported the incident to the principal. The teacher stated she believed the IEP was being followed, but had only worked with the Student for a short period of time.

Special Education Teacher

23. In an interview with the special education teacher, the teacher stated that before school starts for the school year, the special education teachers meet with administrators to receive their

³ The special education supervisor is a District-level staff member that supervises the special education program in the elementary school.

caseloads. The teachers have access to the "IEP at a Glance" form and IEP Online. Paraeducators are assigned to classrooms and the teachers create service schedules and assign paraeducators to individual students, as necessary, and provide additional training.

24. The paraeducator assigned to the Student previously received Right Response training.⁴ When asked what "adult proximity" meant in the Student's IEP, the teacher stated the paraeducator was "not attached to the hip," but kept at certain distance as needed. According to the teacher, the Student was making appropriate progress. The Student had difficulties with transitioning between activities and "voice volume," but the teacher reported that there was not sufficient concern to have an IEP meeting. The teacher also reported she had no concerns regarding the implementation of the Student's IEP, including the adult proximity accommodation and the support provided by the paraeducator.

School Principal

25. In an interview with the school principal, the principal was asked how school ensures that services are provided as written in the IEP. The principal stated that special education is supervised and overseen by the special education supervisor and the board-certified behavior analyst. The teacher's "professional responsibilities" are supervised by the principal. Regarding the implementation of services for an individual student, the special education teacher or the case manager is responsible for ensuring services are provided as required. Regarding the Student, the principal expressed no concerns about the implementation of the Student's IEP and "there were no signs of problems between the student and the paraeducator."

Director of Employee Relations

26. In an interview with the director of employee relations, the director stated she was responsible for addressing professional behavior and was required to follow the collective bargaining agreement. In January 2019, the director investigated an allegation made by the general education teacher that the paraeducator was "rough" with the Student. The paraeducator denied the allegation and the investigation found that the allegation could not be substantiated. The director was not familiar with the allegation regarding the paraeducator not responding to the Student dropping his pants. The paraeducator was reassigned to another school in January 2019.

Paraeducator

27. In an interview with the paraeducator, the paraeducator stated she had been working with the Student since the beginning of the 2018-2019 school year. The special education teacher informed her of her responsibilities according to the Student's IEP and she followed the "behavior plan" that was in the Student's file. The paraeducator stated she provided the following support to the Student:
- Support when the Student was having emotional problems
 - Social goals – providing social prompts to the Student

⁴ Right Response is a training program for staff to learn to de-escalate behavior.

- Academic – explaining information when the Student did not understand
- Reading – re-reading passages that the Student did not understand

The paraeducator stated she also worked with two other students. If she was working with one student but another student needed assistance, she radioed a request for assistance from other staff. Staff was always responsive when she called and there was no delay in providing support to the Student. Regarding the situation when the Student dropped his pants, the paraeducator stated that the Parent misinterpreted her explanation. She had been working with another student and when the Student dropped his pants, she was unable to immediately attend to the Student, but another paraeducator on the playground assisted the Student by pulling up his pants. The paraeducator also denied being “rough” with the Student during the January 2019 alleged incident. The paraeducator stated that on this occasion, the Student had taken a water bottle and when the paraeducator attempted to retrieve the water bottle, the Student dropped to ground, which he often did when he did not get his way.

CONCLUSIONS

Issue 1: Implementation of Accommodations – The Parent alleged that the District did not provide adequate supervision of the Student by failing to implement the accommodations in the Student’s IEP, specifically the accommodation for adult proximity. A district is required to implement the IEP as written. However, when a district does not perform exactly as called for by an IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the IEP. A material failure occurs when there is more than a minor discrepancy between the services provided and the services required.

Here, the Student’s 2018 IEP provided for an accommodation for adult proximity and a three-to-one staffing ratio of students to staff—the relevant accommodations in this complaint. According to the Parent, the District failed to implement the accommodations based on two incidents: first, when the Student dropped his pants at recess, and according to the Parent, the paraeducator ignored the Student because she was busy helping another student; and second, when the paraeducator allegedly was “rough” with the Student. In the District’s response to the complaint and in interviews with District staff, the District reported that staff were informed of their responsibilities under the Student’s IEP, including the accommodation for adult proximity and a three-to-one student to staff ratio. The staff understood that adult proximity meant staff needed to be readily available to the Student but it did not mean close one-to-one support. While there was no direct documentation of adult proximity and the three-to-one staff ratio was being implemented, the documentation provided by the District indicates that the accommodations were implemented as written. In interviews with District staff, staff were able to describe how they worked with the Student in a manner consistent with the Student’s IEP, including the paraeducator who explained how she provided support to the Student. Significantly, the two incidents cited by the Parent as a basis for his complaint could not be substantiated.⁵

⁵ Even if the other paraeducator had not responded during recess, this does not necessarily represent a material failure to implement the IEP, as it would represent a single instance of not providing an accommodation.

In addition to the implementation of adult proximity and the three-to-one staffing ratio, the Parent also expressed concerned about the Student's progress and being teased. According to the emails between the Parent and the District, the District made numerous attempts to meet with the Parent to address these issues. The documentation showed the District requested an IEP meeting, initiated bullying prevention, offered to reevaluate the Student, provided a specially trained staff member to work with the Student in response to the Parent's concerns, and made the headphones provided by the Parent available to the Student. Despite these efforts, the Parent chose to withdraw the Student from the District. Based on the documentation indicating that adult proximity and the three-to-one ratio were implemented, and the District attempts to address the Parent's concerns, there is no violation.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None

DISTRICT SPECIFIC:

None

Dated this ____ day of April, 2019

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