

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 14-04

PROCEDURAL HISTORY

On January 15, 2014, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from a non-parent complainant (Complainant) on behalf of two students (Students), who attend the Vancouver 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 Students' education.

On January 15, 2014, 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 February 6, 2014, OSPI received the District's response to the complaint and forwarded it to the Complainant on the same day. The Complainant was invited to reply with any information she had that was inconsistent with the District's information.

On February 13, 2014, OSPI received the Complainant's reply. The information was forwarded to the District on the same day.

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

OVERVIEW

The Students, who moved out of the District to another district at the end of the 2011-2012 school year, transferred back into the District for the 2013-2014 school year, where they attend sixth grade. The Students received special education services based on their eligibility under the specific learning disability category. After the Students moved back into the District, the general education teachers and staff became concerned that the Students were not benefiting from their current educational placement, due to their low academic functioning and other developmental issues. The individualized education program (IEP) team received parent consent to reevaluate the Students. The IEP team then conducted additional adaptive assessments, communication assessments, and collected general education teacher information and medical reports. The IEP team did not conduct any new academic or cognitive testing because the previous district had conducted such assessments the prior school year. Just prior to the reevaluation/IEP team meeting, District administration informed the IEP team that they could not consider placing the Students into the school's intensive academic classroom. **The Complainant alleged that by giving a directive restricting placement options, the District violated procedures for allowing IEP teams to make placement decisions on behalf of the Students. The District denied the allegations, stating that the IEP team's reevaluation data did not support a more restrictive environment.**

SCOPE OF INVESTIGATION

This decision references events that occurred before the investigation time period, which began on January 14, 2013. The purpose of these references is to add context to the issues under investigation and is not intended to identify additional issues or potential violations occurring before the investigation time period.

ISSUE

1. Did the District follow procedures for ensuring that the IEP team made decisions about the appropriate placement and LRE for Students' A and B?

LEGAL STANDARDS

Placement Procedures: A group, including the parents and other persons, who are knowledgeable about the student, the meaning of the evaluation data, and the placement options, shall determine placement for a student eligible for special education. The selection of an appropriate placement must be based on (a) the IEP, (b) least restrictive environment requirements, (c) whether it provides a reasonably high probability of assisting the student to attain his or her annual goals, and (d) consideration of any potential harmful effect that on the student or on the quality of services that the student needs. The IEP team must not remove the student from age-appropriate general classrooms solely because of needed modifications. 34 CFR §300.116; WAC 392-172A-02060.

Eligibility Category: Once a student qualifies for special education, the student's eligibility category does not determine the scope of services or the student's placement. *In the Matter of Issaquah School District*, OSPI Cause No. 2002-SE-0030 (WA SEA 2002). The important reevaluation issue is not the eligibility category but the determination of the special education services needed to meet the unique needs of each student. The team does not design services solely based on the student's eligibility category. WAC 392-172A-01175.

Reevaluation Procedures: Qualified professionals must conduct a reevaluation using a variety of assessment tools, including information from the parent. As part of a reevaluation, the IEP team must review the student's existing data, including previous evaluations, independent evaluations, current assessments, teacher observations, and other information provided by the parents to determine whether additional assessments are needed to complete the reevaluation. 34 CFR §300.303-306; WAC 392-172A-03025. The evaluators must not use any single measure or assessment as the sole criterion for determining eligibility or the appropriate program. 34 CFR §300.304; WAC 392-172A-03020.

Least Restrictive Environment: To the maximum extent appropriate, the school district must ensure that it educates children with disabilities with children without disabilities. The school district should remove a student from the general education environment only when the nature or severity of the disability is such that supplementing the student's education with aids and services will not satisfactorily educate the student. 34

CFR §300.114; WAC 392-172A-02050. The district needs to consider less restrictive placements, but it does not always have to try them. *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996).

