

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-67

PROCEDURAL HISTORY

On May 5, 2023, the Office of Superintendent of Public Instruction (OSPI) received and opened a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Olympia School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On May 5, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on May 8, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On May 25, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent on May 26, 2023. OSPI invited the Parent to reply.

On June 2, 2023, OSPI received the Parent's reply. OSPI forwarded that reply to the District on June 9, 2023.

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

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on September 7, 2022, per the allegations in the complaint. These references are included to add context to the issues under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.

ISSUE

1. Per WAC 392-172A-03105, was the Student's individualized education program (IEP), including the Student's one-to-one paraeducator, implemented properly during the 2022–2023 school year?

LEGAL STANDARD

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 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. 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 disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

FINDINGS OF FACT

Background: 2021–2022 School Year

1. During the 2021–2022 school year, the Student was a fifth grader at a District elementary school.
2. On June 6, 2022, the Student's IEP team met. The Student's IEP provided specially designed instruction (SDI), provided primarily by a special education teacher, from June 7 until September 7, 2022, and mostly in a special education setting, as follows:
 - Math: 45 minutes/5 times weekly.
 - Reading: 45 minutes/5 times weekly.
 - Written Language: 45 minutes/5 times weekly.
 - Communication: 20 minutes/7 times monthly (speech language pathologist (SLP)).
 - Adaptive: 70 minutes/5 times weekly.
 - Social/Emotional: Reading: 60 minutes/5 times weekly.
 - Social/Emotional: Reading: 20 minutes/5 times weekly (general education).

The Student received 1,675 minutes per week of building instructional time, with 1,360 minutes served in the special education setting. The percent of time in a general education setting was 18.81%. The Student's LRE was 0–39%.

On June 6, 2022, the Student's IEP team met. The Student's IEP included a second services matrix that provided SDI, primarily provided by a special education teacher, from September 8 until November 29, 2022, and mostly in a special education setting, as follows:

- Math: 45 minutes/5 times weekly.
- Reading: 45 minutes/5 times weekly.
- Written Language: 45 minutes/5 times weekly.
- Communication: 20 minutes/7 times monthly (SLP).
- Adaptive: 70 minutes/5 times weekly.
- Social/Emotional: Reading: 60 minutes/5 times weekly.
- Social/Emotional: Reading: 20 minutes/5 times weekly (general education).

The Student received 1,750 minutes per week of building instructional time, with 1,360 minutes served in the special education setting. The percent of time in a general education setting was 22.29%. The Student's LRE was 0–39%.

3. A prior written notice (PWN), dated June 6, 2022, stated, in part, "The district is proposing adding a second setting to [Student's] IEP...[Student] will be attending middle school in September. At that time, the number of minutes [Student] attends school will change."

2022–2023 School Year

4. On September 7, 2022, the District held its first day of instruction for the 2022–2023 school year. The Student was enrolled as a sixth grader at a District middle school and continued to be eligible for special education services.

5. According to the District's response:

[The Student was] placed in the Developmental Learning Classroom (DLC)...The DLC is a setting designed to meet the needs of students requiring a high adult/student ratio based upon the students' educational needs. The...DLC at the [Student's middle school] currently services 14 students and is staffed with a total of 13 adults (one certificated teacher and 12 paraeducators). Ten of these paraeducators provide student specific (i.e., '1:1') support for eight of the students (one student requires 1:1 support). This level of support has been determined via the IEP process and is included as a service on each of those IEPs. The remaining six students (including [the Student]) are supported by the remaining three paraeducators and the certificated teacher. This program design allows for support of students in multiple contexts throughout the day: direct instruction in the special education setting as well as inclusive programming in general education settings, with support provided by various program paraeducators.

6. On November 17, 2022, the Student's team met regarding the Student's triennial evaluation.

7. A PWN, dated November 17, 2022, stated, in part:

[The Student's] team met to discuss the results of the reevaluation. The team proposes to continue [the Student's] eligibility category of Autism with an Educational Placement in Special Education. [The Student] qualifies for specially designed instruction in the areas of Communication, Social-emotional, Adaptive, Math, Reading, and Written language. An IEP will be developed reflecting these recommendations.

