

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-78

PROCEDURAL HISTORY

On May 31, 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 Peninsula 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 31, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on June 2, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On June 20, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent on June 21, 2023. OSPI invited the Parent to reply.

On July 6, 2023, OSPI requested that the District provide additional information, and the District provided the requested information on the same day. OSPI forwarded the information to the Parent on the same day.

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 June 1, 2022. 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.

ISSUES

1. Did the District implement the Student's testing accommodation according to WAC 392-172A-03105 during the 2022–23 school year?
2. Did the District change the Student's placement according to WAC 392-172A-03115 during the 2022–23 school year?

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. "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).

Parent Participation in Determining Placement: Each school district must ensure that a parent of each student eligible for special education is a member of any group that makes decisions on the educational placement of the parent's child. The school district must use procedures consistent with the procedures described in WAC 392-172A-03100 (1) through (3). WAC 392-172A-03115.

FINDINGS OF FACT

Background Information

1. In December 2021, the Student's IEP team developed a new annual IEP for the Student. The IEP included annual goals in reading and written language with progress reporting at the trimester. The Student's December 2021 IEP provided the Student with the following specially designed instruction:

Services 12/09/2021–06/22/2022

Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)
Reading	Special Education Teacher	Special Education Teacher	100 Minutes / Weekly	Special Education
Written Language	Special Education Teacher	Special Education Teacher	100 Minutes / Weekly	Special Education

Total minutes per week student spends in school: 1,740 minutes per week.

Total minutes per week student is served in a special education setting: 200 minutes per week.

Percent of time in general education setting: 88.51% in General Education Setting.

Services 06/23/2022–12/08/2022

Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)
Reading	Special Education Teacher	Special Education Teacher	25 Minutes / Daily	Special Education
Written Language	Special Education Teacher	Special Education Teacher	25 Minutes / Daily	Special Education

Total minutes per week student spends in school: 1,740 minutes per week.

Total minutes per week student is served in a special education setting: 250 minutes per week.

Percent of time in general education setting: 85.63% in General Education Setting.

The Student's IEP also included classroom accommodations and state testing accommodations, including "small group testing-as needed," text-to-speech as needed, and simplified directions as needed.

2022–23 School Year

2. At the start of the 2022–23 school year, the Student was eligible for special education services under the category of specific learning disability, was in the sixth grade, and attended a District elementary school.

- In December 2022, the District reevaluated the Student for eligibility and determined the Student’s educational needs. The Student’s teacher reported that the Student had a “chronic problem” with attendance. The teacher stated:

He is sometimes prepared and independent. He usually follows directions. His emotional regulation/attitude presents as: even-tempered. He sometimes/rarely participates in class. He completes some work of adequate quality. He receives low scores on tests/quizzes. His social skills present as: gets along well with peers. He is sometimes organized but rarely completes homework.

Based on the results, the evaluation team recommended services in the following areas: reading, written language, math, and social/emotional/behavioral.

- On December 8, 2022, the Student’s IEP team met to review the results of the reevaluation and develop a new IEP for the Student. The IEP team considered the Student’s behavior and concluded that it did not impede the Student’s learning or the learning of others. The Student’s IEP provided annual goals in the areas of social/emotional/behavioral (self-advocacy), math (computation), reading (comprehension), and writing (editing work and writing fluency). The IEP provided the following special education services to the Student:

Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)
Special Education				
Reading	Special Education Teacher	Special Education Teacher	30 Minutes/5 Times Weekly	Special Education
Written Language	Special Education Teacher	Special Education Teacher	20 Minutes/5 Times Weekly	Special Education
Math	Special Education Teacher	Special Education Teacher	15 Minutes/4 Times Weekly	Special Education
Social Emotional/Behavioral	Special Education Teacher	Special Education Teacher	10 Minutes/4 Times Weekly	Special Education

The Student’s IEP continued to include accommodations for the state testing that included small group testing as needed, simplified directions as needed, and text-to-speech as needed.