IEP Revision: The IEP team should revise the IEP to address the lack of expected progress toward annual goals, reevaluations, information provided by the parent, anticipated needs, and other matters. In conducting a review, the IEP team must consider any special factors unique to the student. 34 CFR §300.324; WAC 392-172A-03110(3).

Predetermination of student placement: A district violates procedural IDEA requirements if it independently develops an IEP, without meaningful parental participation, and simply presents the IEP to the parent for ratification. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003); WAC 392-172A-03100; 34 CFR 300.322. Likewise, a district “may not enter an IEP meeting with a ‘take-it-or-leave it’ approach. *Id.* However, preparation by a district prior to an IEP meeting, including developing a draft IEP, does not itself establish predetermination. *Lee’s Summit R-VII Sch. Dist.*, 112 LRP 14677 (SEA MO 2012).

FINDINGS OF FACT

1. Student A and Student B are twins and attend sixth grade in a District middle school. They are eligible for special education services under the specific learning disability category.
2. The District initially found both Student A and Student B eligible for special education services when they were in kindergarten. The District’s documentation did not specify Student A’s disability category at that time, but did specify that Student B was eligible under the developmental delay category. In addition, the District’s documentation noted that as infants and toddlers, Student A and Student B had delayed developmental milestones. On May 13, 2010, when the Students were in second grade, the District reevaluated the Students and determined they were now eligible under the specific learning disabilities (SLD) category. Based on the SLD determination, the District provided both Students with special education services in reading, math, written language, communication, and fine motor skills.
3. Both Students A and B had attended five different elementary schools between kindergarten and fifth grade. Four of the schools were within the District. The Students transferred to a neighboring school district at the end of fourth grade, and were also provided special education services under the category of SLD in that district through fifth grade before returning to the District for sixth grade. In addition to frequent school changes, both Students had relatively high absentee rates, missing between approximately 15 to 26 school days per year.
4. On December 4, 2012, while attending fifth grade outside the District, the Students were reevaluated by the district and determined to continue to be eligible for special education services under the category of SLD. The December 2012 reevaluations

showed that the Students had declining standard academic scores and little to no progress in their grade level achievement, despite borderline to average intellectual functioning. The Students' December 4, 2012 IEPs, developed while they were in fifth grade and in effect when they transferred to sixth grade in the District, provided for special education services in the areas of reading, writing, and math with speech as a related service. The Students participated in general education classes approximately 75% of the time. The Students also received extended school year (ESY) services from the prior district.

5. In September 2013, the Students transferred back into the District and enrolled in the District's sixth grade middle school for the 2013-2014 school year. The middle school provided services comparable to the Students' fifth grade IEPs. Specifically, each Student received 490 minutes per week of specialized instruction and spent 72.78% of time in the general education setting with modifications and accommodations. The IEP team met on September 25, 2013, because the Parent reported concerns that neither Student A nor Student B had the problem solving or directional skills needed to walk safely to school. The IEP team added special transportation services for the Students at that time. The school psychologist emailed the District's special services manager, informing her that the Students' teachers were concerned about their abilities and lack of progress in the teacher's classes. The school psychologist informed the special services manager that the District: (a) may need to reevaluate the Students and (b) that the Students might need more intensive supports.
6. In October 2013, the school psychologist informed the special services manager that the evaluation group did not see a need for new academic and cognitive testing because that testing had been done by the prior district in the previous year.
7. On November 7, 2013, the evaluation group obtained parental consent to conduct a reevaluation for both Students. The group conducted new adaptive assessments, communication assessments, and collected general education teacher assessments and medical reports.
8. The November 7, 2013 adaptive skills assessment showed delayed adaptive skills for both Students. Both Students A and B had composite below average adaptive skill scores. However, the Students did not have delayed socialization skills. The Students' general education teachers provided input for the District's reevaluation and questioned whether the general education placement was appropriate because of limited evidence to support that the Students understood the concepts being taught despite the provision of accommodations and modifications. The Students' teachers also reported their concerns that the Students' academic deficits negatively impacted their ability to access the general education class.
9. On November 7, 2013, about a month before the scheduled reevaluation meeting/IEP team meeting, the school psychologist emailed the special services manager, informing her of the adaptive evaluation results, and reminding her that the IEP team was not conducting additional academic or cognitive evaluations because

