

## **SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 19-24**

### **PROCEDURAL HISTORY**

On March 28, 2019, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Bellingham 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 28, 2019, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District Superintendent on the same day. OSPI opened the complaint on the following issue: Did the District implement the following accommodation in the Student's individualized education programs (IEPs) on November 30, 2018 and January 15, 2019: "access to call home (see behavior intervention plan)"? OSPI asked the District to respond to the allegations made in the complaint.

On March 30, 2019, March 31, 2019, and April 1, 2019, the Parent provided several communications regarding his continuing concern about transportation and requested that an issue be added to the complaint. On April 2, 2019, OSPI declined to add an additional issue because it was not clear from the complaint that the circumstances described were a potential violation of the IDEA or the circumstances described were instances investigated in a previous SECC (SECC 18-91).

On April 10, 2019, the Parent provided OSPI with additional information regarding the November 30, 2018 incident. OSPI declined to add a new issue to SECC 19-24, as it was too late in the complaint timeline to add an issue and give the District time to respond.

On April 19, 2019, OSPI received the District's response to the complaint and forwarded it to the Parent on April 22, 2019. OSPI invited the Parent to reply with any information he had that was inconsistent with the District's information.

On April 22, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. On April 22, 2019, OSPI received the requested information from the District. OSPI forwarded this information to the Parent on April 23, 2019.

On April 22, 2019, OSPI received a copy of a request for a due process hearing, No. 2019-SE-0060, filed by the Parent. No. 2019-SE-0060 contained allegations that overlapped with the issue raised in SECC 19-24 and potentially concerned the same time period and same set of factual circumstances. Pursuant to WAC 392-172A-05035, on April 29, 2019, OSPI placed the issue identified for investigation in SECC 19-24 in abeyance pending the resolution of the due process hearing No. 2019-SE-0060.

On June 18, 2019, the Parent emailed OSPI, checking on the status of SECC 19-24, and stated he had withdrawn the due process hearing request. OSPI confirmed that the Parent withdrew his request for a due process hearing and that 2019-SE-0060 was dismissed.

On June 20, 2019, OSPI sent the Parent a letter that read, in part:

As stated in OSPI's April 29, 2019 letter, as OSPI is proceeding with the investigation, it will consider the following: on April 29, 2019, OSPI received a new request for a special education citizen complaint from [the Parent], which alleged that the District transported the Student on public transportation on November 30, 2018, "in violation of his BIP, against the wishes of his family, and in violation of the previous understanding between the school and [the Student's] family." While OSPI previously declined to add an additional issue to SECC 19-24 for the above reasons (also detailed in previous letters from OSPI), it has become clear that this issue is intertwined with the original issue opened in SECC 19-24. It will not be possible to address the original complaint issue in SECC 19-24 without considering the November 30, 2018 incident as a whole, including: the Student's BIP as a whole, the de-escalation strategies, and the transportation concerns.

In the June 20, 2019 letter, OSPI stated that the following issue would be investigated in SECC 19-24: "Did the District implement the Student's individualized education programs (IEPs) and behavioral intervention plan (BIP) on November 30, 2018, including 'access to call home (see behavior intervention plan)' and de-escalation strategies; and, did the District implement 'access to call home (see behavior intervention plan)' on January 15, 2019?"

On June 20, 2019, OSPI established a new timeline for investigating SECC 19-24: OSPI stated that the District would have until July 12, 2019 to provide an additional response; that the Parent would then have an opportunity to submit an additional reply; and that OSPI would issue a decision no later than August 16, 2019.<sup>1</sup>

On July 3, 2019, OSPI received the District's additional response under the new timeline and forwarded it to the Parent on July 5, 2019. OSPI invited the Parent to reply with any information he had that was inconsistent with the District's information.

On July 10, 2019, OSPI received the Parent's reply under the new timeline. OSPI forwarded that reply to the District on July 11, 2019.

On July 18, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. On July 22, 2019, OSPI received the requested information from the District. OSPI forwarded this information to the Parent that same day.

On July 24, 2019, OSPI received additional information from the Parent. OSPI forwarded that information to the District on July 25, 2019.

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<sup>1</sup> WAC 392-172A-05035(1) states that, "if a written complaint is received that is also the subject of a due process hearing...OSPI must set aside any part of the complaint that is being addressed in the due process hearing...until the conclusion of the hearing." WAC 392-172A-05035(1) (emphasis added); *see also Questions and Answers on IDEA Part B Dispute Resolution Procedures* (Office of Special Education and Rehabilitative Services July 2013) (Question B-21); WAC 392-172A-05025(7)(b) (The 60-day decision deadline can be extended if "the complainant and school district...agree in writing to extend the time to use...an alternative dispute resolution method").

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

### **SCOPE OF INVESTIGATION**

This decision references events which occurred prior to the investigation time period, which began on March 29, 2018. These references are included to add context to the issue under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation time period.

### **ISSUE**

1. Did the District implement the Student's individualized education programs (IEPs) and behavioral intervention plan (BIP) on November 30, 2018, including "access to call home (see behavior intervention plan)" and de-escalation strategies; and, did the District implement "access to call home (see behavior intervention plan)" on January 15, 2019?

### **LEGAL STANDARDS**

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 who is eligible to receive special education services. A school district must ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. The initial IEP must be implemented as soon as possible after it is developed. 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 [child with a disability] and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

Behavioral Intervention Plan (BIP): A behavioral intervention plan is a plan incorporated into a student's IEP if determined necessary by the IEP team for the student to receive FAPE. The behavioral intervention plan, at a minimum, describes: the pattern of behavior(s) that impedes the student's learning or the learning of others; the instructional and/or environmental conditions or circumstances that contribute to the pattern of behavior(s) being addressed by the IEP team; the positive behavioral interventions and supports to reduce the pattern of behavior(s) that impedes the student's learning or the learning of others and increases the desired prosocial behaviors and ensure the consistency of the implementation of the positive behavioral interventions across the student's school-sponsored instruction or activities; and the skills that will be taught and monitored as alternatives to challenging behavior(s) for a specific pattern of behavior of the student. WAC 392-172A-01031.

