

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-126

PROCEDURAL HISTORY

On October 11, 2022, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the grandparent (Complainant) of a student (Student) attending the **[REDACTED]** School District (District). The Complainant 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 October 13, 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 October 28, 2022, OSPI received the District's response to the complaint and forwarded it to the Complainant on November 1, 2022. OSPI invited the Complainant to reply.

On November 14, 2022, OSPI requested additional information from the District. The District provided it the same day, and that information was forwarded to the Complainant on November 15, 2022.

On November 17, 2022, OSPI requested additional information from the District. The District provided that information on November 21, 2022, and that information was forwarded to the Complainant on November 22, 2022.

On November 29, 2022, the OSPI complaint investigator conducted telephone interviews with the Complainant and the District's director of special services.

On November 29, 2022, OSPI requested additional information from the Complainant, and the Complainant provided that information on the same day. That information was forwarded to the District on November 30, 2022.

OSPI considered all of the information provided by the Complainant 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 October 12, 2021. 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. Did the District follow placement procedures for determining the Student's placement for the 2022–2023 school year?

LEGAL STANDARDS

Placement: When determining the educational placement of a student eligible for special education including a preschool student, the placement decision shall be determined annually and made by a group of persons, including the parents, and other persons knowledgeable about the student, the evaluation data, and the placement options. The selection of the appropriate placement for each student shall be based upon: the student's IEP; the least restrictive environment requirements contained in WAC 392-172A-02050 through 392-172A-02070, including this section; the placement option(s) that provides a reasonably high probability of assisting the student to attain his or her annual goals; and a consideration of any potential harmful effect on the student or on the quality of services which he or she needs. 34 CFR §300.116; WAC 392-172A-02060.

Change in Placement: A reevaluation must be completed before a significant change of placement is made. *In re: Kent School District*, OSPI Cause No. 2016-SE-0111 (WA SEA 2016); *Student Placement in Elementary and Secondary Schools and Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act* (Office for Civil Rights, August 2010). The performance and skill levels of students with disabilities frequently vary, and students, accordingly, must be allowed to change from assigned classes and programs. In determining whether a change in placement has occurred, the district responsible for educating a student eligible for special education must determine whether the proposed change would substantially or materially alter the student's educational program. In making this determination, the following factors must be considered: whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled children to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular activities; and, whether the new placement option is the same option on the continuum of alternative placements. *Letter to Fisher*, 21 IDELR 992 (OSEP, July 6, 1994).

FINDINGS OF FACT

1. At the start of the 2021–2022 school year, the Student was enrolled in a therapeutic day school (program 1) and the Student's January 19, 2021 IEP was in effect. Program 1 was located out-of-state and was a special education program with a primary focus on emotional and behavioral growth, serving students whose needs prevent success in other settings.
2. The Student's January 19, 2021 IEP provided the Student with specially designed instruction (SDI) as follows:
 - Adaptive Skills: 30 minutes/5 times per week (provided by special education teacher, in a special education setting)
 - Math: 100 minutes/5 times per week (provided by special education teacher, in a special education setting)
 - Reading: 100 minutes/5 times per week (provided by special education teacher, in a special education setting)
 - Social/Emotional Skills: 150 minutes/5 times per week (provided by special education teacher, in a special education setting)
 - Writing: 75 minutes/5 times per week (provided by special education teacher, in a special education setting)

The Student spent 0% of the time in general education. The Student was also supported by a 1:1 paraeducator for 455 minutes daily, and there was an emergency response protocol (ERP) in place for the Student.

