

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-100

PROCEDURAL HISTORY

On August 31, 2022, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the [REDACTED] 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 September 2, 2022, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On September 19, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent on September 22, 2022. OSPI invited the Parent to reply. OSPI did not receive a reply.

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

ISSUE

1. Since December 2021, has the District implemented the Student's individualized education program (IEP), including implementing accommodations to allow participation in nonacademic activities?

LEGAL STANDARDS

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 served through enrollment who is eligible to receive special education services. A school district must ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105.

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

Nonacademic and Extracurricular Activities: The student's IEP will address how the student will be educated and participate with nondisabled students in the general education classroom and in extracurricular and nonacademic activities. 34 CFR §300.320; WAC 392-172A-03090. The district must take steps, including the provision of supplementary aids and services, to afford a student

eligible for special education the equal opportunity to participate in nonacademic and extracurricular services and activities. 34 CFR §300.107; WAC 392-172A-02025.

FINDINGS OF FACT

2021–2022 School Year

1. At the start of the 2021–2022 school year, the Student was eligible for special education services under the category of other health impairment, attended a District high school, and her April 2021 individualized education program (IEP) was in effect.
2. The Student’s April 2021 IEP included present levels, goals, and specially designed instruction in reading, writing, math, and adaptive. The Student received supplementary aids and services in the form of a consultation from a speech language pathologist (SLP), occupational therapist (OT), and physical therapist (PT).

Under the present level section of the IEP, it stated, “Due to [the Student’s slower processing speed, she needs additional time to respond verbally. [The Student] may need to alert her listener to her IEP need for additional time to respond.” The adverse educational impact section included “recommended instructional/curricular practices and student management strategies.” It indicated, among other things, that the Student needed “Frequent check in for understanding and focus one step at a time,” “Enlarge printed copies,” and “All classroom lights on for better visibility.”

The Student’s IEP included numerous accommodations and modifications, with the following that related to participation in activities:

- “Give adequate amount of time to respond verbally and in writing”
- “Preferential seating”
- “Seat in class that best accommodates her vision needs. She has partial vision and needs enlarged text both digitally and on paper”
- “Assign a ‘buddy’ for new environments”
- “Adjust work areas to meet physical needs”
- “Simplify language in directions/outlines”
- “Provide additional examples”
- Allow for extended time for assignments and transitions”
- “Due to short and long term memory issues, [the Student] needs scaffolding to prior learning when she begins a new task”
- “Reduce Assignments as needed”
- “[Student] needs 1/1 paraeducator support during academic time in class and also while walking and changing locations at school.”

The IEP indicated the Student would “participate in nonacademic activities with nondisabled peers and have the same opportunity to participate.”

3. The Student’s schedule, relevant to this complaint, included concert band. The Student played the drums. The District noted that concert band also included pep band as an extracurricular component.

4. According to the findings of the discrimination investigation,
At the start of this school year 2021-2022, the Student's Case Manager met with the Band Teacher to discuss the student. The Case Manager explained to the Band Teacher that the Student has an IEP...which entitles her to access, accommodation, and modifications, which are spelled out in her IEP. The Case Manager also talked regularly with the Student's [paraeducator] and the Student about concert band. The student expressed that she liked band and it was going well. The Case Manager also checked in with the Band Teacher. Prior to December 1, 2021, it was the Case Manager's understanding that the Student was doing well in band, and that the Band Teacher gave her some instruction and that the [paraeducator] also assisted her in band.
5. On October 21, 2021, the Student's band teacher announced that there would be pep band performances on December 1, 7, and 13, 2021, and that students in concert band were expected to attend.
6. On December 1, 2021, the pep band played at the high school basketball game.
7. Based on the findings of the discrimination complaint, the Student and Parents learned on December 1, 2021 that the Student would not be playing in the pep band at a high school basketball game that night.
8. On December 2, 2021, the Parents filed a disability-based discrimination complaint with the District regarding the Student and specifically related to participation in band and pep band.
9. The December 7 and 13, 2021 pep band performances were canceled.
10. On December 7, 2021, the Parent emailed and pointed out that the Student came home with a piece of music that was blurry and that this was in disregard of the Student's IEP accommodations and modifications.
11. On December 14, 2021, the Student's IEP team met to discuss the Parent's concerns regarding accommodations and modifications in concert and pep band. The IEP team agreed to amend the Student's IEP and added the following accommodations/modifications:
 - "She has loss of peripheral vision...[Student's] has [sic] partial vision in her left eye...and needs enlarged text both digitally and on paper"
 - "Assign a 'buddy' for new environments/after school activities (if no buddy is available District will provide a PARA to assist)"
 - "District will contract with outside personal to modify sheet music provide to [Student]"
 - "Due to short and long-term memory issues, [Student] needs scaffolding to prior learning when she begins a new task (provide material to [Student] and PARA prior to instruction)."