Health Plans: A district is required to include the provisions of a student’s health plan into their IEP. An IEP must include a statement of how the student’s disability affects the student’s involvement and progress in the general education curriculum, and the IEP team is required to consider, and describe in the IEP as appropriate, the related services, supplementary aids and services, and accommodations a student needs to enable his/her participation in his/her education and to support his/her teachers. 34 CFR §300.320; WAC 392-172A-03090. And a health plan, when deemed necessary for a student by that student’s IEP team, represents a related service under the IDEA. See WAC 392-172A-01155(1).

**FINDINGS OF FACT**

1. During the 2018-2019 school year, the Student was in ninth grade and attended a District high school. The Student was eligible for special education services under the category of intellectual disability.
2. The District’s response included a health plan for the Student, dated August 16, 2018. The August 2018 health plan stated that the Student is prone to four different types of seizures: absence, neural, frontal lobe, and grand mal. The August 2018 health plan read, in part: “[Student] calls his seizures a ‘shake’ [or ‘head shake’] and [states that it] feels like jelly in his head.” The August 2018 health plan stated the following are “seizure triggers or warning signs:” strong emotions, smells, strobe light/flashing lights, and over exertion.
3. On September 5, 2018, the District issued the Parent a prior written notice that read, in pertinent part: “[Student] has medical concerns that can impact his behaviors. He is prone to...seizures that can be brought on by stress or stressful situations.”
4. On September 19, 2018, the Student’s IEP team created a new annual IEP for the Student. Relevant portions of the September 2018 IEP are as follows:
  - Team Considerations: [Student] has a behavioral intervention plan [BIP] and benefits from using breaks...[Student’s] current BIP is working well and we will continue to use it.
  - Present Level of Educational Performance – Medical-Physical: [Student] is prone to four different types of seizures. He has a medical plan to follow if he has a grand mal seizure at school. If a seizure lasts longer than 4 minutes, the school nurse will be the first line of defense to administer midazolam nasally to [Student].

Among other accommodations, the Student’s 2018 IEP included the following:

<b>Accommodation</b>	<b>Frequency</b>	<b>Location</b>	<b>Duration</b>
Access to call home (see behavior intervention plan (BIP))	When [Student] requests to call	Special education and general education	09/19/2018 to 09/18/2019
Allow for breaks	When [Student] feels stressed or anxious	Special education and general education	09/19/2018 to 09/18/2019
When [Student] is escalated staff working with [Student] need to use a calm voice, give [him] ample space and get down at his level (see BIP)	When [Student] is escalated	All school settings	09/19/2018 to 09/18/2019

5. On September 19, 2018, the Student's IEP team also created a BIP for the Student. The September 2018 BIP read, in part:

**Target Behavior: Escalating Behaviors**

Starts with no talking, chews on clothing, sad look on his face, skin will start to flush, leaves room without permission and starts walking, may start to tear things off the walls, defiant (ability to reason is not there), tries to provoke others by name calling and getting into your bubble.

...

**Intervention Strategies** (the replacement behavior that will be taught to meet the hypothesized function in a more socially appropriate manner)

- Take a break in a designated safe space.

**Setting Event Strategies** (how the environment will be set up to decrease the likelihood of the target behavior and increase the replacement behavior)

- Safe environment with a trusted adult (needs to have [a] relationship with staff members to feel safe and be able to discuss what is upsetting him or if he is having a 'shake.'

...

**Antecedent Strategies** (how will the events that immediately precede the target behavior be addressed to minimize or prevent the behavior?)

- Give [Student a] choice and walk away.
- Give [Student] time to process and decide (it could take about 15 minutes).
- If unable to decide, ask if he would like a break or call dad.
- First...then.
- Avoid ultimatums and saying 'no.'
- Use simple sentences with few words.
- Works of interest to [Student] with a mixture of hands on and written work.
- Ask [Student] if he wants a snack or something to eat or drink.

**Teaching Strategies** (what skills will be taught to the student, and how will staff teach those positive behaviors)

- Relaxation techniques (deep breathing).
- Use a friendly, caring tone when talking to [Student].
- Give [Student] an opportunity to express his viewpoint and feel heard.
- Problem solve through issues as a whole group and all individuals to voice their concerns.
- Reinforce with tangible reward for compliance (if this than that).

**Consequence Strategies** (what will happen after the replacement behavior occurs? AND what will happen after the target behavior occurs?)

- Use of the following rewards for following expectations: computer time, preferred board game with preferred adult, taking a walk.
- Use of calm, friendly voice when speaking with [Student].
- Positive verbal reinforcements from all adults through the day such as using the word 'proud.'
- First...then...wording and reward-based motivators.
- Increasing predictability.

**Reinforcement Plan** (what will staff use to increase the positive alternative/replacement behavior?)

- If [Student] becomes unsafe to himself or others (hitting, kicking, throwing items, destroying property) call Dad to notify [him] of [Student's] behaviors and talk to [Student] if possible.
- Clear the space of other students and unsafe objects.
- Staff de-escalating [Student] need to use a calm voice, give [Student] personal space, get down at his level, don't overreact, state to [Student] that no one is upset or angry with him, and not overwhelm him with verbal information when he is upset.
- Staff member must be traded out so that the person who is de-escalating him is not the person he is upset with.
- No use of words such as 'police' [or] 'principal.' Do not give ultimatums such as 'police may be called' etc.
- Remind [Student] he could possibly be having a seizure.
- Attempt to have [Student] to take a break in therapy room.
- Close doors to hallway to keep [Student] contained in one hallway to keep himself safe and so [as to] not destroy property.
- Notify administrators and life skills staff of the situation.
- Gather a team of right response-trained staff to stand by but not to put hands on unless [Student] poses safety risk to himself.