...[The Student] meets the state of Washington criteria for inclusion as a special education student and he is in need of specially designed instruction in the aforementioned areas.

8. On November 17, 2022, the Student's IEP team met. The Student's IEP provided SDI, provided primarily by a special education teacher, mostly in a special education setting, as follows:

- Math: 45 minutes/5 times weekly.
- Reading: 45 minutes/5 times weekly.
- Written Language: 45 minutes/5 times weekly.
- Communication: 25 minutes/4 times monthly (SLP).
- Adaptive: 45 minutes/5 times weekly.
- Social/Emotional: Reading: 20 minutes/5 times weekly.
- Social/Emotional: Reading: 20 minutes/5 times weekly (general education).

The Student received 1,760 minutes per week of building instructional time, with 1,025 minutes served in the special education setting. The percent of time in a general education setting was 41.76%. The Student's LRE was 40–79%.

9. On December 6, 2022, the Parent emailed the teacher as follows:

[The Student] forgot his yellow communication binder so I am sending you this email.

...

Can you please assign [paraeducator 1] to him for all periods? I see it makes big difference when he works with [paraeducator 1]. When he come home, less upset, more happy about the day at school.

10. On December 7, 2022, the teacher responded to the Parent, "Thanks for letting me know."
11. On December 16, 2022, the Parent emailed the principal as follows, "Can you please assign [paraeducator 1] to [the Student for all the periods? I see it makes a big difference when he works [paraeducator 1]...[Paraeducator 1] is a good fit for [the Student]."

12. On February 9, 2023, the Parent emailed the principal as follows:

I am sending you this email to request your assistance to assign paraeducator [1] to [the Student] for all periods...

I reached out to [the teacher]...regarding my request on 12/07/2022...at first he agreed to my request and did so for a few weeks but lately he changed the plan without agreement with me. I also had a conversation on the phone with [the teacher] on Thursday Jan 19, I insisted again about having [paraeducator 1] assigned to [the Student].

As a parent of an autistic child, I know consistency is key to optimal learning, I need to choose a paraeducator that works well with my child instead of a constant rotation of difference paraeducators, which will have a significate (sic) negative impact to my child's learnings at school. I don't see the rotation change will have any benefit to [the Student].

[Paraeducator 1] knows [the Student's] IEP very well, knows not only how to put [the Student] to work, but also work harder, has a rewarding program created for [the Student] knows how to redirect him to other areas when [the Student] keeps on repeating the same topics, cares about the consistent progress for [the Student's] academic learnings, knows how to calm him down when he is so frustrated, upset, and and/or mad.

I have talked to teachers and friends...I was told that [paraeducator 1 and the Student] work very well together.

[Emphasis in original.]

13. On February 10, 2023, at 8:13 am, the teacher emailed the principal as follows, "...Bottom line is that it is better for [the Student] in the long run to have a few paras working with him throughout his day. Additionally, [paraeducator 1] wants to work with other students (burnout). We are doing just fine."

14. On February 10, 2023, at 8:32 am, the teacher sent an internal District email that stated:

Just so you are aware...I've been pretty clear with her (the Parent) about needing to have her student work with a few paraeducators (via phone conversation). It benefits the students in the long run so they don't get too attached to a specific person, and I need the flexibility within the students' day to day in scheduling. [Paraeducator 1] agrees and she would like to work with a variety of students as well. [The Student] doesn't need a student specific paraeducator with him all day, but rather the proximity of an adult to keep him focused outlined in his IEP.