The amended IEP also stated:

- "[District] administration is working with district facilities to review the current setup for the Pep band in the bleachers"
- "Special Services is going to contract with outside sources to modify and accommodate sheet music"
- "Special Services (Occupational & Physical Therapy) will tour both the band room and gym to give recommendations for accommodations"

According to the notes from the IEP meeting, the team discussed the Student's existing accommodations as they related to band:

- "For her vision accommodations, [Student] needs special consideration based on her partial vision. This is for both the classroom, the pep band in the gym, and for concerts."
- "For lighting: Will look into getting additional lighting for [Student's] space (ex: a clip-on light)."
- "Assign 'buddy' for new environments: a student in band has been identified as [Student's] 'buddy.'"

And the notes indicated the team discussed modifying the Student's music so that the Student could play one-handed.

The notes also stated:

- "[Parent] asked for the district to translate the music (whatever she is expected to play) to make it specific to drums. He also asked that the music be provided to [Student] in enlarged format. The district will support this."
- "[Special education teacher]: The drum kit for pep band is currently in a challenging location for [Student] to physically access. The drum kit is located in this position for safety reasons and is a maintenance decision. [Assistant principal] will find out about changing the location of the drum kit for pep band."
- "[Special education teacher]: Will have a flashlight available for [Student] when backstage during performances so that she can more easily see."
- "[Assistant principal] will look into relocating the drum kit near a railing so that [Student] has support when she accesses the kit."
- "[Special education teacher] will go over this discussion with [Student] tomorrow and get her input."

12. On December 15, 2021, there was a band concert in which the Student participated. Emails indicated the Student was supported by a buddy at the concert per her IEP.

13. Between January 3 and 11, 2022, the band teacher was out sick, and a substitute teacher taught the class.

14. On January 6, 2022, the PT, OT, assistant principal, and maintenance staff met to review the platform used for pep band. The band teacher participated via phone/videoconference.

It was determined that it would be safest to put the drum kit on the floor next to the bleachers. The District also planned to follow up with the company that makes the bleachers to determine if there were options for adding an accessible platform to the bleachers.

15. On January 12, 2022, the Parent emailed the District about sheet music the Student received, stating, "The music she was provided has been shrunk to a small size and appears to be made up of several strips cut from other music and taped to a piece of paper sloppily. This is in direct conflict with [the Student]'s IEP and contrary to the discussion in our last IEP meeting before winter break."

16. According to the discrimination investigation findings:

The [paraeducator] said the Student never complained to her that she was unable to read this music, but [the paraeducator] was concerned about the small print size given the Student's visual impairment. The [paraeducator] showed the sheet music to the Case Manager. The Case Manager was also concerned about the small size of the print and asked the [paraeducator] to enlarge the sheet music on the school copy machine and said he would talk to the Band Teacher upon his return to obtain a sheet of music with just the Student's snare drum part on it. The [paraeducator] said she enlarged the sheet music and supplied the enlarged version to the Student. The [paraeducator] said that when she showed the Student the enlarged music, the Student said she was able to read it.

