

## **SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 19-51**

### **PROCEDURAL HISTORY**

On June 21, 2019, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Vashon Island 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 June 25, 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 July 17, 2019, OSPI received the District's response to the complaint and forwarded it to the Parent on July 18, 2019. OSPI invited the Parent to reply with any information she had that was inconsistent with the District's information.

On July 29, 2019, OSPI received the Parent's reply to the complaint. On July 31, 2019, OSPI forwarded it to the District.

On August 6, 2019 and August 7, 2019, OSPI requested clarifying information from the District. On August 7, 2019 and August 8, 2019, OSPI received the requested information and on August 8, 2019, OSPI forwarded it to the Parent.

On August 13, 2019, OSPI interviewed the special education teacher and director of student services (director) by phone to obtain clarifying information.

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

### **ISSUES**

1. Did the District implement the Student's specially designed instruction during the second semester of the 2018-2019 school year?
2. Did the District follow procedures for implementing the accommodations in the Student's individualized education program (IEP)?

### **LEGAL STANDARDS**

Definition of Specially Designed Instruction: Specially designed instruction means adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction: to address the unique needs of the student that result from the student's disability; and to ensure access of the student to the general curriculum, so that the student can meet the educational standards within the jurisdiction of the public agency that apply to all students. A need for special education is not limited strictly to academics; it also may include physical education, transition services, behavioral progress, and the acquisition of appropriate social and/or organizational skills. 34 CFR §300.39; WAC 392-172A-01175.

Program Modifications: An individualized education program (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).

Difference Between Accommodations and Modifications: Accommodations: (a) do not fundamentally alter or lower expectations or standards in instructional level, content, or performance criteria; (b) provide equal access to learning and equal opportunity to demonstrate what is learned; and (c) grading and credit is the same as typical students. Modifications: (a) do fundamentally alter or lower expectations or standards in instructional level, content, or performance criteria; (b) provide a student with meaningful and productive learning experiences based on individual needs and abilities; and (c) grading and credit are different.

Definition of a Free Appropriate Public Education (FAPE): A “free appropriate public education” (FAPE) consists of instruction that is specifically designed to meet the needs of the child with a disability, along with whatever support services are necessary to permit him to benefit from that instruction. The instruction and support services must be provided at public expense and under public supervision. They must meet the State’s educational standards, approximate the grade levels used in the State’s regular education system, and comport with the child’s IEP. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 186-188, (1982). Every student eligible for special education between the ages of three and twenty-one has a right to receive a FAPE. 34 CFR §300.101; WAC 392-172A-02000. 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. 34 CFR §300.17; WAC 392-172A-01080.

Provision of FAPE: An IEP is required to be “reasonably calculated to enable the child to receive educational benefit.” It does not require the absolute best or potential-maximizing education for that child. Rather, the district is obliged to provide a basic floor of opportunity through a program that is individually designed to provide educational benefit to a child with a disability. The basic floor of opportunity provided by the IDEA consists of access to specialized instruction and related services. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). For a district to meet its substantive obligation under IDEA, a school must “offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” An IEP must “aim to enable the child to make progress,” the educational program must be “appropriately ambitious in light of [the student’s] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom,” and the student should have the opportunity to meet challenging objectives. *Andrew F. v. Douglas County School District RE-1* 137 S.Ct. 988, 69 IDELR 174 (2017).

If a school district fails to comply with the procedural elements set forth in the IDEA or fails to develop and offer an IEP that is reasonably calculated to enable a child to received educational

benefits, the district is not in compliance with the IDEA. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176 (1982). “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).

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction 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. It must also ensure it provides all services in a student’s IEP, consistent with the student’s needs as described in that IEP. The initial IEP must be implemented as soon as possible after it is developed. 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(3)(a).

**FINDINGS OF FACT**

**2018-2019 School Year**

1. During the 2018-2019 school year, the Student was in 10<sup>th</sup> grade and attended a District high school. He was eligible for special education under the category of specific learning disability.
2. On September 4, 2018, the 2018-2019 school year began in the District.
3. According to the District’s documentation, the Student’s schedule for the first semester of the 2018-2019 school year was as follows:

<b>Time</b>	<b>Subject</b>
8:00 a.m. – 8:56 a.m.	Spanish I
9:00 a.m. – 10:00 a.m.	Biology B
10:14 a.m. – 11:10 a.m.	World History A
11:14 a.m. – 12:10 p.m.	Geometry A
12:49 p.m. – 1:45 p.m.	Sophomore English A
1:49 p.m. – 2:45 p.m.	Learning Lab <sup>1</sup> A

4. The Student’s schedule additionally showed he was enrolled in a “SMART” period during first semester. According to the District, SMART periods are “flexible times in [the District high school’s] weekly schedule for tutoring support, test/assignment make ups, homework completion, and school activities.” SMART periods occur in the general education setting.
5. On November 14, 2018, the Student’s special education teacher emailed the Student’s general education teachers to request information on the following topics in light of the Student’s

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<sup>1</sup> According to an email received by OSPI on August 8, 2019, “[Learning] Lab is a special education resource room where [specially designed instruction] is provided in the areas of reading and written language...”

upcoming individualized education program (IEP) meeting: (a) "overall progress and participation on his gen ed work," (b) "reading comprehension," (c) "essay writing or other writing conventions," and (d) "which and what types of writing accommodations he is taking advantage of and using in class." The special education teacher additionally asked each teacher to respond with "what types of goals and accommodations you see as being most necessary for [Student] to continue his success in class."