- From December 19, 2022 through January 2, 2023, the District was on winter break.
- After winter break, the Student’s resource room teacher and case manager changed. Later, in April 2023, the Student’s resource room teacher changed again.
- According to the District, sometime in April 2023, the Student’s case manager discovered the Student had been inadvertently removed from the special education resource room between the second and third trimester and did not receive his special education services afterwards.
- The District stated the Student did not receive special education services, starting on or around March 16 through April 21, 2023, which amounted to approximately 116 hours of special

education services missed. The Parent did not dispute the number hours of services the Student missed.

9. On April 27, 2023, the Student’s team met to review the IEP. The IEP provided the following services:

Services 04/27/2023–12/07/2023

Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)
Reading	Special Education Staff	Special Education Teacher	30 Minutes / 1 Times Weekly	Special Education
Written Language	Special Education Staff	Special Education Teacher	30 Minutes / 1 Times Weekly	Special Education
Math	Special Education Staff	Special Education Teacher	30 Minutes / 5 Times Weekly	Special Education
Social Emotional/ Behavioral	Special Education Staff	Special Education Teacher	30 Minutes / 2 Times Weekly	Special Education
Social Emotional/ Behavioral	Special Education Staff	Special Education Teacher	20 Minutes / 5 Times Weekly	Special Education

The IEP provided 17 accommodations, including text-to-speech, simplified directions, and small group testing (“SBA (smarter balance assessment) all subjects and class assessment when available”) for state testing. Also, the Student’s IEP section under “State or Districtwide Assessments of Student Achievement)” listed small group testing and text-to-speech.

10. On May 2, 2023, the Parent emailed the Student’s case manager, asking her about the state testing that was occurring during the week. The Student reported he took the test with “his full class and without any assistance.” The Parent asked if the Student was tested in a small group setting. The case manager replied that after speaking to the test coordinator, the accommodation was not implemented. The case manager reported it to the principal and the principal responded that it was corrected.
11. On May 22, 2023, the Student’s team met to amend the Student’s accommodations. The IEP accommodations section include small group testing for “all assessments and classes.” The section under “State or Districtwide Assessments of Student Achievement” listed small group testing (and text-to-speech).
12. On May 24 and 25, 2023 the District staff exchanged emails, indicating the Student did not receive his accommodation for small group testing on the first day of the state math assessment. On May 25, 2023, the Parent emailed the principal, asking why the accommodation was not implemented. The principal replied:

I think the confusion came up because before the IEP meeting on 4/27 the team asked all students with ‘as needed small group testing accommodations’ whether they wanted/needed this accommodation during SBAC, [Student] communicated he would

rather test in his ELA (English language arts) and Math class. The IEP team decided to take out the 'as needed' and have [Student] test in a small group setting on a regular basis as I recall. We started testing Monday and the quick turnaround may be why the ELA-CAT (computer adaptive test) test got by the team.

We are aware of the mistakes and are taking action to support [Student] to ensure IEP goals and accommodations are implemented.

The Parent replied that she preferred that the Student did not have a choice about whether he needed a small group setting at the time of the testing.

13. The following information tracks the Student's accommodation for small group testing through the IEPs over several years:

IEP	Accommodation	Frequency	Location	State/Districtwide Assessment Accommodation
December 2021	Small group testing	As needed	State Test	Small Group Testing
December 2022	Small group testing	As needed	State Test	Small Group Testing
April 2023	Small group testing	"SBA all subjects and class assessments when available"	General education/Special education	Small Group Testing
May 2023	Small group testing	All assessments and classes	General education/Special education	Small Group Testing

14. In all the following testing sessions, the District reported the Student was tested in a small group setting.

15. On May 31, 2023, the Parent filed the complaint with OSPI.

16. On June 8, 2023, the Student's team met again to discuss the accommodations. The meeting notes stated that the Parent would review proposed accommodations with her advocate. According to the District, the Parent has not responded.

17. Based on the number of hours of missed special education instruction, the District recommended 40 hours of compensatory education services because the Student would receive 1:1 instruction, which the District stated would be more intense than small group instruction.

CONCLUSIONS

Issue One: Testing Accommodation – The complaint alleged the District failed to provide the Student's accommodation for small group testing during the state and district assessment. A district is required to provide special education services and accommodations in conformity with the IEP.