...

**De-escalation Plan** (Identify the signs staff will observe which indicate escalation and steps to follow should the student's behaviors escalate?)

- Staff will follow response plan above if [Student's] behaviors become unsafe to himself or others. A nurse will be available to watch for signs of a possible seizure but seizure medication should not be administered unless he has a grand mal seizure lasting longer than 4 minutes.

**Crisis and Recovery Plan** (steps to follow in the event of a crisis and steps to help the student return to baseline)

- Call Dad to determine whether [Student] should stay at school or if he would like to have him go home.

6. According to the Parent's complaint, the Parent believed that the Student's September 2018 IEP "allow[ed] [Student] to call family at his request."
7. According to the Parent's complaint, "on November 30, 2018, [Student] went to [a] grocery store with his life skills class...during the trip to the store, [Student] asked to call his mother, to tell her he had a 'head shake.' He was not allowed to call [his mother]."
8. The District's response included the following recollection of paraeducator 2 concerning the events of November 30, 2018:  
Our class planned to go to the grocery store...to do some shopping for their families. [Student] is always excited for this type of outing and brought a shopping list and money for his groceries. It was absolutely beautiful outside so it was decided that the class would walk to [the grocery store] and take the bus back. Knowing this would be hard on [Student], we came up with the alternative plan of taking the bus both ways (still providing the option

of walking to him in case he was interested). During his 6<sup>th</sup> period class (PE), I asked [Student] which method he would like to take to the store. He mentioned taking the Suburban but I told him that it was not an option for this trip. After answering a couple questions about why we couldn't take the Suburban, he chose the bus and was excited about purchasing the items on his list.

[Student, behavior intervention specialist], and myself made our way to the store and proceeded to shop. I want to note that [Student] was having a fantastic day at this point. He was extremely polite to all the cashiers and showed ability to be adaptable when he ran into adversities (example: having a hard time finding the tea section). Once the rest of the class arrived at the store, he wanted to join [special education teacher 1's] group, ask classmates about their shopping list, and travel in a group around the store. At one point, he even walked over to the bakery to get a cookie for one of the students that didn't get one earlier (no one prompted him to do so). I want to make note of these things because some of this behavior has NEVER been seen before from him when interacting with his classmates. He was truly blowing all of us away and all three staff ([special education teacher 1, behavior intervention specialist], and myself) were positively reinforcing these behaviors.

Things took a turn when we ran into [Student's mom] unexpectedly at the store. He asked her if he could come home with her after shopping, in which she told him no, he would need to go back with his class. I didn't notice a change in his mood but [behavior intervention specialist] noted that he did seem upset he wasn't able to go with her. While the rest of [special education teacher 1's] group was checking out, we walked over to the food court to take a break before the bus came. [Student] then stated that he had three shakes earlier in the day and needed to tell his mom. This was the first time I had heard about these shakes. I was surprised by this because [paraeducator 3] and [paraeducator 1] are very diligent about telling me (or anyone else in charge of him) if he has reported a shake earlier in the day. [Behavior intervention specialist] and I offered to call or text [Student's] dad knowing the odds of running into [Student's mom] again were slim. He persisted about finding her, so we offered to do a lap around the store and also created the backup plan of calling [Student's] dad in case we didn't find her. He agreed to this and we preceded into the store.

As predicted, we could not find [Student's] mom. [Student] became upset about this and did not want to leave the store. At this point, we are not able to do another lap because we need to start walking to the bus stop to catch the bus back to [high school]. [Student] slowly starts walking away from the store, still looking around for his mom, and outwardly showing he's sad about not being able to find her. [Behavior intervention specialist] and I have offered to call and text dad to tell him about the shakes. We even offer to call mom to tell her about them, but he refuses all options. At this point, he seems more sad than upset. [Behavior intervention specialist] and I try to comfort him by telling him we understand he's upset and agreeing this is something that would make us upset too (this has calmed him down in the past). We have also mentioned to him that we need to get going because we are going to miss the bus if we don't head out soon.

We get him to the crosswalk...and [Student's] behavior switches from sad/upset to mad. He starts using the term 'I don't care' when asked questions. He also states that he is going to eat his gum on the bus because he knows he's not allowed to eat on the bus. As the crosswalk signals us to cross, [Student] starts crossing the road at an abnormally slow pace

for him (one that would not allow him to make it across in the time allowed). There is a car that is trying to make the left and is in the middle of the intersection waiting for him. [Student] sees this and continues walking at this slow pace. By the time we get him to the other side, the light has changed which left three cars in the intersection and ultimately causing a traffic jam.

We continue walking towards the bus stop. [Student] seems to be picking up the pace but still doesn't show any interest in making efforts to catch the bus. At this point, I have called [special education teacher 1] and we have come up with an alternative plan to get picked up if needed. As we finally get on to the street the bus stop is on...we notice our bus has turned the corner and is now headed towards our bus stop. [Student] then notices a traffic cone sitting on the side of the street, picks it up, and slings it over his shoulder. He proceeds to pick up the pace, cone in hand, and we somehow manage to make it to the bus on time. [Behavior intervention specialist] attempted to do a trade for a bus pass for the cone. [Student] wanted nothing to do with this idea and wants to bring the cone on the bus. [Behavior interventions specialist] attempted to take the cone from him (without putting any hands on him, only the cone). This attempted [sic] was small and did not seem to escalate the situation at all. We get him on the bus, cone in hand, and proceed on our way.