3. September 7, 2021 was the first day of instruction at program 1.
4. During the first 22 days of the 2021–2022 school year at program 1, the Student attended on only nine days, and only attended for two days out of the thirteen school days that occurred between September 20 and October 7, 2021.
5. Between September 7 and October 7, 2021, the Student engaged in at least nine acts of aggression against staff and/or destruction of property at program 1.
6. According to the Complainant, the state where program 1 is located had an in-door and out-door mask mandate at the start of the 2021–2022 school year. Additionally, the Student had a 60-minute daily commute to and from program 1. This resulted in the Student having to wear a mask from 7 am–3:30 pm during school days, and according to the Complainant, this was very frustrating and caused the Student to act out.
7. On October 7, 2021, the Complainant withdrew the Student from program 1. The Complainant stated she was informed that it was better to withdraw the Student from program 1 because he could re-apply to the program in the future if necessary than to have the Student kicked out, which would prevent the Student from re-applying to the program.
8. On December 3, 2021, the Student’s IEP team met to review the reevaluation that was initiated on November 5, 2021, and review the Student’s IEP and placement. The IEP team proposed an out-of-state residential placement for the Student. The Complainant rejected the residential placement.

According to the District, the Complainant submitted a form, which indicated an intent to homeschool. The Complainant’s position is that she did not want to homeschool the Student, but that was the only option she had at that time, other than out-of-state residential placement. The Complainant stated that she wanted to continue to access outside private services and have the Student receive applied behavioral analysis (ABA) therapy. The IEP team agreed to a homeschool placement and sent home worksheets in the Student’s goal areas each week.

9. The Student’s December 3, 2021 IEP provided SDI as follows:
 - Adaptive Skills: 10 minutes/1 times per week (provided by a behavior specialist, in a general education setting)
 - Math: 10 minutes/1 times per week (provided by a behavior specialist, in a general education setting)
 - Reading: 10 minutes/1 times per week (provided by a behavior specialist, in a general education setting)
 - Social/Emotional Skills: 10 minutes/1 times per week (provided by a behavior specialist, in a general education setting)

- Writing: 10 minutes/1 times per week (provided by a behavior specialist, in a general education setting)

The Student's LRE placement was "home-schooled/part-time enrolled." Additionally, the IEP stated:

The Student demonstrates extreme behaviors in both the classroom setting and at home and demonstrates a need for substantial support. He has been exited from [therapeutic day] school due the nature, severity, and frequency of his behaviors. He is not eligible to be accepted by other day treatment programs in this area. The Student's grandmother has filed an intent to homeschool with the district because she wants the Student to complete his schoolwork at home and be able to continue working with his ABA therapist and mental health therapist with 2:1 support for 42.5 hours per week through his Developmental Services and Care Plan. She would like the Student's IEP to continue with educational materials provided by the district.

10. According to the Complainant, the Student was never in a "home-school program" and for most of the year, the District sent home worksheets and the Student would work on the worksheets with the private provider who was providing the Student his ABA therapy. The Complainant stated that quite often, the ABA providers would not be available because of staff shortages, and by late May 2022, the ABA therapy was discontinued. At that time, the Complainant informed the District of her intent to send the Student back to in-person school for the 2022–2023 school year.

Summer 2022

11. On August 8, 2022, the parties discussed the Student's school plan with the District recommending a residential program and the Complainant rejecting that option because the Complainant was not interested in placement outside of Washington. Based on this disagreement, the Complainant requested the District contact program 1 to see if they would accept the Student.
12. The District contacted program 1 and on August 30, 2022, program 1 declined to enroll the Student because the Student had not made progress while at program 1 and posed significant behavioral challenges. Upon hearing this news, the Complainant asked the District to explore all therapeutic options in the surrounding counties.
13. The District subsequently contacted four other therapeutic educational programs (programs 2–5).

2022–2023 School year

14. On August 30, 2022, the District had its first day of instruction. The Student was not enrolled with the District, or in any school or program, and the parties were trying to resolve where the Student would be educated.
15. On September 2, 2022, program 2 responded that they were not accepting any students due to staff shortages.