6. On November 15, 2018, the Student's science teacher responded with the following input:  
[Student] is on top of his classwork. As you know, he struggled on the first test and I think we really saw his learning disability come through as he was trying to learn for the retake. He got a 21/27 (77%) on the second unit test, which was above the class average. He is accessing testing accommodations...He also had an extra retake opportunity. I only have one real sample of his writing, but his conventions are not strong – missing punctuation and some syntax errors. It's not bad though and doesn't seem too far below grade level.
7. On November 15, 2018, the District conducted an annual review of the Student's IEP. It is not clear from the documentation provided whether the Parent attended the meeting.

According to the November 2018 IEP, the Student's specific learning disability adversely impacted the Student's educational process in the areas of basic reading, reading fluency, and written expression. The Student required "targeted instruction in recognizing and spelling high frequency sight words and variations of root words as well as in writing conventions such as grammar, punctuation, capitalization and spelling in order to make adequate progress toward graduation and post-secondary goals." The Student additionally "benefit[ed] from instruction in the general education setting, but continue[d] to require a higher level of support and accommodation to be successful in reaching the learning targets in this setting..."

The IEP included a post-secondary transition plan that included transition goals in education/training, employment, and independent living. The transition plan stated, "Consideration to remove Learning Lab from [Student's] daily schedule in junior year if he continues to progress to get all specially designed instruction in gen ed setting. Make sure to plan what can be elective and CTE (career technical education) to make sure of graduation requirements."

The Student's IEP provided the Student with the following specially designed instruction in the special education setting:

- Reading: 25 minutes, 5 times weekly (provided by the special education teacher)
- Written Language: 25 minutes, 5 times weekly (provided by the special education teacher)

The Student's IEP further provided the following accommodations:

- Access to graded test/quiz prior to re-take
- Allow re-takes on tests/quizzes
- Calculator
- Check for understanding
- Extra time on assignments (2 extra days)
- Extra time on tests and quizzes
- Modified directions
- Preview and specifically teach content-specific vocabulary
- Read-aloud – English
- Scribe
- Speech-to-text or scribe

- Take test in separate location
- Text-to-speech or read aloud or audio books
- Test or work in a separate location

The November 2018 IEP included four measurable annual goals, to be reported quarterly in written progress reports:

Annual Goal:	
Reading (word recognition)	By 11/15/2019, when given a set of word variations from the same root word, [Student] will accurately read words with at least 90% accuracy across 3 trials improving word recognition from 4 <sup>th</sup> grade level to 10 <sup>th</sup> grade level as measured by teacher created data sheets.
Reading (word recognition)	By 11/15/2019, when given a set of high frequency sight words, [Student] will correctly read words with at least 90% accuracy across 3 trials improving word recognition skills from 4 <sup>th</sup> grade to 10 <sup>th</sup> grade as measured by teacher created data sheet.
Written language (writing conversations)	By 11/15/2019, when given a paragraph requiring editing at his reading level [Student] will apply correct capitalization, punctuation, and grammatical conventions to the writing with at least 95% accuracy improving writing conventions from 1 out of 3 opportunities to 3 out of 3 opportunities as measured by teacher determined data sheets.
Written language (spelling)	By 11/15/2019, when given a list of 10 known high frequency sight words at his reading level [Student] will correctly write these words with at least 80% accuracy across 3 trials improving spelling from 4 <sup>th</sup> grade to 10 <sup>th</sup> grade as measured by teacher created data sheets.

The November 2018 IEP indicated the Student would spend 86.77% of his time in the general education setting.

- On November 15, 2018, the District provided the Parent with prior written notice (PWN), which stated the IEP team considered "moving [specially designed instruction] to all Gen Ed setting and decreasing minutes of services" but the IEP team "determined [Student] continues to require the time and targeted convention work that can occur in the Learning Lab setting. Team will meet prior to junior year scheduling to determine if continued Learning Lab is required."
- On December 21, 2018, according to an email sent by the Student's science teacher to the Student's special education teacher, the Student retook a test during learning lab period and was provided a laptop as an accommodation.
- On January 15, 2019, a special education progress report based on the November 15, 2018 IEP stated, "Sufficient Progress being made to achieve annual goal with duration of IEP," for all the Student's goals except for the spelling goal. The progress report stated, "Not been provided instruction on this goal." Comments on the Student's progress on individual goals was reported as follows:

Annual goal area	Comments
Reading goal 1 (word recognition)	[1/15/19] When given a set of 7 words with 3 variations for each word (i.e. reappear, appearance, disappear), [Student] was able to automatically read the words sets with an average of 60% accuracy. His current reading level is approximately 6 <sup>th</sup> grade when given high frequency sight words list. Way to go, [Student]!
Reading goal 2 (word recognition)	[1/15/19] When given a set of high frequency sight words, [Student] was able to independently and automatically read 6 <sup>th</sup> words with 80% accuracy, upper MS words with 65% accuracy and HS words with 55% accuracy, Keep reading, [Student]!
Written language (writing conversations)	[1/15/19] When writing an independent paragraph, [Student] was able to use appropriate punctuation and capitalization conventions consistently. His sentences were simple, but grammatically correct approximately 2/3 of the time. His paragraph had a topic and conclusion sentence with appropriate supporting details.
Written language (spelling)	[1/15/19] [Student] has been focusing on increasing his reading and exposure to grade level words through reading. His spelling has improved in his ability to spell phonetically. He will often use a simpler form of the word that he is comfortable spelling, but when he does use higher level words, his spelling attempts are reasonable. With more accessing to reading text, his spelling will continue to improve and more attention will be given at that time to spelling conventions and increasing his repertoire of sight words with accurate spelling.