17. On January 12, 2022, the District provided the Student with a new version of the piece of music that had been too small and poorly copied.
18. On January 25, 2022, an email was sent to band members and their parents that for a variety of reasons, including the increase in COVID cases, the District was postponing pep band for the winter sport season.
19. According to the Parent, as of February 17, 2022, the Student had not been provided copies of any sheet music that have been modified to accommodate her one-armed playing.
20. On March 1, 2022, the Parent resent his January 12, 2022 email about the music provided to the Student and stated he was still waiting for contact from the District regarding the discrimination investigation. The Parent further stated, "I would also like to point out that the accommodations required by [Student's] IEP are still not being adhered to despite our repeated requests."

In subsequent emails, the Student's mother indicated she spoke with the District's director of student services (director). The Student's mother stated the Student had not received music, and that the District had not yet found someone to contract with to modify music for the Student. The Student's mother stated, "In December, we had an IEP meeting where we decided that [Student's] drum teacher would be contacted and that the district would employ him to turn her pep band music into drum music she can read. That has not happened. It has been three months and no one at the IEP table has followed through with the plan."

21. On March 9, 2022, the District sent the Parent a letter regarding the outcome of the investigation into the Parent's discrimination complaint. The investigation looked at the following issue: "Was the Student discriminated against on the basis of disability and denied an equal education or opportunity to participate in concert or pep bands, including a December 1, 2021, pep band performance?"

The investigation found, related to special education:

- "The Student was not provided appropriate accommodations and modifications to participate in nonacademic activities."
- "The Student was not provided access to pep band music that met her IEP accommodations – in other words, ahead of performances to allow extra time to practice, did not provide music with drum notations, did not provide music in enlarged print, did not provide or make a plan

for the Student to access the drum kit in the gym, was provided music that did not meet IEP requirements.”

In the findings of facts, the investigation report also outlined that prior to mid-December 2021:

- “The Student has not received any instruction from the Band Teacher for how she might modify any of the pep band songs to play drum parts, if needed, with one hand.”
- “The Student’s IEP provides for support for general education teachers by the PT and/or OT. But I did not find any evidence that, prior to the December 14, 2021, IEP team meeting, the Band Teacher raised any questions or concerns about how he might modifications pep band music with the Student’s PT and OT. Nor did I find any evidence that prior to the December 14, 2021, IEP team meeting, the Band Teacher asked the Student, the Student’s Parents, or others, such as the [high school] music teacher how they might modify the Student’s drum parts to accommodate her one-handed playing.”

The corrective actions in the discrimination complaint included:

1. “[Pep] band music will be provided to the student in accordance with the IEP. The music pieces that were chosen for pep band performances will be modified to provide the student access to the materials. The modifications will be legible and include drum pieces for the student. This will be completed by March 25, 2022. Any new music introduced to the student will also be legible. It will also include drum pieces or direct instruction to the new music.”
 2. “Complete modifications and plans to the bleachers in the gym for student access to the drum kit. Though the pep band season is over, the evaluation, assessment, and modifications to the platform and/or movement of the pep band to another location will be completed. The director of maintenance and operations has reached out to the company that inspects our bleachers. An assessment will be conducted to determine the feasibility of installing and/or retro-fitting a new platform. Should this not be an option, consideration will be given to moving the platform to a different location or placing the drum kit on the floor pending on safety considerations.”
 3. “The district will provide training to immediate staff of its obligations to students who are qualified and eligible for Special Education Services. The training will include specific strategies to implement for the remainder of the school year. The training will include the IEP process, understanding the requirements and implementation of the IEP including accommodations. The training will also include oversight of an IEP and how to respond to concerns. The training will be completed by April 15, 2022. The district will also provide training to the entire [District] High School staff prior to the next school year. The training will include the same components and will be required for all certified staff.”
 4. “Any communication regarding student information, performances, and student progress will be with the case manager. The band teacher will forward information to the case manager who will communicate this information to the parents and appropriate personnel.”
 5. “The school will meet with the parents to discuss yearly goals and expectations prior to the beginning of each school year. The school will review the accommodations and how the [IEP] can be implemented in the classroom and for other activities.”
22. In March 2022, according to the District’s response, it located and contracted with a provider to create modified drum music for the Student.