During the bus ride, [Student] mentions that he brought the cone on the bus and that he stole it and was going to keep it in the class. He spends the bus ride sitting with his cone safely besides him. As we are getting off the bus and [Student] starts to push the cone against my arm. I quickly tell him that he is not to use the cone to harm people and if he wasn't going to abide by that rule the cone would be taken away. He's extremely fixated on keeping the cone in the class and is worried about someone taking it. He specifically points towards [behavior intervention specialist] and is worried she will be taking the cone. As soon as we have safely crossed the street, I get on the phone with [Student's dad] and let him know what's going on. [Student's dad] was one foot out the door and is on his way before the phone call was made as it was close to the time [Student] would normally be picked up (2:45ish). [Behavior intervention specialist] and I create a plan for her to stay with [Student] while I go down to grab his backpack. [Student] wants to walk down to the class so he can put his cone in the class.

Once back to class, [Student] makes multiple threats to other paras about touching the cone. He also makes a point to make sure [special education teacher 1] sees the cone in the classroom and would not leave the class until she did. He asked many times if someone was going to take the cone over the weekend. Both [behavior intervention specialist] and I stated that the cone was not his, it belonged to the city, and would need to be returned.

According to the District, "[The] behavior intervention specialist...who was present with [paraeducator 2] throughout the above account, reviewed this statement at the time of the incident and again on April 12, 2019, and confirms it is an accurate account of events as she remembers them."

9. On December 1, 2018, the Parent emailed special education teacher 1, stating, in part: [On November 30, 2018, Student] became upset because he wasn't able to tell his mother that he'd had a 'shake' earlier in the day. Apparently she had already left the store...When I arrived [at the school after the class returned from the grocery store, the behavior intervention specialist] was trying to remind [Student] that the traffic cone would be



returned, it was wrong to have taken it, and that it would not be there on Monday...Here are the issues I have with this matter: [Student] had a 'shake' while playing chess with [paraeducator 3]. He mentioned this to [paraeducator 3]...[And] why am I not being contacted when things like stealing a traffic cone happens? He was clearly agitated...If you can't de-escalate him on your own, you call.

...

[The behavior intervention specialist] chose to continue to tell [Student] that he wasn't right to steal the cone, but they allowed it [so as to] pacify him. The cone would be returned and not where he put it, on Monday. This was wrong at literally every possible turn. Reinforcing poor behavior (stealing a cone) to pacify him is unacceptable. That's theft. How do I now counter the reinforced tendency to steal when under stress. I should have been called, this should never have been allowed...Next, [the behavior intervention specialist] continued to confront him about the cone being wrong...and that it wouldn't be there on Monday. [Student] was continually agitated by this. There was simply no need to 'make this point' to him, he was having a frontal lobe seizure at that point.

10. In the investigation of this complaint, the Parent provided OSPI with his understanding of the events of November 30, 2018. In relevant part, the Parent's statement read:

While the notes indicate that staff was attempting to de-escalate [Student], it should be noted that he WAS escalated, and required de-escalation. [emphasis in original]...I was eventually called on the phone, and was told that [Student] was escalated, and was back at school. When I arrived to pick him up, he was having a frontal lobe seizure. He was still arguing with staff about the traffic cone, which he took [when he first started having the] frontal lobe seizure...The escalation could have been avoided...[Student's] BIP specifically states that he needs to be de-escalated in a quiet environment, away from other stressors...Per the Response Plan section of the BIP, I should have been notified as soon as the traffic cone was taken. [Furthermore, the fact that both the behavior intervention specialist and paraeducator 2 told Student that the cone was not his, that it belonged to the city, and that it needed to be returned means these individuals] engaged in argumentative behavior, when he [was] already escalated. The BIP is clear that this is NOT to be done by staff. [emphasis in original].

...

Again, [Student] was escalated and no attempt to contact his parents was made. There were two people with [Student] when he became escalated, either one could have called, neither did. That alone violated his IEP. As a secondary factor, family is to be notified when [Student] reports that he's had a 'shake.' That should have been cause to text or call immediately.

...

As for what I observed at the school when I arrived, the staff was not using 'Right Response Training' in deescalating [Student]. There was a continuous disagreement going on with [Student] and [the behavior intervention specialist]...That is direct confrontation with a student manifesting his disability, which goes against best practices, training and his documents, which call for quiet de-escalation. Continuing to argue and escalate him, when he's having a frontal lobe seizure can lead to a grand mal seizure. The actions of staff put him at the potential for greater harm, because they didn't follow right response procedures, and the required de-escalation in the documents [Student] has to [ensure he's provided] with FAPE.

11. In its response, the District made the following arguments in regard to the incident on November 30, 2018:

- During the outing to the grocery store, the Student did not become escalated, as defined by the 'Target Behavior' section of the Student's September 2018 BIP, until the class left the grocery store "and proceeded to the bus—Student began to show non-compliance (walking slowly enough to stall traffic, saying he will eat gum on the bus even though he knows it's not allowed, picking up a traffic cone and insisting on taking it with him);" and,
- When the Student did become escalated on November 30, 2018, District staff utilized appropriate de-escalation strategies from the Student's September 2018 BIP, including the following: taking a break with the Student; offering to call the Student's mom or dad; using a friendly, caring tone when talking with the Student; allowing the Student to express his viewpoint; and avoiding giving the Student ultimatums.

12. On December 4, 2018, OSPI issued a decision in SECC 18-91—a previous special education citizen complaint filed by the Parent. As part of the corrective action for that decision, OSPI required the following:

By or before January 31, 2019, the District will schedule an IEP meeting at a mutually agreeable time for the Parent, Student, and District to discuss the Student's BIP. The team will discuss the following topics during the meeting, at a minimum: Cell phone (including what it will be used for, how it will be used, and how the Student will access it in all settings, including when off campus).