11. On January 15, 2019, the Parent emailed the special education teacher, stating, "As we discussed at his IEP meeting, we were going to touch based on him dropping his Learning Lab second semester. What are your thoughts? I was thinking ceramics or Independent Living?"
12. On January 17, 2019, the special education teacher replied:
 

Yes, I am in support of [Student] using his 6<sup>th</sup> period (or whenever) to do an elective. He has been working hard in learning lab to complete things. I have work that I can give him that will support and target his goals that he can incorporate throughout the rest of his day and we can use SMART periods too when we need to connect about this...[Student] and I talked about that if moving out of LL (Learning Lab) next semester proves too much for [Student], we can always re-address."
13. According to the District, the high school counselor withdrew the Student from learning lab where the Student received his special education and placed the Student in an elective class.
14. In its response, the District acknowledged that it failed to timely execute an amendment to the Student's IEP to reflect "an agreement between the District and Parent" to "change [the Student's] service delivery model for the second semester." However, the District stated that although it did not amend the IEP, the Student continued to receive specially designed instruction, the Student continued to make progress on his IEP, and there was no material failure to implement the IEP:
 

Here, the District believes that the Staff did not fail to implement Student's November 2018 IEP in any material fashion. [...] Student continues to receive the [specially designed instruction] identified in the November 2018 IEP in support of Student's making progress toward his annual goals. [Special education teacher's] agreement with Parent's proposal to

allow Student to access another elective in place of the Learning Lab did not change this in any material respect. Rather, pursuant to [special education teacher's] proposal on January 17, 2019, [special education teacher] [was] working with Student each week outside of [his] Learning Lab class period, including during the [high school] SMART periods. After the June 6<sup>th</sup> meeting, [special education teacher's] paraeducator also began removing the Student, by agreement from one elective period each week for further work towards his IEP goals. The documentation indicates that Student made progress towards his November 2018 IEP goals while receiving these services [...].

15. On January 29, 2019, the second semester began in the District.

16. During the second semester, the Student's schedule was as follows:

<b>Time</b>	<b>Subject</b>
8:00 a.m. – 8:56 a.m.	World History B
9:00 a.m. – 10:00 a.m.	Spanish IB
10:14 a.m. – 11:10 a.m.	Geometry B
11:14 a.m. – 12:10 p.m.	Sophomore English B
12:49 p.m. – 1:45 p.m.	Ind. Living
1:49 p.m. – 2:45 p.m.	Biology B

17. The Student's schedule additionally showed he was enrolled in "SMART" periods during the second semester. According to the District, the Student spent 90 to 120 minutes per week in SMART periods during the second semester.<sup>2</sup> According to the District's response, when the District changed the Student's schedule and removed learning lab, all specially designed instruction received by the Student was provided by the special education teacher or the special education paraeducator to the Student during SMART periods. The District did not keep records regarding how much of each SMART period was spent providing specially designed instruction to the Student. In addition to receiving specially designed instruction during SMART periods, the documentation showed the Student also utilized SMART periods to make up tests, catch up on work, and receive general tutoring from the special education teacher or paraeducator.<sup>3</sup>

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<sup>2</sup> This information was obtained by OSPI in an email with the District's counsel, received on August 8, 2019. In the email, the District's counsel explained that "SMART periods are between 90 and 120 minutes a week, which related to 3 35 min STARTs or 2 60 min SMARTs, depending on each week's bell schedule." The District provided a document containing a schedule of all the SMART periods for the 2018-2019 school year.

<sup>3</sup> On August 13, 2019, OSPI interviewed the special education teacher and director regarding the provision of specially designed instruction to the Student. The special education teacher told the OSPI investigator specially designed instruction was most often provided by a paraeducator whom she supervised. The teacher stated both she and the paraeducator were in frequent contact with the Student's general education teachers and the Student regarding the material the Student was working on and areas in which the Student felt he required targeted support. The OSPI investigator was told during the interview that the paraeducator would attend a section of the Student's class (often world history) to learn the material, gather notes from the class, and then would reteach the material to the Student during SMART periods to ensure the Student was grasping overall concepts being taught in the general education curriculum. The special education