those assessments had been done in the prior school year. The school psychologist then asked if the IEP team had the special services manager's support to consider changing Student A's and Student B's current placements, potentially moving them from a general education setting to an intensive academic classroom (IAC) setting. The special services manager replied that she was supportive, noting that it seemed logical because the Students had adaptive needs, and because they required more support than the current instructional settings could provide.

10. The District has a four-step procedure for consideration of a more restrictive placement. Each step requires the signatures of the school principal and the special services manager. The first step is for the IEP team to consult with the special services manager, discussing and documenting interventions and strategies for the student. Possible outcomes of this meeting may include conducting a functional behavioral assessment (FBA), modifying the modifications/accommodations, teaching new learning strategies for four to six weeks, or convening an IEP meeting. If the first step is unsuccessful, the second step is another consultation with the special services manager. The outcome of this meeting includes reviewing/revising: (a) the amount of services in the building, (b) the IEP modifications, or (c) the FBA. If the second step is unsuccessful, the third step is another consultation with the special services manager with the same possible outcomes as step two with the addition of the possibility of reevaluation. If the third step is unsuccessful, and if the school principal and the special services manager provide a final signature, the fourth step is for the IEP team to consider placement options. With the necessary documentation, including the required signatures noted above and a placement memo, the IEP team may consider a change placement.
11. On December 3, 2013, a few hours before the Students' reevaluation/ IEP meeting, the school psychologist again emailed the special services manager. The school psychologist asked whether the IEP team was free to change Student A's and Student B's schedules, reflecting their new placements in an IAC, or whether the scheduling change would not take place until after the placement memos, specified in the District's four-step procedure for consideration of a more restrictive placement. The school psychologist also copied the IAC teacher on the email.
12. About 45 minutes after the school psychologist's email to the special services manager, the IAC teacher also emailed the special services manager. The IAC teacher stated that once the two Students were in her classroom, she would be in overload status. The IAC teacher then asked several follow-up questions related to overload compensation. A few minutes later, the special services manager emailed the IAC teacher, copying the school psychologist, and replying, "This is a moot point, the [Students] will not be in your class." In a separate email, the special services manager then emailed the IEP team, stating that IAC placement for the two Students was inappropriate because their "academic and adaptive test scores were too high." The special services manager also told the IEP team that to be placed in an IAC, students "should be DD eligible, which neither of these students are." The special services manager also wrote that because the Students had high academic needs and significant discrepancies between their academic and cognitive scores, they

needed to continue in a predominately general education setting with specially designed instruction provided by learning support instead of the IAC. Members of the IEP team, including the Parent, and the group of qualified professionals, held a meeting and discussed the reevaluation results, but postponed the IEP meeting because the teachers and staff on the IEP team felt that the special services manager's email prohibited them from placing the Students into an IAC setting. Two days later, on December 5, 2013, the special services manager phoned the middle school associate principal, expressing her position that the Students' data did not support a more restrictive placement.

