

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-42

PROCEDURAL HISTORY

On April 20, 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 Seattle 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 April 21, 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 April 29, 2022, the District requested an extension of time to response to the complaint. OSPI approved the extension, in part, to May 13, 2022 while other documentation was to be sent by May 6, 2022.

On May 6 and May 13, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent on May 17, 2022. OSPI invited the Parent to reply.

On May 27, 2022, OSPI received the Parent's reply. OSPI forwarded that reply to the District on the June 2, 2022.

On May 26, 2022, OSPI received additional information from the District. OSPI forwarded the additional information to the Parent on the same day.

On June 8, 2022, the OSPI complaint investigator requested additional information from the Parent. OSPI received the information on June 13, 2022 and forwarded the information to the District on the same day.

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

ISSUE

1. Did the District implement the special education services in conformity with the Student's individualized education program (IEP) from September 2021 to April 20, 2022?

LEGAL STANDARDS

IEP Implementation: A district must 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.

Resolution of a dispute through mediation: If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and

that: States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and is signed by both the parent and a representative of the agency who has the authority to bind such agency. A written, signed mediation agreement is enforceable in a state court of competent jurisdiction or in a district court of the United States. Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any federal or state court. WAC 392-172A-05070.

Settlement Agreements: The Office of Special Education Programs (OSEP) has provided guidance regarding whether a state educational agency (SEA) can dismiss allegations raised in a state complaint that were addressed in a previous settlement agreement resulting from mediation or the resolution process. The guidance states that, "If a State complaint alleges violations specific to the child who is the subject of a prior settlement agreement resulting from mediation or the resolution process, the SEA may determine that the settlement agreement is binding on the parties as to those issues and inform the complainant to that effect." *Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Educ. Act (Part B)*, 61 IDELR 232 (OSEP 2013).

FINDINGS OF FACT

Background: 2020–2021 School Year

1. At the beginning of the 2020–2021 school year, the Student attended a District high school and was eligible to receive special education services under the category of autism.
2. On June 6, 2021, the Student's team reviewed the Student's IEP. The IEP stated the Student had significant behavior needs that required two behavior technicians (BTs) with him and a board-certified behavior analyst (BCBA) to oversee his program. The IEP provided for annual goals in the areas of adaptive/life skills, communication, and social/behavior along with secondary transition goals in education/training and employment. The IEP included 15 accommodations, 15 modifications, and supplementary aids and services. In addition, the IEP included supports for school personnel, which listed instruction to BTs on assistive technology, fidelity checks by the BCBA, and regular supervision by the BCBA. The IEP provided the following special education services to the Student:
 - Speech/language pathology: 90 minutes, per month (provided by a speech/language pathologist in a special education setting)
 - Adaptive/life skills: 180 minutes, per week (provided by special education staff in a special education setting)
 - Social/behavior: 700 minutes, per week (provided by special education staff in a special education setting)
 - Study/organization skills: 260 minutes, per week (provided by special education staff in a special education setting)
 - Social/behavior: 260 minutes, per week (provided by special education staff in the general education setting).

Supplementary aids and services included the following:

- Occupational therapy: 300 minutes, per year (provided by an occupational therapist in a special education setting)
- 2:1 BT monitored by a BCBA and special education teacher: 1,163 minutes, per week (provided by a BT in a special education setting)
- 2:1 BT monitored by a BCBA and special education teacher: 997 minutes, per week (provided by a BT in a general education setting)

The IEP also provided for extended school year (ESY) services that included instruction in the areas of adaptive/life skills, social/behavior, and study/organization skills and recovery services to address elopement, coping strategies, self-advocacy, and work organization.

3. In July 2021, the District provided a prior written notice regarding the Student's attendance in the ESY program. According to the notice, the Parent chose not to send the Student to the ESY program because the same BTs who worked with the Student during the school year were not available during the ESY program, although other BTs were available.

2021–2022 School Year

4. At the beginning of the 2021–2022 school year, the Student was a twelfth grader who attended a District high school and continued to be eligible to receive special education services under the category of autism. The most current evaluation of the Student occurred in November 2020.
5. September 1, 2021 was the first day of school in the District.
6. On September 13, 2021, the Parent filed a special education community complaint (SECC 21-70) with OSPI. The issues alleged were as follows:
 1. Did the District follow procedures to provide the Student agreed-upon extended school year (ESY) services during July 2021, including providing the behavior technicians (BTs) as outlined in the June 10, 2021 prior written notice?
 2. During the 2021–2022 school year, did the District implement the Student's individualized education program (IEP), specifically supervision provided by a board-certified behavior analyst (BCBA)?
7. On November 2, 2021, the Student's IEP team met to conduct an annual review of the IEP. According to the IEP, the Student was taking a study skills class in a "modified setting" and graphic design, business math, American government/economics, career connect, and literature 12 in the general education setting. Although the case manager reported "[Student] continues to have good attendance to school," as of October 2021, the Student's general education teachers reported the Student attended few classes and had not turned in work.