18. On January 30, 2019, the Student attended a SMART period for 60 minutes.
19. On February 4, 6, and 8, 2019, the Student attended SMART periods for 35 minutes each.
20. On February 25 and 27, 2019, the Student attended SMART periods for 60 minutes each.
21. On March 4 and 6, 2019, the Student attended SMART periods for 60 minutes each.
22. On March 14, 2019, the Student emailed his biology teacher, requesting to make up a test because of a wrestling tournament. That same day, the teacher responded, "Of course. Smart next week. Pick the day."
23. On March 15, 2019, the Student emailed his history teacher, requesting to retake a quiz he didn't do well on. The same day, the history teacher responded, "No, but you can do quiz corrections and get ½ point back per question you get correct."
24. On March 15, 2019, the Parent, who was copied on the Student's email to his history teacher, sent an email to special education teacher and asked her to intervene. The special education teacher replied, "Definitely!" She stated she would check to see if the Student could "re-take Monday for SMART?"
25. On March 17, 2019, the special education teacher emailed the history teacher, informing that the Student wanted to retake the quiz that week.
26. On March 18, 2019, the history teacher replied to the special education teacher and stated, "I see that he has re-taking quizzes as an accommodation. He can come in to SMART today if he wants, or we can make other arrangements."
27. On March 18, 2019, the Student utilized his SMART period to retake a quiz.
28. On March 22, 2019, the Student emailed his biology teacher to ask if he could re-take the quiz on a SMART day. On the same day, the biology teacher replied and stated that he could re-take the quiz.
29. On March 22, 2019, the Student utilized his SMART period to retake a quiz.
30. On March 25 and 27, 2019, the Student attended SMART periods for 35 minutes each.
31. On March 28, 2019, the Student emailed his biology teacher to request re-taking the open note quiz from the previous Friday. On the same day, the teacher replied that he could re-take the quiz.

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teacher additionally stated she worked one-on-one with the Student during reassessment of tests. She explained the Student would take tests in the general education classroom with his peers, but then she would reassess his performance with him, including discussing test prompts with the Student to make sure he understood what was being asked and discuss and strategize how to organize his written responses.



32. On March 29, 2019, the Student attended a SMART period for 35 minutes.
33. On April 15 and 17, 2019, the Student attended a SMART period for 35 minutes each.
34. Also on April 17, 2019, the Parent emailed the special education teacher and requested she contact the history teacher to facilitate a makeup quiz.
35. On April 19 and 22, 2019, the Student attended a SMART period for 35 minutes.
36. On April 22, 2019, the history teacher emailed the special education teacher about the Student having a "rough time" on an essay test. The history teacher stated, "I know that his accommodations allow him to re-take tests. I'm not sure he will do better a second time without more help." On the same day, the special education teacher suggested the Student work with the special education paraeducator. The history teacher agreed in an email reply. The special education teacher also emailed the special education paraeducator and requested assistance for the Student regarding the previous essay test.
37. Meanwhile, on April 22, 2019, the Parent emailed the special education teacher, asking if the Student could re-take a quiz until he passed it. The special education teacher replied that because the IEP did not stipulate the number of times the Student could re-take a quiz, the Student could re-take the quiz as many times as necessary to pass.
38. Also, on April 22, 2019, the Parent and special education exchanged emails regarding the Parent's request for the Student to re-take the last test and receive additional support during SMART periods after the Student returned from an out of state athletic tournament on April 30, 2019.
39. On April 24 and 26, 2019, the Student did not attend scheduled SMART periods due to absences for an out of state athletic tournament.
40. From April 25 to 30, 2019, the special education teacher and paraeducator exchanged emails about how the paraeducator would assist the Student with the essay quiz by re-teaching materials and using graphic organizers.
41. As part of its response to the complaint, the District submitted an undated "[Student] accommodation use record." The document provided the following information:
  - Unit 4 Quiz 1 March 14  
Take – Did not do corrections  
Re-took: score from 4 to 10 on March 20 at 10:09 am
  - Unit 4 Test April 16  
Taken – Did not retake either part  
Score released April 19  
Essay rubric emailed April 24  
Did corrections but did not turn in – emailed instead (noticed 6/6)
  - Absent from May 28 – May 31
  - Unit 5 Quiz 1 May 24  
Did not retake

- Did corrections – not yet in gradebook
- Unit 5 Test 5/31  
Absent for test  
Made up on June 5
- Absences  
April 3  
(Unit 4 Test on April 16)  
April 24, 25, 26, 29, 30  
May 8, 17  
(Unit 5 Quiz 1 on May 24)  
May 28, 29, 30, 31

42. On May 6, 8, and 10, 2019, the Student attended SMART periods for 35 minutes each.
43. On May 6, 2019, according to the documentation, the Parent and District agreed to review the accommodations in the Student's IEP without convening the IEP team. Text-to-speech and text-to-speech read aloud or audio books were added and a scribe was removed from the IEP.
44. On May 13, 2019, the Student attended a SMART period for 35 minutes.
45. On May 14, 2019, the Student emailed his English teacher and requested to retake two reading quizzes. The English teacher responded that he would send the Student a "calendar invite."
46. On May 15, 2019, the Student attended a SMART period for 35 minutes. It is not clear if the Student utilized the period to retake a test or receive specially designed instruction.
47. On May 16, 2019, the Student was scheduled to attend a SMART period for 35 minutes, but did not attend due to an absence.
48. On May 29, 2019, the special education teacher emailed the Student's history teacher to ask if the Student had turned in his essay for the last test and if the grade book had been corrected. The history teacher responded the same day that the Student had turned in the essay and that he would get the gradebook corrected as soon as he could.
49. On June 3, 2019, the Student attended a SMART period for 35 minutes.
50. Between June 4 and June 15, 2019, the special education teacher exchanged numerous emails with the Student's general education teachers regarding grades, making up quizzes, and test corrections.
51. On June 5, 2019, the Student attended a SMART period for 35 minutes.
52. Also, on June 5, 2019, the special education teacher emailed the Parent the following agenda for the IEP meeting the following day:
  - Recap for what we will talk about at tomorrow's IEP meeting
    - Change and add some accommodations, specifically to have the novel provided to [Student] in audio form when assigned in class