13. On December 31, 2013, the school psychologist emailed a memo to the special services management team at the special services manager's request. The school psychologist provided the special services management team with the IEP team's rationale for an IAC placement for the two Students. The school psychologist's memo stated that the IEP team wanted to consider all placement options without the District considering them to be insubordinate. On January 6, 2014, the special services management team met and considered the memo. The special services manager told the school psychologist that the management team had significant questions about whether the Students' frequently changing schools was the primary cause of their failure to progress academically. She also stated that any changes to the Students' schedule or program might not be positive when the Students had frequently changed elementary schools over the past several years. Finally, the special services manager distinguished anecdotal information from reevaluation data, and questioned whether the reevaluation data actually supported a more restrictive placement. She also noted the Students needed to be in the least restrictive environment (LRE) to the maximum extent appropriate. The school psychologist assured the special services manager that the IEP team would consider the Students' frequent change of elementary schools and the LRE requirement when the team met at the January 10, 2014 IEP meeting.
14. On January 8, 2014, the special services manager and the special services manager for the high schools met with the middle school principal. The special services manager opposed an IAC placement for the Students because the Students' special education classification was SLD, and not intellectual disability (ID). The managers also opposed an IAC placement because the Students' socialization scores (as part of the adaptive testing) were in the average range. Finally, the managers opposed the IAC placement because the Students' academic and cognitive scores were from testing done in December 2012. The special services managers presented the principal with three options. There is disagreement regarding the three options presented. The District states that the three options included:
 - (a) Moving forward with the IEP review to add the new adaptive goals, and include a discussion of what services would be appropriate, including the more restrictive placement option, and explain to the Parent what an IAC classroom is, and the demographic the program serves and then let the Parent guide the decision making process;

- (b) Moving forward with the IEP review to add the new adaptive goals, and conduct another reevaluation at that time, so the IEP team could specifically address the academic concerns they have; and,
- (c) Moving forward with the IEP review to add the new adaptive goals, discuss academic concerns with Parents, continue to take and compile data, and conduct another reevaluation later.

15. After the meeting with the managers, the middle school principal met with the associate principal at the school and the school psychologist, to convey the special services management's position. The Complainant states that the options included:

- (a) Proceeding with the IEP meeting, presenting the team's IAC placement recommendation, and the special services manager would attend and take an adversarial position, leaving the Parent confused and uncomfortable;
- (b) Conducting another reevaluation for the Students to provide the special services management team with additional data in the cognitive and academic areas; or
- (c) Holding an IEP team meeting that scheduled additional IAC classes, but retained the current general education placement of the Students and the special services manager would not object.

16. The school psychologist then met with other members of the IEP team, but not including the Parent, and conveyed her understanding of the special services management's position. Believing that the special services management would not support changing the Students' current placement to the IAC, the IEP team members decided to hold the January 10, 2014 IEP meeting, and recommend another reevaluation that included current cognitive and academic data.

CONCLUSIONS

Placement Procedures: The District did not follow procedures to ensure that the IEP team made decisions about Students A and B's appropriate placement. Additionally, the evaluation group/school based IEP team did not follow procedures to ensure parent participation in determining the Students' placement.

It is appropriate for the District to have guidelines regarding a student's placement, including placement into a more restrictive setting. For example, it is appropriate to ask staff to communicate with administrative personnel when contemplating additional resources or a more restrictive setting. It is also appropriate for District administration to provide staff with strategies and feedback that may include requiring additional interventions before changing placement.

The District argues that its December 3, 2013 email merely stated that the Students would not be assigned to a specific IAC teacher's classroom and that it was not intended to mean that the Students could not be assigned to *any* IAC classroom. However, the documentation does not support this interpretation. If the District was concerned that the IAC teacher's concerns were premature, it could have simply told

her so without declaring that the Students would not be in her class. Additionally, the District copied the school psychologist when it responded to the IAC teacher; yet the District special services management never clarified that the IEP team might consider placement in another IAC teacher's classroom. Further, within the same minute that the District emailed the IAC teacher, it also emailed the IEP team, presenting new objections to an IAC placement and to the reevaluation results. Taken as a whole, the documentation substantiates the Complainant's position that the District's December 3, 2013 statements run counter to the provision that the IEP team considers all options and makes placement determinations. 34 CFR §300.116; WAC 392-172A-02060.

The District incorrectly informed the school based IEP team that eligibility for IAC placement requires a developmental disability determination. An eligibility category does not, in and of itself, determine a student's placement. Additionally, the IEP team does not design services based only on a student's eligibility category. Rather, the IEP team designs special education services to meet the unique needs of each student as a result of current evaluation data. Therefore, the District incorrectly informed the IEP team that the Students needed to continue their services in a learning support setting simply because they did not have delayed socialization skills, and they did not score below average on one component of their IQ tests.