16. On September 6, 2022, program 3 responded that the Student would not be a good fit for them, and program 4 responded that they were not accepting new referrals living in Washington.
17. On September 12, 2022, program 5 responded that they could not implement the Student's IEP.
18. On October 4, 2022, the Student's IEP team met. The Complainant's advocates attended and included representatives from the Department of Disabilities Administration, Catholic Community Services, and the ABA case worker. According to the meeting's PWN, the IEP team recommended that the Student be served in a residential program. The PWN also stated that the District was going to conduct an evaluation.
19. The Student's October 4, 2022 IEP provided the Student with SDI as follows:
 - Adaptive Skills: 62 minutes/5 times per week (provided by special education teacher, in a special education setting)
 - Math: 40 minutes/5 times per week (provided by special education teacher, in a special education setting)
 - Reading: 40 minutes/5 times per week (provided by special education teacher, in a special education setting)
 - Social/Emotional Skills: 170 minutes/5 times per week (provided by special education teacher, in a special education setting)
 - Writing: 40 minutes/5 times per week (provided by special education teacher, in a special education setting)

The IEP indicated the Student would spend 0% of the time in general education and he continued to have 1:1 paraeducator support for 352 minutes per day.

20. On October 5, 2022, the Complainant filed the current complaint.
21. On October 5, 2022, according to the Complainant, the District contacted the Complainant and agreed to an evaluative placement with the Student for three periods per day, beginning on October 24, 2022. The Student has been attending school continuously since October 24, 2022.
22. On November 21, 2022, the Student's IEP team met to review the reevaluation, review the IEP, determine placement, and discuss transition services.

Based on the Student's evaluation, the Student was eligible for special education services under the disability category of autism.

The IEP team reported as follows:

[The Student] completed an in-school "trial run" (quotes added) at [District] High School where he attended for 3 periods a day from 10/24/22 till 11/21/22. During that time he attended a combination of special education and general education classes. He was able to participate in general education classes with adult support. He was able to participate in special education classes without adult support.

Additionally, the IEP team reported that during the “trial run”, the Student “did not exhibit behavior that impedes his learning or the learning of others.”

23. The IEP team drafted a new IEP on November 21, 2022, that provided SDI as follows:
- Adaptive Skills: 30 minutes/5 times per week (provided by behavioral specialist, in a special education setting)
 - Math: 60 minutes/5 times per week (provided by behavioral specialist, in a special education setting)
 - Reading: 60 minutes/5 times per week (provided by behavioral specialist, in a special education setting)
 - Social/Emotional Skills: 30 minutes/5 times per week (provided by behavioral specialist, in a special education setting)

The placement option selected on the IEP was 40–79% in general education, with the Student spending 42.14% of the time in a general education setting. The team did not develop a new ERP.

The IEP’s PWN stated as follows: [Student] “is currently attending 3 periods a day and that will be increased to 4 periods starting on Dec. 5th. Once Semester 2 starts on January 28th [Student] will be attending 5 periods a day.”

CONCLUSIONS

Issue One: Placement – The Complainant filed the present complaint because the District wanted the Student to attend school at an out-of-state residential placement for the 2022–2023 school year, while the Complainant disagreed with the District’s placement and requested the Student attend school at a non-residential, in-state setting.

In the present matter, at the start of the 2021–2022 school year, the Student was enrolled at an out-of-state therapeutic day school (program 1) until October 2021, when the Student was withdrawn. During the first 22 days of the 2021–2022 school year, the Student attended program 1 only nine days, and between September 7 and October 7, 2021, the Student engaged in at least nine acts of aggression against staff and/or destruction of property at program 1. For the remainder of the 2021–2022 school year, the Student was homeschooled and each week, the District provided worksheets aligned to the Student’s goal areas.

At the beginning of the 2022–2023 school year, the Student was not enrolled in any school or program and the parties disagreed as to where the Student should attend school. The Complainant wanted the Student to attend an in-District school, and the District wanted the Student to attend an out-of-state residential placement. Ultimately, the parties decided that the Student would be given a “trial run”/evaluative placement at a District school. That “trial run” occurred for almost one month (October 24–November 21, 2022) at the District high school. During that “trial run”, the Student attended school for three periods a day and was assigned a 1:1 paraeducator. Additionally, the Student was reevaluated to determine his continued eligibility for special education and to assess his current needs.