- Change the service minutes to 1 time per week of [specially designed instruction] (outside of SMART, during elective) – confirm and collect more intentional data around this work and strategies
- Make sure that communication around this works and strategies
- Make sure that communication around re-taking quizzes is communicated efficiently with parents and [Student] to know how he performs and if he will need to do another form of assessment (possibly add alternative form of assessment to accommodation list)
- Making sure to connect with [Student] and check in with him about the make ups and re-takes

The big idea is [Student] is working his tail off and will continue to do so and be successful and meet the expectations we set, but remembering that he is working at capacity right now and needs a little extra attention and support to make sure he isn't doing it alone [...]

What would you/he think of having someone to check in before and after school and/or at break each day just for a few minutes to kind of help him and everyone keep track of everything? I am not exactly sure what this would look like at this point, just thinking about things.

53. On June 6, 2019, the District convened a meeting to review the Student's IEP. The Student's specially designed instruction was reduced for the following school year to 25 minutes per week for both reading and written language in the special education classroom, and the accommodations of allowing open notes on tests and quizzes and preview and specifically teach content-specific vocabulary were added. According to the PWN, dated June 7, 2019, the IEP team considered "adding back in service minutes to [Student's] IEP to include a learning lab next year" but "the team, especially the student, has indicated that he feels he will be best served by accessing his service through a weekly class period and supports offered during SMART/homeroom."
54. On June 7, 2019, the Student attended a SMART period for 35 minutes.
55. On June 7, 2019, the special education teacher emailed the Student's independent living teacher to ask if she had any "make up or re do" work the Student could do over the next couple weeks to help the Student bring his grade up to a B average. The special education teacher explained that the Student's IEP team had just met to review and added a couple accommodations and were "trying to see if [they] could get/keep [Student's] grades at a B average this semester." The Student's independent living teacher responded the same day with, "Yep, that's fine with me!"
56. Also, on June 7, 2019, the special education teacher emailed the Student's English teacher the following:
- We met yesterday to make a couple of changes to [Student's] IEP (including adding on open notes for quizzes). The team is trying to figure out if there are 1-2 quizzes or tests or corrections that [Student] can do to bring up his grade in that class with this new accommodation that we are adding. The rationale is that [Student] is doing really well in his classwork and that when it's test time, he just drops off. And this is related to his disability hence the addition of the accommodation. We are planning to spend 5<sup>th</sup> period

working with him over the next couple weeks that we are hoping can bring him up a but and access (somewhat retroactively?) his new and needed accommodations. Let me know!"

57. On June 8, 2019, the Student's English teacher responded to the special education teacher that the Student came in the previous day to take a couple quizzes that he had missed while he was absent and that he would have those graded within the next couple days. The English teacher replied that he would have a "more accurate idea of where [Student] is at for planning the way forward" after having graded those quizzes.
58. According to the District's response, from June 10, 2019 through June 21, 2019, the "Student was pulled from one of his elective courses each week to work with [special education teacher] or [paraeducator] on Student's IEP goals."
59. On June 11, 2019, the special education teacher emailed the Student's English teacher the following, "I just wanted to check in. It looks like [Student] still has a C. Did those grades get entered and that is his is up to date grade or [have] the scores [not] been entered yet? I am meeting with him today to set up some dates and re-take scheduling..."
60. On June 12, 2019, the Parent emailed the District's director of student services (director) and stated, in part, "As it was pointed out in the last IEP meeting on June 6<sup>th</sup>, [Student] did not receive any special instruction this semester. I would like to request an extended school year for [Student] so that he might benefit for that instruction to be successful." On June 13, 2019, the director replied that she needed more information and would get back to the Parent.
61. On June 14, 2019, the special education teacher requested a sample of the Student's most recent writing from the Student's English teacher.
62. On June 15, 2019, the English teacher provided the special education teacher with the requested sample of the Student's writing, and on June 17, 2019, he explained by email that it earned the Student a grade of 75%. On June 19, 2019, the English teacher told the special education teacher that he would provide her with examples of writing that scored both higher and lower in the Student's general education English class so that she could see how the grading was being done. The special education teacher responded that she would appreciate that so that she could see how the Student's work was in relation to standard general education requirements and work.
63. On June 17, 2019, a special education progress report based on the November 15, 2018 IEP stated, "Sufficient Progress being made to achieve annual goal with duration of IEP," for all the Student's goals. Comments on the Student's progress on the individual goals were reported as follows:

Annual goal area	Comments
Reading goal 1 (word recognition)	[6/14/19] When given sets of words with 3 variations for each word (i.e. reappear, appearance, disappear), [Student] was able to automatically read the words sets with an average of 80% accuracy across trials. These are for middle

	school words and he is reading word variations at the high school level with approximately 40% accuracy.
Reading goal 2 (word recognition)	[6/14/19] Overall when reading a list of high frequency sight words, [Student] is reading at upper middle school level with a beginning level of recognition at the high school level. [Student] was able to independently and automatically read 6 <sup>th</sup> grade words with 80% accuracy, upper middle school words with 90% accuracy, and HS words with 65% accuracy. Whoot whoot!
Written language (writing conversations)	[6/14/19] On [Student's] most recent written work for his English class, he was able to write with appropriate punctuation and capitalization conventions on approximately 75% of the time. He continues to struggle with consistency on name capitalization, but there is good progress here. His punctuation use of periods and commas was accurate about 80% of the time. His sentences are beginning to show more complexity, in which he is connecting his ideas with appropriate comma use and in describing more intricate ideas of the text. This has shown to be consistent over trials and across settings. The main area of concern is responding appropriately to the prompt given.
Written language (spelling)	[6/14/19] When given a list of 10 high frequency sight words at the upper middle school level, [Student] is able to correctly spell these words with 50% accuracy on the words total. With the remaining words, they are spelled phonetically correct with [minor] errors with approximately 40% accuracy. On his most recent written work completed on a computer with spell check, his spelling was nearly completely accurate.

64. The District additionally asserted in its response that the Student "did well in each of his general education courses during the 2018-2019 school year." The District received the following grades in his general education classes during the 2018-2019 school year:

2018-2019 Semester One

Soph. English A	B-
Learning Lab A	A
Geometry A	B-
Biology A	B-
World History A	C+
Spanish IA	A
SMART Per 10 A	P

2018-2019 Semester Two

Ind. Living	A
Soph. English B	B-
Geometry B	B
Biology B	B+
World History B	B
Spanish IB	A-
SMART Per 10 B	P

65. On June 19, 2019, the Parent emailed the Student's history teacher that the Student had asked the Parent if he was in "Fundamentals" because he had taken the "Fundamentals final." The Parent also said in her email she wanted to confirm the Student was permitted to use his notes for test and quizzes and not receive different curriculum? She wrote that as she understood "fundamentals is modified grading?" The same day, the history teacher responded to the Parent, confirming the Student took the wrong version of the final and he was permitted to use notes, but because the Student did well on the version of the final he took (fundamentals), the teacher was going to permit the Student to keep the score in the gradebook, and the gradebook would still read that the Student took a core class. The history teacher gave the Student the option of retaking the final again if he wanted, per his accommodation.

66. On June 19, 2019, the Student emailed his English teacher to ask if he could use notes for the final the next day.
67. On June 20, 2019, the English teacher responded to the Student, "No notes, but I will be a resource to you during the test."
68. On June 20, 2019, the special education teacher emailed the director:  
I chatted with [Parent] after we talked this week. We basically talked about that he made progress on his IEP goals and he ended up with pretty good grades by the end of the year (successful grades from what we spoke about as a team). And so while we didn't do [specially designed instruction] SDI in the way of a [special education] curriculum that targeted his discrete skills specifically in isolation, we did provide instruction around his goals as an embedded aspect of the [general education] curriculum through SMART period work with paras and my work collaborating with [general education] teachers [...]
69. On June 21, 2019, the 2018-2019 school year ended in the District.
70. Also, on June 21, 2019, the Parent filed this complaint.
71. On June 24, 2019, the principal emailed the Student's English teacher: "[Student] had a change in his IEP to allow for notes on his final starting after 6/6 which didn't make it to you (I think). In looking at his final grade could you tell me if he had performed dramatically different on his final would it have changed his overall grade at all?"
72. Also, on June 24, 2019, the principal emailed the special education teacher and requested she try to schedule an IEP meeting for the Student.
73. On June 24, 2019, the director and the high school principal met with the Parent. According to the PWN, dated June 24, 2019, the Parent stated she believed the Student did not receive specially designed instruction during the second semester of the 2018-2019 school year. The Parent and the District agreed to the following:
- The District would provide [Student] with the course syllabus for his American Literature class.
  - The District would check a US History book out to [Student] for the summer so he could familiarize himself with the content prior to the start of the year.
  - The District would provide [Student] with the novels from his American Literature class in audio format via Bookshare.
  - Parents would work with [Student] to preview the content of both American Literature and US History over the summer.
  - The District will schedule an IEP meeting prior to the start of the school year in order to clarify the specially designed instruction and accommodations [Student] will have in reading and writing starting in September.
74. In response to its acknowledgement that the District did not timely complete an IEP amendment to document the agreed upon change in the Student's service delivery model for the second semester, the District recommended the District high school special education staff complete training on the requirement to timely complete an IEP amendment to reflect any material change in the Student's IEP, consistent with WAC 392-172A-03110(2)(d). The District

proposed that such training would be completed by November 15, 2020<sup>4</sup> and that documentation would be provided to Parents and OSPI.

## CONCLUSIONS

**Issue One: Specially Designed Instruction** – The Parent alleged the District failed to provide the Student with the specially designed instruction in the Student’s individualized education program (IEP) during the second semester of the 2018-2019 school year.

Specially designed instruction means adapting, as appropriate, to the needs of an eligible student, the content, methodology, or delivery of instruction to address the unique needs of the student that result from the student’s disability, and to ensure access of the student to the general curriculum, so that the student can meet the educational standards within the jurisdiction of the public agency that apply to all students. Every district, at the commencement and throughout the school year, must have an IEP in place for every student within its jurisdiction who is eligible to receive special education services. The IEP developed by the district must be appropriately ambitious and reasonably calculated to enable the student with a disability to make progress in light of his unique circumstances. Districts must implement the services in a student’s IEP as indicated in the IEP. When a school district does not perform exactly as called for by the IEP, it violates the IDEA when the procedural violation results in a material failure to implement the student’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.

