

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-41

PROCEDURAL HISTORY

On March 11, 2020, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen 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 March 12, 2020, 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 by April 3, 2020.

On March 17, 2020, the District requested an extension of time to respond to the complaint. OSPI approved the request to extend the timeline for response to April 17, 2020.

On April 17, 2020, OSPI received the District's response to the complaint and forwarded it to the Parent on the same day. OSPI invited the Parent to reply.

On April 27, 2020, OSPI received the Parent's reply. OSPI forwarded that reply to the District on April 28, 2020.

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

ISSUES

1. Did the District implement the Student's individualized education program (IEP) regarding the services of a one-to-one paraeducator after January 30, 2020?
2. Did the District follow manifestation determination review procedures on February 28, 2020, when considering whether the Student's conduct was the direct result of a failure to implement the IEP?

LEGAL STANDARDS

IEP Implementation: A district must ensure it provides all services in a student's individualized education program (IEP), consistent with the student's needs as described in that IEP. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

Manifestation Determination: Within ten school days of the district's decision to change the student's placement through discipline, the district, parents and other relevant members of the

IEP team (as determined by the parents and the district) must determine whether the behavior that led to the disciplinary action was a manifestation of the student's disability. In making the manifestation determination, the district, parents and other relevant members of the IEP team must consider all relevant information in the student's file to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or if the conduct in question was the direct result of the school district's failure to properly implement the student's IEP or behavior intervention plan. 34 CFR §300.530(e); WAC 392-172A-05146.

FINDINGS OF FACT

Background

1. On January 30, 2020, OSPI received SECC 20-11, a previous complaint filed by the Parent regarding this Student's education. The issues investigated in SECC 20-11 related to the implementation of the Student's individualized education program (IEP) and whether discipline procedures were followed. OSPI found the District in violation, in part, for not implementing IEP services, including 1:1 instructional assistance and not following disciplinary procedures. SECC 20-11 provides some context for the corrective action required in SECC 20-41.

2019-2020 School Year

2. At the beginning of the 2019-2020 school year, the Student was a tenth grader who attended a District high school and was eligible to receive special education services under the category of emotional behavioral disability.
3. On September 4, 2019, the first day of the 2019-2020 school year began in the District. The Student's August 29, 2019 IEP was in effect.
4. The Student's August 2019 IEP (effective from August 29, 2019 to March 28, 2020) stated the Student's behavior interfered with her learning or the learning of others. The Student was diagnosed with attention deficit/hyperactive disorder, post-traumatic stress disorder, and general anxiety disorder. Behavior support included a behavioral intervention plan. The Student's IEP provided for annual goals in the areas of social/behavior and math. The IEP also provided eighteen accommodations and modifications and the following specially designed instruction:
 - Social/Behavior: 265 minutes, per week (provided by a special education teacher in a special education setting)
 - Math: 265 minutes, per week (provided by a special education teacher in a special education setting)
 - Study/Organization Skills: 265 minutes, per week (provided by a special education teacher in a special education setting)

The following supplemental aids and services were provided in the IEP:

- Additional Classroom Instructional Assistance Support: 795 minutes, per week (provided by an instructional assistant in a special education setting)

- Additional Classroom Instructional Assistance Support: 1,030 minutes, per week (provided by an instructional assistant in a general education setting)
5. In January 2020, according to the District, the Student's instructional aide left the District and the position was temporarily filled by substitutes "while they worked to secure a permanent 1:1 IA (instructional assistant), noting that the team was also working to secure a BT (behavior technician) for the position."
 6. On February 13, 2020, the Student was suspended for two days for a behavior incident. The Student was removed for the remainder of the day on February 13, and the school day on February 14, 2020. The Student had previously received a total of fifteen days of disciplinary removals prior to this incident. According to the "Student Discipline History" form, the February 2020 incident was the only behavior incident that led to a disciplinary removal during the period of time from January 30 to March 12, 2020.
 7. The complaint stated the Student's IEP specified a "1:1 IA (instructional assistant)." The complaint alleged no instructional assistant services were provided during the February 2020 incident and had the services been provided, the incident could have been avoided – meaning the behavior was a direct result of the Student's IEP not being implemented. The complaint further alleged no instructional assistant services were provided during the previous three weeks prior to the incident.
 8. From February 17 through 21, 2020, the District was on mid-winter break.
 9. After attempts to meet sooner, the Parent and relevant members of the Student's IEP team conducted a manifestation determination review (MDR) on February 28, 2020. The MDR found that the Student's conduct on February 13, 2020 had a direct and substantial relationship to the Student's disability and was a direct result of the District's failure to implement the Student's IEP. In response to the complaint, the District acknowledged that no instructional assistant services were provided at the time of the incident and were not consistently provided after January 30, 2020, when the previous instructional assistant left the District.
 10. On February 28, 2020, the District contracted with an outside behavior agency for a behavior technician to work with the Student. According to the District, the agency would be observing the Student during the week of March 2, 2020 and would start "weeks later."
 11. On March 2, 2020, the District completed a reevaluation of the Student. The reevaluation stated the Student need a structured school program with routines, a high staff-to-student ratio, and staff who were trained to work with students with behavior challenges. According to the District's response, "the team assessed the appropriateness of [Student's] school placement. Because [Student] had not yet been served by a BT [behavior technician], the team agreed to try her current school program with a 1:1 BT for a trial period..."
 12. On March 11, 2020, the Parent filed this complaint.

13. On March 12, 2020, the District was closed because of the COVID-19 outbreak. The District proposed having an IEP meeting on March 27, 2020, but the Parent declined, stating she wanted to wait until school resumed to meet.