15. On February 13, 2023, the teacher sent an internal District email that stated, "[The Student] does not have a 1:1 assigned para on his IEP but when he is in the general education environment he does get that support."
16. A PWN, dated February 14, 2023, and sent to the Parent on February 17, 2023, stated, in part:
Description of the proposed or refused action:
Parent requested a specific paraeducator to be assigned to their student for the duration of the school day. This request is being denied.
- The reason we are proposing or refusing to take action is:
[Student] is making adequate progress on his IEP goals and does not require this service. He also receives individualized support from classroom staff as needed.
17. On February 17, 2023, at 3:45 pm, the Parent emailed the District as follows:
I have not received a positive response to my request to retain [paraeducator 1] as my son's 1:1 paraeducator. Having a 1:1 in place will protect him from the constant rotation of different paraeducators. As I have explained before, I believe this is in the best interests of my autistic son and I have seen noticeable improvement in his attitude and educational progress when she was working with him. I strongly request that [paraeducator] be assigned 1:1 to [the Student] for all his school periods to maximize his academic and emotional improvement. In her we have found a good match for him. I would appreciate your consideration and timely response please.
18. On February 17, 2023, at 4:18 pm, the teacher emailed the Parent as follows:
...services are provided by how much time a student requires support. It is up to the district to assign position assignments to the student, and is determined by what the teacher thinks is best for the student given the available resources. As stated before, [the Student] is working with [paraeducator 1] as well as consistently working with two other assigned paraeducators. The other two paraeducators are equally as effective in working with [the Student] and allow for flexibility within the classroom schedule. Attached is a prior written notice (February 14, 2023) outline the decision.
19. Sometime in March 2023, based on email documentation, paraeducator 1 transferred to a different school in the District.
20. On March 30, 2023, the principal emailed the Parent as follows:
[Teacher 1] is still sick so I have not had a chance to speak with him. I did talk with our assistant principal...who attended the meeting with [paraeducator 1] and [the teacher] on Friday, March 17th. She said that [paraeducator 1] was told she would be working with [the Student] 5 periods each day instead of 4. She was not told that she would no longer be working with [the Student]. I am not sure why this was communicated to you. Regardless, we are sad that she transferred to a different school and hope to hire someone who will be able to replicate the great work she did with [the Student].
21. On April 3, 2023, the Parent emailed the principal as follows:
...
During the last two weeks, random paraeducators have been assigned to [the Student]. I am sending you this email to share with you the feedback I have received from [the Student's] teachers in the last few days and my observations:

He started doing weird things that he had not done before, for example, [the Student] pulled a student's hair. [Teacher 2] stated recently [the Student] hasn't been able to focus. He hasn't seen this problem from [the Student] before. It feels like [the Student] is now a different person. [The Student] used to work very hard. All the teachers have mentioned that [paraeducator 1] has done such wonderful work to keep [the Student] on task, worked well with [the Student] and her consistency really benefitted him so much.

This is what happens when the paraeducator is randomly rotated, is not highly experienced, or doesn't know how to work with [the Student].

It's very essential to have this 1:1 person in place promptly to prevent more negative impacts from happening to [the Student].

[Paraeducator 1] was willing to be [the Student's] 1:1 and had planned a daily routine for [the Student] yet later on she was removed more and more from [the Student's] periods, which in part made her leave. With the new person, I really do not want this happen (sic) again. The quality of the paraeducator is what is most important to me. So I want to be sure that whoever is working with [the Student] is working at the same level of quality as [paraeducator 1]. I have since spoken to [paraeducator 1] and she has agreed with me she is willing to offer training to the new person on how to work with [the Student]. Once this person is identified, I'd like this person to meet or discuss with [paraeducator 1] regarding how to work with [the Student].

Another concern I have going forward is regarding how decisions were made and changed, which created frustrations and confusion for us. My request is now that once the decision is made about the appropriate paraeducator for [the Student], please stick with it. This is very important to be communicated to [teacher 1].

I hope we can get a new informal 1:1 assigned promptly for the rest of school year – This person should be working with [the Student] for 5 periods including the open 5th period each day, train with [paraeducator 1], and get [the Student] back on the road to progress he was on before this unfortunate chain of events involving [teacher 1]. For the coming school year, we will be working on the official 1:1 contract for [the Student] – all six periods, which will benefit him the most. Please let me know the process for it. If my requested (sic) is denied, I also need to know the appeal process.