13. On January 14, 2019, the Student's IEP team amended the Student's September 2018 IEP. Among other accommodations, the Student's January 2019 Amended IEP continued to include the following:

Accommodation	Frequency	Location	Duration
Access to call home (see behavior intervention plan (BIP))	When [Student] requests to call	Special education and general education	01/15/2019 to 09/18/2019

The "IEP Start Date" for the Student's January 2019 Amended IEP was January 15, 2019.

14. On January 14, 2019, the Student's IEP team also amended the Student's September 2018 BIP. The January 2019 Amended BIP does not mention the use of a phone. In pertinent part, the January 2019 Amended BIP read:

- Description of Target Behavior**
- Name Calling
  - Leaving room
  - Tearing items off walls
  - Following and verbally provoking staff to gain attention
  - Taking things that do not belong to him
  - Throwing objects
  - Destroying property
  - Hitting
  - Kicking
  - ...

**Response Plan (what will staff do if the target behavior occurs?)**

Notify teacher

Teacher notifies nurse, administration, and family

15. On January 14, 2019, the District issued the Parent a prior written notice that read, in part:

**1) What will the cell phone be used for?**

The cell phone will be used for medical and health purposes as described in [Student's] health plan.

**2) How will the cell phone be used?**

The cell phone will be used by school staff to communicate with the nurse, teacher, and family regarding [Student's] health needs throughout the school day.

**3) How will the para/staff working with [Student] access the cell phone in all settings including off campus?**

The cell phone will travel with the staff member working with [Student] to all school and community settings. His health plan was updated to document the need for staff to have access to a cell phone while they are working with [Student] to meet his medical needs.<sup>2</sup>

16. On January 14, 2019, the Student's IEP team amended his August 2018 health plan to include the following accommodation: "Student will have a phone available to be used by staff to alert parents to seizure activity."

17. According to the Parent's complaint:

On January 15, 2019, [Student] asked to contact home. He was told his phone use rights had changed and he wouldn't be immediately allowed to make contact any longer. He was told by his 1:1 paraeducator that this teacher had the phone at that time and that she would have to talk to him first. [Student] was frightened and cried. When the school eventually got in touch with me, I brought him home immediately...This is a violation of the IEP which was in place at the time.

18. The District's response included the following recollection of paraeducator 1 concerning the events of January 15, 2019:

Daily Living [Class]

Student asked to text home about possibly having a playdate with his friend...sometime. Because this is not an urgent health concern, I responded with the suggestion to write it down to share with Dad. I also went to share with the teacher about this as I could see [Student] was a bit resistant to writing his question down instead of texting. I handed the phone to the teacher and she responded that she would speak to [Student] about the situation. I again encouraged [Student] to write down his question and he asked me where the phone was. I told him that the teacher in our classroom has the phone and will be here in a minute to talk to you about the playdate. [Student] seemed fine and we continued to play Connect4. The teacher came to encourage [Student] to write down his question about a possible playdate. [Student] became upset because he was worried the phone was with the teacher. We reassured him that he was safe, and we had the phone the entire time.

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<sup>2</sup> These questions and answers also appear, with a substantively similar wording, in the District's meeting notes regarding the January 14, 2019 IEP meeting.

Community [Class]

...At 12:45 a note came down from the office stating, 'Now please, Dad is here' as his dad was at the office. [Student] asked me, 'Why is he here?' I told him I wasn't sure and that maybe he was here to take you home. [Student] seemed confused and responded, 'Nah, I'm gonna leave my stuff here.' We went up to the office and Dad said he was here to take [Student] home. I returned to classroom for [Student]'s things for him. He went home with Dad.

19. The District's response included the following recollection of paraeducator 3 concerning the events of January 15, 2019:

...Sometime during our normal morning routine, [Student] asked to use the phone to call his dad to tell him something funny. I took that opportunity to discuss the plan for the phone with [Student]. I explained to [Student] that his dad and the district had come up with a new plan trying to limit use of the phone for medical reasons. [Student] seemed curious and asked some follow-up questions like, "Why?" I told him I thought that it might be so that his dad would know that anytime we called it was very important. He did ask me if I had the phone with me, and I told him yes and showed it to him. He seemed to accept the idea and he did not ask to use the phone for the remainder of the morning. I also offered to get him a new composition book so he could record his ideas and share them later with his dad. [Student] seemed uninterested in the composition book idea and we just continued with our morning.

20. The District's response included the following recollection of special education teacher 1 concerning the events of January 15, 2019:

[Paraeducator 3] informed me of the conversation, I took note of this. If I thought that [Student] was escalating or harm was caused, I would have addressed this with him personally right away.

2nd period is my prep. I met with our technology support staff to begin to develop a One Note spreadsheet for [Student] to use as a communication tool for his family...

I was excited about all the different options [Student] had available to him...I am open to any idea that would get [Student]'s needs met; a composition book, sticky note, staff scribing for [Student], using "Notes" on an iPhone. I figured we would try many options and pick the one that works best for [Student].

3rd period. [Paraeducator 1] was supporting [Student] as his 1:1 paraeducator at this time. I was in the middle of instructing the class. [Paraeducator 1] approached me with the phone and stated that [Student] wanted to text his Dad to see if [another student] could come over. [Paraeducator 1] handed me the phone and I said I would be right there. I just needed to finish with the class and I will come talk to [Student]...This lasted maybe 30 seconds. When I got to [Student] I could see that he was crying. He said he was crying because the phone was not with him and it made him worried. He kept repeating 'what would my Dad have to say about this?' I got down on his level and listened to his concerns. I acknowledged that I could see that this made him feel unsafe. I assured him that my #1 priority is [Student]'s safety and that I would never have the phone outside of his safety zone. I could see [Student] the whole time, and if he had a seizure would be right there to help support him. I also told [Student] that I was sorry he felt unsafe and if it made him feel better I would make sure that the phone stayed in the off-shoot room with [Student]. Because he

was so worried about his Dad, I assured him that I would email him right away so he was aware of what had happened. \*see email below. He appeared to feel better about this and was calm when I left for Special Olympics basketball. My partner teacher [special education teacher 2] stayed behind and [paraeducator 1] and [Student] had plans to make pancakes.