23. Between March 17 and 21, 2022, the principal and a middle school band director emailed regarding separating music into percussion parts, which included music for the Student.
24. On March 21, 2022, the Student participated in the school's second after-school band concert of the year. The District noted that at this concert, the Student accessed her buddy accommodation.
25. By April 14 2022, according to the District's response and emails, it completed the purchase of an accessible drum kit platform for the 2022–2023 school year pep band performances.
26. On April 28, 2022, the Student's IEP team met and completed the annual review of the Student's IEP. No changes were made to the Student's accommodations and modifications.

According to the OT's notes, following the IEP meeting, there was a meeting in the gym with the Student to discuss accessing the newly installed platform (for pep band performances). The Student practiced entering the bleachers and walking on the platform.

27. On May 13, 2022, the band teacher announced the final band concert of the year and provided information about auditions for jazz band.

Subsequent emails from the Parents indicated they were concerned the Student had not been adequately prepared for the jazz band auditions.

The assistant principal responded and outlined the steps taken to support the Student; and the band teacher emailed the Parents with information about the audition process and the available accommodations and modifications for the Student prior to her individualized audition in mid-June 2022. The assistant principal noted that accommodations and modifications, such as additional time and provision of samples of rhythms students would be expected to play.

28. On May 20, 2022, the band teacher emailed the Parents regarding jazz band auditions, including the specific styles of music the Student would be required to demonstrate. The teacher provided video/audio examples and attached sheet music for the rhythms. The band teacher stated he had discussed the accommodations and modifications they would provide the Student during the audition, and noted that while the audition date was June 15, 2022, the date "is not concrete and can be adjusted to give [Student] more time to prepare."
29. On May 23, 2022, the Parents emailed the assistant principal and stated the District "created barriers to prevent [Student] from auditioning for jazz band." Specifically, the Parent stated that the barrier was that they refused "to teach [Student] any of the skills she would need to be successful with jazz music."

The assistant principal responded, in part, that jazz band is an "audition based, competitive program" and that the Student would receive accommodations for the audition, including more time and access to sheet music and video examples. The assistant principal also noted

that if the Student made jazz band, they would “provide the necessary accommodations moving forward as written in the IEP.”

30. On May 24, 2022, the Parent emailed the assistant principal that the Student would not be auditioning for jazz band.
31. On June 7, 2022, the concert band performed, the Student participated in the concert, and was provided her buddy accommodation.
32. The District’s 2021–2022 school year ended on June 17, 2022.
33. The District noted the Student received an “A” in both semesters of concert band.
34. On August 31, 2022, according to the OT’s notes, there was a planning meeting at which the OT consulted with the special education team and discussed the Student’s participation in pep band for the 2022-2023 school year.
35. Also, on August 31, 2022, OSPI received and opened the Parent’s complaint. The Parent primarily alleged that the District had identified in a previous discrimination investigation that the Student’s IEP had not been implemented and the Student was not provided accommodations to participate in required academic activities. The Parent also alleged that the District’s proposed corrective actions, in response to the discrimination investigation findings, had not been carried out.
36. The District, in response to the Parent’s complaint, stated, “denies that it has failed to implement Student’s IEP or the accommodations therein since December 2021 in any material respect.” The District stated it “acknowledges Parents’ frustration with the efforts taken to support Student’s participation in band. However, the District believes that it has provided Student adequate staff supports and accommodations for Student’s meaningful participation in band since December 2021.”

The District noted that while “it took longer than expected to contract with a qualified provider to create modified sheet music for Student following the December 2021 IEP Amendment meeting, the District does not believe this constituted a material implementation failure given the cancellation of the Pep Band performances after December 1, 2022.” And the District stated that in concert band, “the documentation substantiates that Student was provided modified sheet music, a buddy to accompany her after school, and extra time for preparation and learning of new material.”