On November 21, 2022, the Student's IEP team met to assess the "trial run". Based on a reevaluation conducted during the "trial run", it was determined the Student was still eligible for special education services under the category of autism and that the Student would receive specially designed instruction in reading, math, social/emotional skills, and adaptive skills with an LRE placement of 40–79%. The IEP team also stated that during the "trial run", the Student did not exhibit behavior that impeded his learning or the learning of others. For this reason, the IEP team decided the Student should attend an in-District school for the remainder of the 2022–2023 school year and the Student's IEP team determined the Student did not need a 1:1 paraeducator or an ERP.

When making an educational placement decision, the IEP team must consider the following steps:

1. Placement must be determined annually.
2. The decision must be made by a group of persons, including the parents, and other persons knowledgeable about the student, the evaluation data, and the placement options.
3. A reevaluation must be completed before a significant change of placement is made.

Based on this case's facts, the IEP team abided by all the required steps for significantly changing the Student's placement. First, the IEP team made three decisions on the Student's placement within one year when they drafted IEPs on December 3, 2021, October 4, 2022, and November 21, 2022. Second, the Student's current placement decision was made by the IEP team after the team had the opportunity to observe the Student from October 24 until November 21, 2022, during the Student's in-school "trial run" for three periods a day and during which the Student was assigned a 1:1 paraeducator. Third, a reevaluation was conducted during this "trial run". Thus, there is sufficient basis to support the District's decision regarding the Student's 40–79% LRE placement that is in the November 21, 2022 IEP. Further, the Complainant's main objection was to an out-of-state residential placement, which was discussed, but the District did not actually place the Student at a residential placement.

In making a placement decision, the following factors must also be considered:

1. Whether the educational program in the student's IEP has been revised.
2. Whether the student will be educated with nondisabled children to the same extent.
3. Whether the student will have the same opportunities to participate in nonacademic and extracurricular activities.
4. Whether the new placement option is the same option on the continuum of alternative placements.

Regarding the first factor, the IEP team significantly revised the Student's education program in the three IEPs that occurred over the last year. In the first IEP (December 3, 2021), the Student was being homeschooled and spending no time in a general education setting. Based on the third IEP (November 21, 2022), the Student is now scheduled to spend 42% of his time in a general education setting. This is a significant increase in the amount of time the Student will be spending in a general education setting, and the increase is supported by the information the IEP team collected during the Student's evaluative placement and reevaluation.

The 42% of the time the Student will be in a general education setting also addresses the second factor regarding the extent to which the Student will be educated with nondisabled students. Regarding the third factor, the Student's new IEP gives the Student the opportunity to attend

school and gives him a greater opportunity to participate in nonacademic and extracurricular activities than the Student's December 3, 2021 or October 4, 2022 IEPs did. Finally, regarding the fourth factor, the new placement option is a less restrictive placement option than was provided for the Student in his December 3, 2021 or October 4, 2022 IEPs. Thus, it is apparent that the District considered the necessary relevant factors when the District decided to significantly change the Student's placement.

For the reasons stated above, no violation has occurred in the present case regarding the placement procedures. OSPI does note that the Student's placement changed significantly and his schedule and number of classes at school is still changing. Thus, OSPI strongly recommends the Student's IEP team schedule an IEP meeting or meetings to check-in, review the Student's progress, and discuss his placement as the number of classes he attends increases. OSPI also notes that the Student's return to an in-school/in-District placement was somewhat delayed during the 2022–2023 school year. OSPI recommends the Student's IEP team consider whether the Student requires any compensatory educational services to address the delayed return to school.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this 6th day of December, 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.)