CONCLUSIONS

Issue 1: Implementation of the One-on-One Paraeducator – The complaint alleged the District did not provide one-on-one paraeducator services in accordance with the Student’s individualized education program (IEP) after January 30, 2020. A district must ensure that all services are provided as described in the IEP.

Here, the Student’s August 2019 IEP provided the Student with “additional classroom instructional assistance support” that was described by both the District and the Parent as 1:1 instructional assistance during what amounted to the entire school day. The Parent alleged the District did not provide the services of the 1:1 instructional assistant after January 30, 2020, a time period which included the behavior incident on February 13, 2020 that resulted in a disciplinary removal of the Student. The District acknowledged that services from a 1:1 instructional assistant were not consistently provided to the Student after January 2020 and during the February 2020 behavior incident as the position was filled by substitutes after the previous instructional assistant left the position. The documentation showed that the District then contracted with an outside behavior agency to provide the services of a behavior technician for the Student, but the services were not implemented before the District closed because of COVID-19. Based on the District not consistently providing 1:1 instructional assistance to the Student, a violation is found.

The District proposed providing the Student with two hours of compensatory services to address the Student’s disciplinary removal on February 14, 2020, which was a result of the Student not having 1:1 instructional assistance.¹ The Parent requested two hours of compensatory services for each of the 24 days in which the service was not provided from January 30 to March 12, 2020 which assumed that no 1:1 instructional assistance was provided. The purpose of compensatory services is to remedy the harm to the Student based on the District’s failure to provide the services during the time period that services were missed, but there is no requirement for hour-to-hour compensation for services missed. In this case, the District acknowledged that the services of 1:1 instructional assistance were “not consistently” provided, which is not the same as providing no services. Although, it was not clear how much services were provided to the Student. Significantly, the 1:1 instructional assistant did not deliver the Student’s specially designed instruction, but instead provided additional behavior support. There is no indication that the inconsistent provision of a 1:1 instructional assistant had a negative impact on the Student’s access to her educational program beyond the disciplinary removal that in part resulted from the failure to provide the 1:1. Thus, OSPI finds that compensatory services to address the Student’s disciplinary

¹ According to the District, the District’s proposal to provide two hours of compensatory services for each day of removal was based on OSPI’s acceptance of its proposed corrective action in SECC 20-11. In SECC 20-11, OSPI found that no services were provided; while in SECC 20-41, only 1:1 instructional assistance was not provided.

removal is appropriate. OSPI accepts the District's proposal for two hours of compensatory services as corrective action.²

Issue 2: Manifestation Determination Review – The complaint alleged the District did not follow manifestation determination review (MDR) procedures by not considering whether the conduct that resulted in the February suspension was a direct result of the District's failure to implement the IEP. In conducting an MDR, a district must review all relevant information in the student's file, including the IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct was caused by or had a direct relationship to the student's disability, or if the conduct was the direct result of the district's failure to implement the IEP.

Here, on February 13 and 14, 2020, the Student was suspended. Because of the mid-winter break, relevant members of the Student's IEP team and the Parent met within the ten-day timeline on February 28, 2020, to conduct an MDR in response to the Student's disciplinary removal. According to the MDR form completed by the District, the conduct that resulted in the Student's removal was caused by the Student's disability and the conduct was a direct result of the District's failure to implement the IEP. Since the District acknowledged that 1:1 instruction assistance was not provided during the February 2020 incident that led to the Student's removal, and documented on the MDR that the conduct was a direct result of no 1:1 instructional assistance at the time, no violation is found.

CORRECTIVE ACTION

By or before **October 30, 2020**, the District will provide documentation to OSPI that it has completed the following corrective action.

STUDENT SPECIFIC:

The District will add two additional hours to the ten hours of compensatory services required by SECC 20-11 in the area of social/behavior³. By no later than **October 30, 2020**, the District will send documentation to OSPI that the two hours of compensatory services have been completed.

² It should be noted that in a previous complaint, SECC 20-11, the corrective action required the following to ensure that 1:1 instructional assistance was provided to the Student: "By September 4, 2020, the District will be required to provide a current copy of the Student's IEP and BIP to all of the Student's special education and general education teachers, and staff who regularly interact with the Student. This may be done by a staffing meeting, which may be held electronically. When reviewing the IEP and BIP, the required members will specifically review the assignment of a 1:1 and determine how to ensure that one is provided consistently, as per the IEP." This corrective action will also address the violation identified in this current complaint.

³ SECC 20-11 states: "By or before September 4, 2020, the District and the Parent will develop a schedule for providing the following compensatory education to the Student: 10 hours of specially designed instruction with at least 3 hours in social/behavior, at least 3 hours in math, and at least 3 hours in study/organizational skills. The remaining hour offered by the District may be used in either social/behavior, math, or study/organizational skills."

The compensatory education will occur in a one-on-one setting and be provided by a certificated special education teacher. The instruction will occur outside of the District's school day and may occur on weekends or during District breaks. If the District's provider is unable to attend a scheduled session, the session must be rescheduled. If the Student is absent, or otherwise does not attend a session without providing the District with at least 24 hours' notice of the absence, the District does not need to reschedule.

DISTRICT SPECIFIC:

None.

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.

RECOMMENDATION

OSPI recommends the Student's IEP team clarify "Additional Classroom Instructional Assistance Support" in the IEP. In this complaint, both the Parent and District agreed that this meant "1:1 instructional assistance." However, on their face, additional classroom instructional assistance and a 1:1 instructional assistant are not necessarily the same. Further clarification would reduce the possibility of a future dispute over what the IEP provided for.

Dated this ____ day of May, 2020

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