*\* Thanks for coming to the meeting yesterday to discuss [Student]'s education and plans moving forward. [Paraeducator 1] brought me the phone today during class because [Student] was wanting to text you regarding having [a friend] spend the night. I was in the middle of class so I said I would finish up and then come talk to [Student] regarding this. Of course [Student] took it as "his phone was not with his medication." I assured him that I had his phone and I would not let anything happen to him that would put him in harm's way.*

*I let [Student] know that I met with the tech guy on ONE NOTE and how it works. I think it is a great way for [Student] to communicate with you. It has video and voice recognition that he can just talk into. Very cool. I will make time in the next day to show him some of the features. He will be able to take it home and show you what he came up with. Letting you know that he would like to have a friend over is a perfect time to get his thoughts down so he doesn't forget later.*

*I'm wondering if maybe you, [Student] and I should talk together about implementing the "journaling" type of communication with you so he doesn't get confused or worried.*

I did not get the impression that [Student] was upset that he could not contact dad, but that the phone was not with him in his medication pouch. I did mention to Dad in my email that I do think it is important to have all of us sit down together to come up with a plan on how the communication will look. I know the importance of buy-in by [Student] and Dad to make this a successful transition. I don't think it is good to spring changes on [Student], which is the reason I mentioned it in the email.

*\* I want to note that [Student] actually did text his Dad and asked about getting together with [his friend]. This was a new change and I was not going to hold a rigid ground until we had a chance to properly implement this change.*

When I arrived back to school, Dad had already pulled [Student] out of school. I tried to call him right away, but he was driving and could not take my call. I texted him about a half hour later and asked him to call me because I think there was a misunderstanding and I wanted to explain what had happened. He texted me back and said he was done talking to me and he was not happy.

[Student] came to school the next day, the 15th of Jan.<sup>3</sup> Dad continually emailed the team throughout the day inquiring about the status of the IEP/BIP. I emailed him back that same day.

"We have a current plan in place and are following it. The team will need to meet and go through the IEP process to talk about any changes and input to the plan. I will have the secretary call you today so we can get a meeting scheduled as soon as possible."

Dad emailed that he was keeping [Student] home until a new IEP/BIP meeting.

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<sup>3</sup> Based on the documentation in this complaint, this is a typo and should read: "the next day, the 16<sup>th</sup> of Jan."

21. On January 15, 2019, special education teacher 1 emailed the Parent, stating, in part:  
[Paraeducator 1] brought me the phone today during class because [Student] was wanting to text you regarding having [a friend] spend the night. I was in the middle of class so I said I would finish up and then come talk to [Student] regarding this...of course [Student] took it as 'his phone was not with his medication.' I assured him that I had his phone and would not let anything happen to him that would put him in harm's way.
22. On January 29, 2019, the assistant special education director (assistant director) emailed the Parent, stating, in part:  
The phone is intended for the purpose of notifying you in case of medical emergency, or for calling 911 in the event [Student] needs immediate medical attention due to a seizure, not for behavior stabilization. The written guidelines for cell phone use are included in the IEP, BIP, and health plan.
23. On January 30, 2019, following a meeting with the Parent, the District issued the Parent a prior written notice that read, in part:  
A meeting was held on January 14<sup>th</sup> to clarify the purpose of the use of a cell phone as part of [Student's] IEP, as a corrective action for a Citizen Complaint through OSPI. The change to the BIP was implemented after the initiation date, however, the parents requested an additional meeting to provide more input. The District agreed to hold another meeting on January 30<sup>th</sup> to consider parent input.  
  
Considered parent input that [Student] should have unlimited access to use the district cell phone throughout the day as a behavior stabilization strategy. Parents requested that the BIP be changed to reflect that the District cell phone be used as a management tool for [Student's] anxiety and behavior.  
  
The reasons we rejected those options: 1) unlimited access to a district cell phone for [Student] is interfering with his ability to focus on instruction and is disruptive to the educational environment; 2) it was agreed upon by the team at the January 14<sup>th</sup> meeting that the district cell phone was for emergency health purposes only; 3) classroom data shows that [Student] is improving his ability to stabilize his behavior through the use of instructional strategy described [in his BIP] that do not include unlimited access to calling or texting his family; 4) the district would like to focus on student independence.
24. On February 22, 2019, OSPI mailed the District superintendent a letter, and carbon copied the Parent. In this letter, OSPI confirmed that the District had complied with the corrective action requirements of 18-91, and that OSPI was closing the case file for SECC 18-91. The letter read, in part:  
Because [Parent] disagreed with [the decision to eliminate] the cellphone from the BIP, [which was made at the January 14, 2019 meeting], the IEP team met again on January 30, 2019, to provide [Parent] with another opportunity to provide input in the decision. The team again determined that the cellphone should not be a part of the plan to address the Student's behavior. The District provided [Parent] prior written notice regarding its decision. The documentation demonstrated that the District followed proper procedures in conducting the IEP meetings by providing [Parent] with an opportunity to provide input into the decision making, providing prior written notices, and making a decision based on Student specific information.

25. On March 1, 4, and April 10, 2019, the Student's IEP team met and further amended his IEP and BIP.<sup>4</sup> The April 2019 IEP does not include the following accommodation: "Access to call home (see behavior intervention plan) – frequency: when [Student] requests to call."

## CONCLUSIONS

**IEP Implementation: November 30, 2018: Phone Call** – The Parent alleged that, on November 30, 2018, the District did not implement those portions of the Student's individualized education program (IEP) that pertained to phone calls. A school district must ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. When present, a behavioral intervention plan (BIP) and health plan are considered part of a student's IEP. 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 child with a disability and those required by the IEP.