Here, the Student's 2022 IEP provided an accommodation "as needed" during state testing. The IEP's section for state and districtwide testing also provided for small group testing. The frequency of the small group testing accommodation was later amended in April 2023, to "SBA all subjects and class assessments." Accommodations in the April 2023 IEP for state and districtwide assessments continued to include small group testing.

The District acknowledged that the accommodation was not provided to the Student during the first day of the state assessment. The District stated staff believed the Student's accommodation was "as needed" at the time the assessments began in May 2023, and which meant it was the Student's choice whether he wanted the small group testing. However, the April 2023 IEP did not specify "as needed" for small group testing. The IEP stated, "SBA subjects..." and there was no indication that implementation of accommodation depended on the Student's choice. If it was appropriate for the Student to choose, the IEP team should have discussed that option and clarified it in the IEP so that all providers were clear of their responsibilities.

The circumstances also indicated that staff were not informed of the testing provisions in the Student's updated IEP. The District is responsible for ensuring staff have access to a copy of the Student's IEP and are informed of their responsibilities under the IEP, which they were after the first day of assessments. Because the District did not implement the small group testing accommodation during the first day of assessments and the staff were not informed of their responsibilities under the Student's IEP, a violation is found. The District must review its testing procedures to ensure that accommodations for state and districtwide assessments are implemented and revise the procedures as necessary.

Issue Two: IEP Implementation – The complaint alleged the District failed to provide the Student's special education services in conformity with the IEP.¹ A district is required to provide special education services in conformity with the IEP.

Here, the Student's December 2022 IEP provided services in the areas of reading, math, written language, math, and social/emotional/behavioral that amounted to approximately 350 minutes a week of special education instruction. The Student's April 2023 IEP addressed the same areas and provided 370 minutes a week of special education services. Due to staff changes in the spring 2023, the District acknowledged the Student did not receive his special education beginning on or around March 16 through April 21, 2023, thereby missing 116 hours of instruction. Because services were not implemented in accordance with the Student's IEP, a violation is found.

The District recommended 40 hours of 1:1 compensatory education services because the 1:1 services would be more intense than group instruction. OSPI accepts the District's recommended 40 hours of compensatory education services. In addition, the District is required to review its supervision of special education programs to ensure that services are delivered in conformity with the IEP.

¹ The Parent's original issue was that the District did not inform the Parent that the Student's teachers had changed. Although there is no requirement that parents are informed of teacher changes, the change in teachers led to the District not implementing the Student's special education services.

OSPI notes that not only did the District have duty to implement the IEP, the District should have timely informed the Parent that services were not being provided so the Parent had sufficient information about the implementation of the Student's IEP in order to effectively participate in making decisions about the Student's educational program.

CORRECTIVE ACTIONS

By or before **September 22, 2023, October 6, 2023, and March 8, 2024**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Compensatory Education

By or before **September 15, 2023**, the District and Parent will develop a schedule for 40 hours of compensatory education in the areas of reading, math, writing, and social/emotional/behavioral.

Unless otherwise agreed to by the District and Parent, services will be provided by a certified special education teacher. Services will be provided in a 1:1 setting. Services will be provided outside the District's school day and can be schedule on weekends, over District breaks, or before or after school. The District will provide OSPI with documentation of the schedule for services by or before **September 22, 2023**.

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 or provider with at least 24 hours' notice of the absence, the session does not need to be rescheduled. The services must be completed no later than **March 1, 2024**.

The District must document the dates, times, and length of each session, and state whether any of the sessions were rescheduled or missed by the Student. By or before **March 8, 2024**, the District must provide OSPI with documentation that it has completed compensatory services for the Student.

The District either must provide the transportation necessary for the Student to access these services or reimburse the Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must provide reimbursement for round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **March 8, 2024**.

DISTRICT SPECIFIC:

Procedures Review

On or before **September 22, 2023**, the District special education director, along with any other necessary District administrators, will revise and revise as needed the District's procedures for ensuring accommodations during state and districtwide assessments are implemented and providing the necessary supervision of the special education programs to verify special education services are provided as required.

On or before **October 6, 2023**, the special education director will provide documentation that the procedures were reviewed and revised as necessary. OSPI must approve the procedures and will provide feedback as necessary.

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.

Dated this 27th day of July, 2023

Dr. Tania May
Assistant Superintendent of Special Education
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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.)