22. On April 11, 2023, the principal emailed the Parent as follows, "...[paraeducator 1's] position is posted, but we have not yet had any applicants. We will hopefully in the near future have some candidates that we can interview and then find a quality person to hire!"
23. On April 26, 2023, a meeting to amend the Student's IEP was held. In her reply, the Parent expressed that she did not know about this meeting and did not attend it. The District did not amend the Student's SDI minutes. The PWN stated, "According to data, [the Student] does not qualify for ESY at this time...There is no regression in IEP goal areas."¹

¹ OSPI did not investigate the Parent's lack of participation in the April 26, 2023 IEP meeting because the allegation was outside the scope of the Parent's original allegations. OSPI recommends the District schedule a follow-up IEP meeting to ensure the Parent is included in discussions related to the Student's potential need for ESY.

24. On May 5, 2023, the Parent filed SECC complaint 23-67, alleging, in part, "The School failed to provide 1 on 1 instruction to [the Student] after his progress with a 1 on 1 paraeducator...showed good results and the parent request demonstrated this was in the student's best interests."
25. On May 25, 2023, the District submitted its response to the Parent's complaint. Regarding this case's issue, the District responded in part:
- ...None of the IEP reviews or amendments in effect for the 2022/2023 school year indicate the need for the student specific paraeducator support. The parent was in attendance at each of these meetings.²

Various email correspondence during the 2022/2023 school year reflects the parent's desire to have a particular staff member (who subsequently took a position in another school) provide all of the student's support, and ultimately, to have that staff person designated as the Student's '1:1'. Ultimately, a...PWN was issued on February 14, 2023, indicating the IEP team's determination that, based upon the Student's rate of progress on IEP goals, as well as the support provided by the DLC program design, 1:1 support was not warranted and that the existing IEP provisions provided for an appropriate level of support.

CONCLUSIONS

Issue: 1:1 Paraeducator Support – In the present case, the Parent has alleged, "The School failed to provide [a specific paraeducator as Student's] 1 on 1 [paraeducator]."

At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. 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.

Based on emails sent between the parties from December 2022 through March 2023, the Parent wanted paraeducator 1 to be designated as her son's one-to-one paraeducator because according to the Parent, the Student and paraeducator 1 worked well together. Paraeducator 1 was one of the three general paraeducators in the program to which the Student was assigned.

The Parent's allegation regarding the paraeducator does not represent a violation for three reasons. First, the June 2022 IEP that was in effect when the Student entered middle school at the beginning of this 2022–2023 school year did not include a one-to-one paraeducator. Second, the Student's November 2022 annual IEP also did not include a one-to-one paraeducator service. Thus, the District did not fail to implement the Student's IEPs with respect to paraeducator support, as this was not a support included in the IEPs. Rather, the District explained that based on the model of the program the Student was in and the student to staff ratio in that program, he consistently had additional adult support from the teacher and paraeducators.

² As noted, the Parent has expressed that she did not attend the April 26, 2023 IEP meeting.

Third, the District appropriately responded to the Parent's requests and documented this in a PWN from February 14, 2023, which stated:

Parent requested a specific paraeducator to be assigned to their student for the duration of the school day. This request is being denied . . . [because the Student] is making adequate progress on his IEP goals and does not require this service. He also receives individualized support from classroom staff as needed.

Based on the first two facts mentioned above, the District did not have a responsibility to provide the Student with one-to-one paraeducator services during the current school year from September 2022 through February 14, 2023. Additionally, based on the third fact, the District has considered the issue of assigning the Student a one-to-one paraeducator, and rejected such a service based on the progress the Student has been making and because the program staff provide the Student individualized support when he needs it.

For the reasons provided above, the District has not materially failed to implement the Student's IEP during the 2022–2023 school year, thus, OSPI does not find a violation.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this 20th day of June, 2023

Dr. Tania May
Assistant Superintendent of 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.)