In analyzing what was required of the District concerning phone calls on November 30, 2018, the Student's September 2018 IEP documents (IEP, BIP, and health plan) must be read together. According to these documents, there were three situations in which a phone call was supposed to be placed to the Parent:

- i. If the Student was escalated, as defined by the Target Behavior section of the September 2018 BIP, and then the Student asked to call his Parent.<sup>5</sup>
- ii. If the "Student [became] unsafe to himself or others (hitting, kicking, throwing items, destroying property)" (Reinforcement Plan section of BIP).
- iii. If the Student underwent a "crisis" (Crisis and Recovery Plan section of BIP).

Situation One: The September 2018 IEP and BIP required that a phone call be placed to the Parent if: a) the Student was escalated; and b) the Student then asked to call his Parent.

It is not clear when the Student first became escalated during the outing to the grocery store. The "Target Behavior" portion of the Student's BIP mentioned the following were signs the Student was escalated: he would get a "sad look on his face [and his] skin [would] start to flush." Here, the behavior intervention specialist did note the Student seemed "upset [when] he wasn't able to go [home] with [his mom]" after seeing her at the grocery store. Assuming the Student was escalated at this moment, the record does not show that the Student then asked to call his mother.

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<sup>4</sup> This fact is taken from the information provided in SECC 19-41, another special education citizen complaint filed by the Parent regarding the Student's educational program. These amended IEPs and BIPs were not in effect during the alleged incidents at issue in this complaint.

<sup>5</sup> The Student's September 2018 IEP included the following accommodation: "access to call home." The frequency with which this accommodation was to be provided was: "when [Student] requests to call." These provisions, however, were clearly intended to be incorporative of the Student's September 2018 BIP, as the provision included the following language: "see behavioral intervention plan." And, importantly, under the BIP, the District's obligation to place a phone call to the Parent was conditioned on the Student first being escalated—again, as defined in the Target Behavior section of the September 2018 BIP.

According to the behavior intervention specialist and paraeducator 2, the following events took place: District staff offered to call the Student's dad; the Student opted to look for his mom in the grocery store instead; District staff and the Student were not able to find the Student's mom; District staff then offered to call either the Student's mom or dad; the Student "refuse[d] all options." Under these facts, Situation One did not occur, and therefore, the District was not obligated to call the Parent.

The "Target Behavior" portion also mentions the Student was escalated whenever he was "defiant" and/or violated another person's personal space.<sup>6</sup> Here, the District concedes the Student became defiant when he said he was "going to eat his gum on the bus because he [knew he wasn't] allowed to eat on the bus" and when he refused to give up the traffic cone. It also appears that he violated paraeducator 2's personal space at the end of the bus ride by "pushing the cone against [paraeducator 2's] arm." There is nothing in the record, though, that suggests that, after these events, the Student requested to call his Parent. Even assuming the Student did request to call his Parent, paraeducator 2 called the Parent soon after the class exited the bus after returning to school. Therefore, these events do not represent a violation of the September 2018 BIP.

Situation Two: The September 2018 BIP also required that a phone call be placed to the Parent in the event the "Student [became] unsafe to himself or others (hitting, kicking, throwing items, destroying property)." According to the behavior intervention specialist and paraeducator 2's statements, the only time the Student potentially became "unsafe to himself or others" was when he pushed the cone against paraeducator 2's arm during the bus ride back to school. As discussed above, soon after the bus returned to school, paraeducator 2 called the Parent. Therefore, these events do not represent a violation of the September 2018 BIP.

Situation Three: The September 2018 BIP also required that a phone call be placed to the Parent in the event of a "crisis." Neither the September 2018 IEP nor the September 2018 BIP define the term "crisis." A reasonable interpretation of this term is as follows: a crisis, as that term is used in the September 2018 BIP, means one of the following three situations occurs: a) the Student experiences a significant—meaning above normal—manifestation of the "Target Behavior"; b) the Student becomes unsafe to himself or others; or c) the Student suffers and/or reports a seizure. Only one of these three potential "crises" appears to have occurred during the outing to the grocery store: soon after seeing his mom in the store, the Student reported experiencing a "head shake" (seizure) earlier that morning. Therefore, at that point in time, District staff had an affirmative duty to call the Student's Parent to inform him that the Student potentially had a seizure earlier. As this did not occur, this represents a violation of the September 2018 BIP.

For several reasons, though, this represents a minor discrepancy between what was in the Student's IEP and what was provided to the Student. First, the Student's September 2018 IEP and BIP do not actually define the word "crisis"—OSPI had to define that term from a reading of those documents, as well as a reading of the Student's health plan. Second, this incident represents one time the District did not call the Parent, on one single day; in other words, the record does not contain evidence of a systemic refusal by District staff to call the Parent when the Student reported

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<sup>6</sup> The September 2018 BIP describes the latter category as "getting into your bubble."



a seizure. Third, District staff actually offered to call the Parent but the Student refused. Fourth, the Student did not report that he was currently experiencing a seizure, rather, he reported that he experienced “head shakes” earlier in the day. For these reasons, this represents a minor discrepancy between what was in the Student’s IEP and what was actually provided to the Student, and therefore, this does not represent a denial of a free appropriate public education (FAPE) and no corrective actions are warranted.

**IEP Implementation: November 30, 2018: De-escalation Strategies** – The Parent alleged that the District did not utilize the de-escalation strategies in the Student’s September 2018 IEP and BIP on November 30, 2018. A school district must ensure it provides all services in a student’s IEP, consistent with the student’s needs as described in that IEP. 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 child with a disability and those required by the IEP.