The IEP stated:

Functional Classroom/School Skills

[Student] has been attending his classes very infrequently this school year. His case manager reports that he is refusing nearly all prompts to attend class, or even meet with the teacher. He currently has 27 absences in his 2nd period Language Arts class. His Study Skills teacher reported that he has only been to her class approximately 5 times, and stayed

in the class for about 15 minutes each time...When not in class he is spending his time in an otherwise unused classroom that has been established as his safe space with 1-2 behavior techs providing supervision. When observed by this OT (occupational therapist), he has had the lights off while either sitting on the floor or on a table staring at his phone. He has not yet provided more than one-word answers when OT has attempted to engage in conversation with him, and often simply ignores questions or prompts to engage.

The IEP continued to provide annual goals in the areas of adaptive/life skills, social/behavior, communication, and study/organization skills. One of the goals addressed the Student's resistance "in putting away his Electronic devices and doing school work (either in class or on his laptop)." According to the District, the Student had problems with excessive use of his Nintendo Switch and it was the "main reason for [Student's] lack of progress academically this year."

The new IEP provided additional BCBA services to the Student that included:

- 2:1 BT monitored by BCBA and special education teacher: 1,163 minutes, per week (provided by a BT in a special education setting)
- 2:1 BT monitored by BCBA and special education teacher: 997 minutes, per week (provided by a BT in a general education setting)
- 1:1 BT bus/transportation monitor: 300 minutes, per week (provided by a BT in a special education setting)
- 1:1 BCBA direct service to student: 210 minutes, per week (provided by a BCBA in a special education setting)

8. The prior written notice, dated November 2, 2021, provided the following, in part:

- "[Parent] would like to see an increase in communication regarding [Student's] progress, with a minimum of once a week. The Case Manager and the BCBA will coordinate a system of communication, and the Case Manager will organize a frequent meeting with the following participants: (Case Manager, BCBA, Program Specialist, Parent, BT's (if requested), Student if he is up for it)."
- "[Parent] voiced her concerns about how the BT's have handled [Student] when we was walking away from campus. The BCBA will address these concerns and communicate with the parent when these problems arise. It was also discussed about decreasing the class room and hallway presence of the BT's."
- "The IEP discussed [Student's] lack of engagement when using his electronic devices (particularly his Nintendo Switch). The Case Manager, Program Specialist, and the BCBA will work on coming up with a plan for [Student] that allows him to bring it to school. [Student] will be a part of the conversation and will assist in coming up with consequences when he is not engaging in academic work."
- "The IEP will reconvene in six weeks to update the [functional behavior assessment] FBA/BIP. This is due to the need to collect further data on [Student's] behavior now that he is back in school in person."
- "[District] will ensure that all behavior supervision will be overseen by a certified BCBA."
- "It was discussed if [agency] would be an alternative option for similar supports as BT/BCBA, but [Parent] declined this as an option."

9. Sometime in November 2021, the District offered a "Switch/Gaming Controller Proposed Plan" to address the Student's previous unlimited access to the Nintendo Switch.

10. On November 18, 2021, according to the District, the agency the District contracted with for applied behavioral analysis (ABA) services for the Student informed the District and the Parent it would no longer provide ABA services to the Student.
11. Sometime later in November 2021, the Student stopped attending school because of the lack of ABA services. According to the District, the District offered interm services, such as 1:1 aides, but the Parent chose not to have the Student attend school.
12. On November 30 and December 1, 2021, the Parent and representatives of the District signed a settlement agreement resolving the Parent's complaint (SECC 21-70). The agreement stated, in relevant part:

Entire Agreement: The parties agree that this Agreement is intended to resolve all issues between them related in any way to the issues identified in SECC 21-70 between July 1, 2021 and the date of full execution of this Agreement...

The settlement agreement provided the Parent up to a \$2,000 reimbursement for education or recreation services, in relevant part. In addition, the agreement included the following:
Pursuant to the Student's IEP dated November 2, 2021, the District will ensure that Student's behavior technicians are supervised for 600 minutes per month by a Board Certified Behavior Analyst (BCBA) and that a BCBA will provide 3 hours a week of consultation and staff training. If Student's IEP team subsequently determines a change to these services is required for Student to receive a free appropriate public education, then the District will implement the services in the Student's subsequent IEP.
13. On December 2, 2021, the special education teacher, Parent, school administration, special education supervisor, and program specialist met to discuss the services from the BTs and BCBA, including interim supports, until the new service providers could be found. The team discussed an agency providing the services and online instruction. The prior written notice, dated December 2, 2021, stated, in part:
 - "[Agency] was rejected because [Parent] indicated that their services were not commiserate [sic] with the BT/BCBA type of supports."
 - "Online school...was rejected because [Student] had not previously worked well in online school."
14. From December 20–31, 2021, the District was on winter break.
15. In December 2021, the District made attempts to provide interim supports to the Student while looking to contract for ABA services. The District pursued hiring a "substitute instructional assistant" but no candidates applied. Another agency agreed to provide services but they could not begin until late January/early February. As of March and April 2022, that agency was not able to provide the services to the Student.
16. On March 4, 2022, according to the District, the Student's team met to discuss a community program and other options for when the Student returned to school.
17. From April 11–15, 2022, the District was on spring break.