Likewise, evaluation/reevaluation reports do not determine placement. Evaluations/reevaluations are intended to address the unique needs of the student, and recommend the services needed to address those needs. Early in the reevaluation process, the school psychologist informed the District that the evaluation group would use the academic evaluations from the previous year as part of the reevaluation. Although it is not clear why the school psychologist believed she needed a manager's approval, the District did not state any concerns about the sufficiency of this data until it contested the evaluation group's placement recommendations in December of 2013. An IEP team reviews existing data to determine whether the evaluation group needs to conduct additional assessments. In this case, nothing in the prior evaluations suggested a need for additional academic or cognitive testing. Additionally, districts are not required to conduct reevaluations more than once a year unless the parent and district agree.

Although the District correctly notes that the IEP team must consider the least restrictive environment for each student, it should also be noted that this consideration is individually based, and not based solely on a student's disability category. When revising an IEP, the IEP team must also consider any lack of expected progress and any special factors unique to the student. 34 CFR §300.324; WAC 392-172A-03110(3).

The school based IEP team/evaluation group did not follow procedures to ensure parent participation in determining placement. Here, the Students' IEP team wanted approval to change the Students' placement before it met with the Parent. It is understandable that the IEP team may need the District administration's input regarding the range of services available to the Students, but taken collectively, the school psychologist's emails suggest that the IEP team wanted to present the Parent with only an IAC placement option. Although it is understandable that the school based IEP team

wanted to avoid confusing the Parent or making her uncomfortable, the school based IEP team must also provide the Parent an opportunity for meaningful participation in considering placement options. While it is important that the school based IEP team present its placement recommendations to the Parent, it is not appropriate for the school based IEP team to make a placement decision before discussing a range of options with the Parent.

The District's internal placement procedures, including predetermining placement options based on a disability category, evaluation scores, or a teacher's potential overload status, violated procedures under the IDEA. Additionally, the school based IEP team/evaluation group's process for predetermining placement options before parental involvement also violated procedures under the IDEA.

CORRECTIVE ACTIONS

On **April 4, 2014**, **April 30, 2014**, and **May 9, 2014**, the District will provide documentation to OSPI that the following corrective actions have been completed.

STUDENT SPECIFIC:

By **March 28, 2014**, Student A's and Student B's IEP team will meet to revise the Students IEPs, based on the information in the reevaluation report, any updated progress information in both the Students' general education and special education classes. The IEP team will determine placement based on (a) the IEP, (b) least restrictive environment requirements, (c) placement options that provide a reasonably high probability of assisting the Students to attain their annual goals, and, (d) consideration of any potential harmful effect on the Students or on the quality of services of the Students' needs. By **April 4, 2014**, the District will provide OSPI with a copy of the Students' IEPs and a copy of the prior written notices provided to the Parent stating the IEP team's decisions.

DISTRICT SPECIFIC:

The District will review and revise its placement procedures (guidelines) to ensure that a process is in place that aligns with WAC 392-172A-02060 and that does not predetermine placement. By **April 4, 2014**, the District will provide OSPI with a draft of the new placement procedures for review. By April 18, 2014, OSPI will provide feedback to the District, including any potential revisions, if necessary. By **April 30, 2014**, the District will submit revised placement procedures to OSPI, incorporating OSPI's feedback. By **May 9, 2014**, the District will provide OSPI with documentation that it has updated its placement guidelines and communicated the updated guidelines to staff.

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.

NOTE: The district may request an electronic version of the matrix by e-mailing [Thin Le](mailto:Thin.Le@k12.wa.us) at Thin.Le@k12.wa.us.

Dated this ____ day of March, 2014

Douglas H. Gill, Ed. D.
Director, 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.)