Here, the facts show that, on November 30, 2018, District staff materially implemented the de-escalation strategies in the Student’s September 2018 IEP and BIP. For example, the September 2018 BIP says that the Student should be allowed to take breaks when he is escalated. According to the behavior intervention specialist and paraeducator 2, soon after the Student first began to become upset, “while the rest of the group was checking out, we walked over to the food court to take a break.” The September 2018 BIP also stated that the Student should be “ask[ed] if he would like a break or [to] call dad.” According to the behavior intervention specialist and paraeducator 2, they asked the Student if he would like to call the Parent soon after they took a break in the food court. (The Student opted to physically look for his mom instead.) The September 2018 BIP stated that District staff should “use a calm voice [with the Student], get down at his level, [and] state to [Student] that no one is upset or angry with him.” According to the behavior intervention specialist and paraeducator 2, before the class got on the bus, they tried “to comfort [Student] by telling him we understand he’s upset and agreeing this is something that would make us upset too.” In these instances, the September 2018 IEP and BIP were materially followed.

More specifically, the Parent alleged that the September 2018 BIP was not followed when District staff engaged in “argumentative behavior” with the Student regarding the traffic cone.<sup>7</sup> The September 2018 BIP does state District staff should “avoid ultimatums and saying ‘no’ [to the Student].” Here, District staff reminded the Student multiple times that the traffic cone did not belong to him and that it would eventually have to be returned; the behavior intervention specialist and paraeducator 2 both report they “stated that the cone was not his, it belonged to the city, and would need to be returned.” These individuals also report that the behavior

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<sup>7</sup> OSPI notes, though, that in his email to special education teacher 1, dated December 1, 2018, the Parent appears to take the opposite stance—stating that District staff were somehow too lenient in their response to the Student having taken the traffic cone: “[District staff] allowed [the Student to keep the traffic cone so as to] pacify him...This was wrong at literally every possible turn...I should have been called, this should never have been allowed.”

intervention specialist “attempted to take the cone from him (without putting any hands on him, only the cone).” Given all factors related to the incident on November 30, 2018, it is clear the September 2018 IEP and BIP were materially implemented. Therefore, OSPI does not find a violation.

**IEP Implementation: January 15, 2019: Phone Call** – The Parent alleged that the District violated the Student’s BIP on January 15, 2019 by not allowing the Student to call the Parent when he made such a request.

On January 14, 2019, the Student’s IEP team determined that, moving forward, the cell phone would only “be used for medical and health purposes.”<sup>8</sup> On that same date, the Student’s IEP team amended the Student’s August 2018 health plan by adding the following accommodation: “[Student] will have a phone available to be used by staff to alert parents to seizure activity.”

According to District staff, on January 15, 2019, the Student asked to call the Parent on two occasions: once because he wanted to ask if a friend could have a sleepover; and once because he wanted to share a funny story with his dad. Neither of these occurrences involved the Student’s seizure condition; thus, no call to the Parent was necessary. Therefore, the January 2019 Amended IEP and BIP were properly implemented on January 15, 2019.<sup>9</sup>

OSPI does note the January 2019 Amended IEP continued to include the following accommodation: “Access to call home (see behavior intervention plan) – frequency: when

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<sup>8</sup> On several occasions, the Parent expressed disagreement with the substantive decision the IEP team made at the January 14, 2019 meeting concerning the use of the phone. OSPI has had several communications with the Parent concerning this disagreement—for example, letters dated February 22 and 28, 2019, and an email dated March 4, 2019. In these communications, OSPI expressed the following to the Parent: a) while the Student’s IEP team was required to consider his input on decisions affecting the education of the Student, state regulations do not permit the Parent to unilaterally dictate provisions of the Student’s IEPs and related documents; ultimately, it is the District’s responsibility to offer the Student a FAPE—and this, potentially, may look different than that desired by the Parent; b) the District complied with the required corrective actions in SECC 18-91 by holding IEP meetings on January 14, 2019 and January 30, 2019; c) the District followed proper procedures under the IDEA in conducting the aforementioned meetings; and, d) if the Parent wants to pursue his contention that the substantive decision made at the January 14, 2019 and January 30, 2019 meetings was erroneous, the most appropriate dispute resolution mechanism for him to utilize is a due process hearing request.

<sup>9</sup> The January 2019 Amended BIP does state the teacher is to be notified if the Target Behavior occurs, and the teacher is to, in turn, notify the “nurse, administration, and family.” Assuming that this language required the District to call the Parent in the event of an occurrence of the Target Behavior, as opposed to a text or email, there is no evidence that the Target Behavior actually occurred on January 15, 2019. The January 2019 Amended BIP defines Target Behavior as: name calling; leaving room; tearing items off walls; following and verbally provoking staff to gain attention; taking things that do not belong to him; throwing objects; destroying property; hitting; kicking. According to District staff, during one moment on January 15, 2019, the Student was confused. During another moment, he was crying. Neither of these emotions or behaviors meet the definition of Target Behavior under the January 2019 Amended BIP. Therefore, the District was not obligated to contact the Parent about them.

[Student] requests to call.” Given the totality of the circumstances, it is clear that the Student’s IEP team intended to limit the use of the cell phone, starting January 15, 2019; the Student’s IEP team did not intend that the phone be used whenever the Student requested it; the Student’s BIP was amended to limit its use to situations where the Student’s health concerns were implicated, and this change was reflected in two prior written notices to the Parent, one email to the Parent, in internal meeting notes, and in an amended health plan. However, OSPI notes that the inclusion of the above language could have been potentially confusing. In the Student’s most current IEP, dated April 10, 2019, though, this language is not present; therefore, no further action is needed.

### **CORRECTIVE ACTIONS**

#### **STUDENT SPECIFIC:**

None.

#### **DISTRICT SPECIFIC:**

None.

Dated this \_\_\_\_ day of August, 2019

Glenna Gallo, M.S., M.B.A.  
Assistant Superintendent  
Special Education  
PO BOX 47200  
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.)