The Student attended school for eighty-two (82) days during the second semester of the 2018-2019 school year, or about 12 weeks.<sup>5</sup> The Student’s November 2018 IEP—in place during second semester—provided the Student with 125 minutes of specially designed instruction in reading and 125 minutes in written language, or 250 minutes per week total of specially designed instruction. According to the Student’s IEP, the Student should have received 3,000 minutes (50 hours) of specially designed instruction during the second semester. If the Student received specially designed instruction full time during the time he spent in SMART periods and not retaking a test, the documentation shows he only would have received 940 minutes of specially designed instruction (15.6 hours)<sup>6</sup>. OSPI finds the District did not implement the Student’s IEP

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<sup>4</sup> OSPI believes this was a typo in the District’s response and the District intended to recommend the training be completed by November 15, 2019.

<sup>5</sup> Documentation provided with the District’s response showed that there were ninety-three (93) days of school during the second semester of the 2018-2019 school year, and that the Student was absent from school (either excused or unexcused) for eleven of those days.

<sup>6</sup> Documentation shows the Student was in a SMART period and did not also document the Student taking a make up test or absent on the following dates: January 30, 2019; February 4, 6, 8, 25, 27, 2019; March 4, 6, 25, 27, 29, 2019; April 17, 19, 22, 2019; May 6, 8, 10, 13, 15; and June 3, 5, 7, 2019. The Student was also pulled from an elective once during the week of June 10, 2019, and once during the week of June 17, 2019, to receive instruction by the special education teacher or special education paraeducator, to receive specially designed instruction on IEP goals.

regarding the number of minutes of specially designed instruction the Student was supposed to receive and is in violation.

Furthermore, the Student's IEP indicated the Student was supposed to receive his minutes of specially designed instruction daily, from a special education teacher, in the special education setting. His IEP further clarified he would receive his specially designed instruction during a learning lab, a daily resource room period during which the Student would have been able to receive his minutes of specially designed instruction as provided in his IEP. The November 2018 PWN stated the IEP team had considered dropping learning lab from the Student's course load, but specifically indicated the Student required that time in order to receive his specially designed instruction. Regardless, during the second semester of the 2018-2019 school year, the Student received his specially designed instruction during SMART periods when he was present and was not using the time to retake a test. During SMART periods, the Student received individualized instruction from the special education teacher or paraeducator in the general education setting. Instead of occurring daily, SMART periods occurred either twice a week for 60 minutes each or three times a week for 35 minutes each. Thus, when the Parent and District agreed to change the Student's schedule so the Student was no longer enrolled in learning lab, the effect was to change the amount of time the Student spent in the special education setting so that he was receiving all of his specially designed instruction in the general education setting. Although this did not change the Student's least restrictive environment (LRE) bracket, it did change the setting, frequency, method of delivery, and number of minutes of specially designed instruction the Student received. The District failed to implement the Student's IEP as written and is in violation of the IDEA and state regulations.

An agreement to change a student's schedule does not automatically equate to an agreement to change service delivery model—including setting, frequency, method of instruction, and number of minutes of instruction—for the provision of specially designed instruction. Here, the documentation shows the Parent and District agreed to change the Student's schedule, but it is unclear if the Parent or the Student were aware of the implications of changing the Student's schedule on the Student's ability to receive specially designed instruction or how changing the service delivery model could impact his ability to make progress. Accordingly, while the documentation makes clear the Parent consented to the change in schedule, because the District did not follow procedures to amend the IEP, including providing the Parent with prior written notice (PWN) of the change, it is less clear if the Parent agreed with the change in provision of specially designed instruction, including the reduction of minutes. Following procedures to amend the IEP or holding an IEP meeting, including providing PWN, would have ensured the Parent, Student, and the rest of the IEP team were informed of the implications of the schedule change and agreed to not just a change in schedule, but also to an IEP amendment.

In its response, the District acknowledged it should have amended the Student's IEP in January 2019 to reflect the changes to the service delivery model for the Student's specially designed instruction. OSPI agrees and finds the District in violation. In its response, the District proposed a training on timely completion of IEP amendments when it makes material changes to the IEP. OSPI accepts the District's proposal for a corrective action.



Although the Student's IEP was not implemented as written, based on the documentation in this complaint, including the Student's progress reports and report card from his general education classes, the Student continued to make progress on each of his IEP goals and in the general education setting throughout the second semester and overall, during the 2018-2019 school year. OSPI notes that while the Student received fewer minutes of specially designed instruction than required in his IEP, the Student also received one-on-one individualized instruction. Further, in June 2019, the IEP team amended the Student's IEP to more closely reflect the service delivery model the Student had been receiving second semester. While the District is in violation for not implementing the IEP as written, and for not following procedures for amending the IEP in January 2019, given the Student's ability to continue to make progress despite the District's failure to perfectly implement the IEP, no individual remedy is ordered.

**Issue Two: Accommodations** – The Parent alleged the District did not follow procedures for implementing the Student's accommodations. Specifically, the Parent alleged that the District did not implement the following accommodations as indicated in the Student's IEP: use of notes on the Student's English final, retaking of tests, use of audiobooks, and provision of study guides. Accommodations do not fundamentally alter or lower expectations or standards in instructional level, content, or performance criteria. They provide equal access to learning and equal opportunity to demonstrate what is learned. Grading and credit for students who receive accommodations is the same as students without accommodations.