18. On April 20, 2022, this complaint was filed with OSPI. The Parent stated that because of the need for compensatory education to be carefully planned, any compensatory services should be determined through agreement between the Parent and District.

The Parent also stated the September 2021 complaint issues were different than the present complaint issues and therefore, the settlement agreement should not apply to the period of August and November 2021.

19. In the District's response to the complaint, the District argued that the Student received special education services from August through November 2021, although implementation was complicated by the Student's excessive use of electronic devices. In addition, the District stated the settlement agreement resolving the September 2021 complaint addressed the time period from August through November 2021.

20. The District acknowledged that the Student did not attend school from December 2021 to April 20, 2022, the date of the complaint, because of problems "hiring and retaining District and contract staff." As a result of the large amount of time missed, the District requested the IEP team and the Parent have the opportunity to create an individualized compensatory education plan rather than OSPI ordering a prescribed number of compensatory education hours.

CONCLUSIONS

Issue One: IEP Implementation – The complaint alleged the District failed to provide special education services in conformity with the Student's IEP. A district is required to provide special education services in accordance with a student's IEP.

August through November 2021

The Student's June and November 2021 IEPs provided specially designed instruction in the areas of adaptive/life skills, social/behavior, study/organization skills, and speech/language pathology (communication). The IEPs provided occupational therapy and continual support to the Student with 2:1 behavior technicians (BTs) that were monitored by the BCBA and special education teacher. In September 2021, the Parent filed a complaint with OSPI regarding ESY and the implementation of the Student's IEP, specifically the supervision by a BCBA. The Parent and District signed a settlement agreement and the complaint was withdrawn. The District argued that the settlement agreement covers the period of time from August through November 2021 and OSPI should defer to the agreement. The Parent argues that the two complaints are different issues and the settlement agreement is not relevant to the current complaint.

OSPI has no authority to enforce a settlement agreement as opposed to a mediation agreement or due process resolution agreement. But OSPI can look to the parties' resolution of the issues to determine if the District has already addressed the issue in the present complaint in a reasonable manner. In this case, while the issues from the previous and current complaints regarding implementation are not the same, there is sufficient overlap between the issues that would render

the provisions in the settlement agreement appropriate to resolve the present issue of whether the IEP was implemented through the signing of the settlement agreement in November 2021. Both complaints addressed implementation of the special education services, particularly the ABA services. The District agreed, in part, to reimburse the Parent for services to the Student and implement the ABA services. The Parent agreed to withdraw the previous complaint with knowledge that the District was having a difficult time implementing the special education services to the Student because of his use of a phone and Nintendo Switch during school. OSPI finds the resolution in the settlement agreement sufficient to address concerns through November 2021 and requires no further Student specific corrective action for this period of time.

December 2021 to April 2022

From December 2021 to April 2022 when this complaint was filed, the District acknowledged it was unable to provide ABA services to the Student because of District staffing and contract staff problems, although the District did make considerable efforts to contract for ABA services and offered alternative services. As a result of no ABA services being available, and despite alternative 1:1 support being offered, the Parent chose not to send the Student to school. OSPI notes that while the situation was not ideal for the Student at school, some missed services and lack of progress could have been mitigated if the Parent had sent the Student to school, even if the alternative staff was not perfect. Regardless, the Student missed an extensive amount of services, as noted by the District. Because the District failed to implement the service in conformity with the Student's IEP, a violation is found.

Based on the recommendations from both the Parent and the District, OSPI requires the District and Parent to develop a compensatory education plan to address any lack of progress that was caused by the lapse in services. OSPI must approve the plan. If there is a disagreement between the District and the Parent regarding the compensatory education plan, the District and the Parent will each submit their plans, along with a rationale to OSPI. Based on the plans and information in the complaint, OSPI will determine the compensatory education to be provided to the Student.

CORRECTIVE ACTIONS

By or before **July 1, 2022**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

By **June 24, 2022**, the District and Parent will develop a compensatory education plan for the Student to address the lack of progress during the period from December 2021 to April 2022.

By **July 1, 2022**, the District will provide OSPI with the compensatory education plan. In the event that there is a disagreement, the Parent and District will submit their respective plans to OSPI by the same date. OSPI will review the plan and approve or modify the plan by July 8, 2022. At that time, OSPI will also add additional review deadlines for monitoring the compensatory education as needed.

DISTRICT SPECIFIC:

None.

Dated this ____ day of June, 2022

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

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