CONCLUSIONS

Issue: Individualized Education Program (IEP) Implementation – The Parent alleged that the District had identified in a previous discrimination investigation that the Student’s IEP had not been implemented and the Student was not provided accommodations to participate in required academic activities. The Parent alleged that the District’s proposed corrective actions, in response to the investigation findings, had not been carried out.

A district must ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a student with a disability and those required by the IEP.

The Student had an IEP that included several accommodations related to participation in activities. The Student plays the drums and her schedule during the 2021–2022 school year included concert band class, which had a required pep band component.

Concert & Pep Band: The documentation reviewed in the complaint, including the findings from a discrimination investigation, indicated there were several instances when the Student's IEP was not implemented, including:

- The Student was not provided the accommodations or instruction needed to participate in the December 1, 2021 pep band performance.¹
- The Student was not provided access to pep band music or modified pep band music, per IEP accommodations, such as extra time, scaffolding, and extra examples, among others.
- There were instances around December 7, 2021 and January 12, 2022² where the Student was provided music that was blurry or otherwise hard to read.

The District worked to address the Parents' concerns at an IEP meeting on December 14, 2021, during which the team added additional accommodations to the Student's IEP, including enlarged text, assigning a student buddy or paraeducator for new/environments and after school activities, contracting to modify the Student's sheet music, and providing scaffolding. The topics discussed at the December 14, 2021 IEP meeting were also echoed in the corrective actions ordered in the discrimination complaint decision, which included: providing music in accordance with the IEP; modifications to make the drum kit platform accessible; staff training; communication plan; and a yearly meeting prior to school to discuss the Student's IEP, goals, and expectations.

While the implementation of the new accommodations was somewhat delayed, for example it took until March 2022 to contract with a provider to create modified sheet music, the District provided documentation that it worked to address the concerns related to band. It does not appear that the delay in modifying the music had a substantial impact on the Student as there were no other pep band performances and the Student participated in all remaining concert band performances during the 2021–2022 school year, with accommodations. Additionally, in the spring of the 2021–2022 school year, the District assessed, purchased, and installed an accessible drum kit platform for the 2022–2023 school year. Finally, at the end of August 2022, the Student's team met to discuss the Student's participation in band during the 2022–2023 school year.

¹ The December 1, 2021 pep band performance ended up being the only pep band performance during the 2021–2022 school year due to COVID-19 related cancelations.

² OSPI notes that the issue with the music around January 12, 2022 appears to have occurred while the band teacher was out sick and once the District was notified of the issue, it provided the Student with a new version of the music.

Overall, OSPI finds that the District did fail to implement the Student’s accommodations with respect to pep band and sheet music. Given that there ended up only being one opportunity to perform with the pep band during the 2021–2022 school year, this represents a material failure to implement the IEP. However, the District responded to the Parents concerns, and in part due to the findings of the discrimination complaint, have already carried out corrective actions. OSPI thus finds that the previous and ongoing corrective actions were appropriate to remedy the violation identified and no additional corrective actions are warranted.

Jazz Band: The Parents also raised concerns about the Student not being adequately prepared for and provided accommodations related to auditioning for jazz band at the end of the 2021–2022 school year. The Parent stated the District created barriers to the Student auditioning, including by not teaching the Student the skills she “would need to be successful with jazz music”. The District, in multiple emails to the Parents, outlined the accommodations that were going to be provided and the steps taken to support the Student, including additional time for the audition and preparing the Student by providing samples of rhythms students would be expected to play, including video/audio examples and sheet music. The District noted that jazz band was an “audition based, competitive program” and that if the Student made the jazz band, they would “provide the necessary accommodations moving forward as written in the IEP.” Ultimately, the Student did not audition for jazz band.

The District offered and was prepared to provide the Student with accommodations and modifications for the audition. Given that participation in jazz band is by audition, the Student was not guaranteed a slot. There is no evidence that the District failed to implement the Student’s IEP with respect to jazz band and OSPI finds no violation.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this ____ day of October, 2022

Dr. Tania May
Assistant Superintendent of Special Education
PO BOX 47200
Olympia, WA 98504-7200

THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

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