The Parent alleged the Student was denied his open notes accommodation during his English final at the end of the second semester. The IEP team amended the Student's IEP on June 6, 2019, to include open notes as an accommodation on tests. Email conversations between the principal and English teacher confirmed the Student's English teacher was not aware of this and denied the Student this accommodation. The Parent's allegation is substantiated, and the District is in violation. The Student was given an opportunity to retake quizzes at the end of the year to improve his grade and the teacher was informed of his violation of the Student's accommodations. The District has taken steps to remedy the violation and no further corrective action is warranted.

The Parent additionally alleged the Student did not receive his accommodation to be able to retake tests. Email communications and the Student's overall progress, including his grades, showed the Student regularly received, utilized, and benefited from his accommodation for retaking tests throughout the 2018-2019 school year. OSPI finds no violation. The documentation does indicate that at times, the Student asked and was allowed to retake tests that he missed due to absences for athletic tournaments. OSPI reminds the District and Parent, however, that IEP accommodations, such as retaking tests, should only be used as a way to provide the Student with an equal opportunity to demonstrate what he is learning despite his disability—not as a means for him to make up tests he missed due to athletic or other extracurricular activities. OSPI accordingly recommends the District review how it is using this accommodation.

The Parent further alleged the Student did not receive his study guides or audiobooks during the 2018-2019 school year. While the documentation does not show the Student received these accommodations, and technically, they should have been provided to the Student because they were in his IEP, there is also no documentation showing the Student requested them or would

have utilized them but was denied. The Student demonstrated he was able to make sufficient progress without them and therefore, while a procedural violation, the District's denial of these accommodations was not material. Further, on June 24, 2019, the director, the high school principal, and the Parent met to discuss the Student's special education services and accommodations for the 2019-2020 school year. As part of that conversation, the Parent and District agreed to provide the Student with several accommodations and supports prior to the start of the 2019-2020 school year, including the provision of audiobooks and study guides over the summer, and agreed to schedule an IEP meeting prior to the start of the school year to clarify specially designed instruction and accommodations. As a result of the meeting on June 24, 2019, the District has remedied the Parent's concerns regarding accommodations and no further corrective action is ordered.

### **CORRECTIVE ACTIONS**

By or before **October 4, 2019, October 11, 2019, and November 8, 2019**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

None.

#### **DISTRICT SPECIFIC:**

By **November 1, 2019**, the District will provide training for all special education teachers, principals, assistant principals, and any general education teachers with students eligible for special education in their classes at the school identified in this complaint on the timely completion of IEP amendments when changes are made to an IEP.

OSPI recommends that the District contact the Puget Sound Educational Service District (ESD 121) to discuss training needs.

By or before **October 4, 2019**, the District will notify OSPI of the name of the trainer and provide documentation that the District has provided the trainer with a copy of this decision for use in preparing the training materials.

By or before **October 11, 2019**, the District will submit a draft of the training materials for OSPI to review. OSPI will approve the materials or provide comments by October 25, 2019 and additional dates for review, if needed.

By **November 1, 2019**, the District will conduct the training regarding the topics raised in this complaint decision.

By **November 8, 2019**, the District will submit documentation that the staff participated in the training. This will include 1) a sign-in sheet from the training, and 2) separate official human resources roster of all staff required to attend the training so OSPI can verify that all required staff participated in the training.

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.

### **RECOMMENDATIONS**

OSPI reminds the District that testing accommodations are a way to provide a student with a disability an equal opportunity to demonstrate what he or she has learned.

Accordingly, when a student makes up a test that they missed due to an extracurricular activity, or any other reason not related to a disability, the provision of a retake is not an IEP accommodation. The documentation showed on more than one occasion, the Student utilized an "accommodation" to retake tests when he was absent for athletic tournaments or other reasons unrelated to disability. While the District may choose to make arrangements for the Student to re-take tests at an alternative time or location in order to enable him to participate in extracurricular activities, as they do for students without disabilities, the arrangement is not an accommodation per the Student's IEP.

Additionally, it is not recommended to provide IEP accommodations with the intended goal of helping a student obtain or maintain a certain grade point average. Here, emails between the director and the general education teachers showed the IEP team determined the Student should be permitted to take tests as many times as necessary to achieve a final grade in the "B" range. Although the documentation showed test re-takes were also used as an opportunity for the Student to more accurately demonstrate what he had learned after having received specially designed instruction to reassess the test—a proper use of test accommodations—the effect of the accommodation being given an indefinite amount of times to produce a predetermined grade range resulted in the additional accommodation of modified grading, which was not on the Student's IEP. Accommodations, which are intended to provide equal access to demonstrate what was learned, are not a substitute for specially designed instruction. A goal of specially designed instruction is to allow a student to access the general curriculum so the student can meet the educational standards that apply to all students. OSPI accordingly recommends the IEP team consider whether in addition to accommodations, the Student may require additional specially designed instruction to help him continue to meet his desired academic goals and make progress in the general education setting.

Dated this \_\_\_\_ day of August, 2019

Glenna Gallo, M.S., M.B.A.  
Assistant Superintendent  
Special Education  
PO BOX 47200  
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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.)