

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-129**

### **PROCEDURAL HISTORY**

On October 25, 2022, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Tumwater 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 October 31, 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 November 17, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent on November 21, 2022. OSPI invited the Parent to reply.

On November 30, 2022, OSPI received the Parent's reply. OSPI forwarded that reply to the District on the same day.

On December 20, 2022, OSPI determined that additional information would be helpful to the investigation and contacted the District. OSPI received the requested information from the District on the same day. OSPI forwarded that information to the Parent on December 23, 2022.

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

### **SCOPE OF INVESTIGATION**

The time period under investigation begins on October 26, 2021, as OSPI may investigate only those issues occurring during a one-year period. Any information included from events prior to October 26, 2021, is mentioned for informative, background purposes only.

### **ISSUES**

1. From October 26, 2021 through the end of the 2021–2022 school year, did the District properly implement those portions of the Student's individualized education program (IEP) that related to providing the Student with a behavior technician, specially designed instruction in reading, and a 1:1 paraeducator?<sup>1</sup>
2. From October 26, 2021 through the end of the 2021–2022 school year, did the District follow proper procedures for reporting the Student's progress on any IEP goals related to occupational therapy?

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<sup>1</sup> In her reply, the Parent clarified, "I apologize for the misunderstanding – I never meant to say that Student [was] not...provided a 1:1 paraeducator. I know he did have a 1:1 paraeducator provided and I spoke with [the individual that served as Student's 1:1 paraeducator] quite a bit, as I helped her create...daily check-in sheets on google that [were, in turn] provided [to] me daily."

3. In June 2022, did the District follow proper IEP development procedures, specifically, did the IEP team possess sufficient data on the Student's behavior needs resulting from the Student's disability such that the removal of the behavior technician IEP provision was appropriate?<sup>2</sup>
4. In October 2022, did the District follow proper reevaluation procedures, specifically, was the October 2022 reevaluation sufficiently comprehensive to address all areas of potential need in the area of behavior?

## **LEGAL STANDARDS**

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. 34 CFR §§300.320 through 300.328; WAC 392-172A-03090 through 392-172A-03115. It must also 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).

Compensatory Education: A state educational agency is authorized to order compensatory education, as appropriate, through the special education Community complaint process. 34 CFR §300.151(b)(1); WAC 392-172A-05030. The state educational agency, pursuant to its general supervisory authority, has broad flexibility to determine appropriate remedies to address the denial of appropriate services to an individual child or group of children. *Letter to Lipsitt*, 181 LRP 17281 (2018). Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 56 IDELR 31, (9<sup>th</sup> Cir. 2011); *See also, Letter to Lipsitt*, 181 LRP 17281 (2018) ("The purpose of a compensatory services award is to remedy the public agency's failure to provide a child with a disability with 'appropriate services' during the time that the child is (or was) entitled to a free appropriate public education and was denied appropriate services.")

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<sup>2</sup> During this investigation, both Parent and District clarified that the accurate time period for Issue 3 was November 2021. In other words, the Student's IEP team removed the Student's previously-provided behavior technician support in November 2021, not in June 2022.

IEP Must State Amount of Services: An IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the student, or on behalf of the student. An IEP must also include a statement of the program modifications or supports for school personnel that will be provided to enable the student: to advance appropriately toward attaining the annual IEP goals; to be involved and progress in the general curriculum in accordance with present levels of educational performance and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children in the above activities. 34 CFR §300.320(a)(4); WAC 392-172A-03090(1)(d). "The amount of services to be provided must be stated in the IEP, so that the level of [the district's] commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be (1) appropriate to the specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP." Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,475, 12,479 (March 12, 1999) (34 CFR Part 300, Question 35).

Progress Reporting: The purpose of progress reporting is to ensure that, through whatever method chosen by a school district, the reporting provides sufficient information to enable parents to be informed of their child's progress toward the annual IEP goals and the extent to which that progress is sufficient to enable the child to achieve those goals. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir, 2001) (parents must be able to examine records and information about their child in order to "guarantee [their] ability to make informed decisions" and participate in the IEP process). IEPs must include a statement indicating how the student's progress toward the annual goals will be measured and when the district will provide periodic reports to the parents on the student's progress toward meeting those annual goals, such as through the use of quarterly or other periodic reports concurrent with the issuance of report cards. 34 CFR §300.320(a)(3); WAC 392-172A-03090(1)(c).

Entitlement to Receive Related Services: Each eligible student is entitled not only to receive special education, but also to such related services as are required to assist the child to benefit from that special education. Related services must be listed in the student's IEP. 34 CFR §300.320(a)(4); WAC 392-172A-03090(1)(d).

Prior Written Notice: Prior written notice ensures that the parent is aware of the decisions a district has made regarding evaluation and other matters affecting placement or implementation of the IEP. It documents that full consideration has been given to input provided regarding the student's educational needs, and it clarifies that a decision has been made. The prior written notice should document any disagreement with the parent, and should clearly describe what the district proposes or refuses to initiate. It also includes a statement that the parent has procedural safeguards so that if they wish to do so, they can follow procedures to resolve the conflict. Prior written notice is not an invitation to a meeting. 34 CFR 300.503; WAC 392-172A-05010.

Prior written notice must be given to the parent within a reasonable time before the district initiates or refuses to initiate a proposed change to the student's identification, evaluation, educational placement, or the provision of a free appropriate public education. It must explain

why the district proposes or refuses to take action. It must describe any other options the district considered, and it must explain its reasons for rejecting those options. 34 CFR 300.503; WAC 392-172A-05010.

IEP Development: When developing each child's individualized education program (IEP), the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child. 34 CFR §300.324(a). WAC 392-172A-03110.

Basis for IEP Team Decisions: Generally speaking, an IEP team's decisions must be based on a student's needs resulting from that student's disability. *See generally* WAC 392-172A-03090(1); *see also* WAC 392-172A-03110. An IEP team should base its decisions on appropriate programming for a student on sufficient, relevant data on the student's needs resulting from the student's disability. *See, e.g.,* WAC 392-172A-03020(g); *see also, generally,* WAC 392-172A-03090.

Reevaluation Requirements: The reevaluation must be conducted in all areas of suspected disability and must be sufficiently comprehensive to identify all of the student's special education needs and any necessary related services. 34 CFR §300.304; WAC 392-172A-03020(3).

Reevaluation – Review of Existing Data: As part of a reevaluation, the IEP team and other qualified professionals must review existing data on the student. Existing data includes previous evaluations, independent evaluations or other information provided by the parents, current classroom-based assessments, observations by teachers or service providers, and any other data relevant to the evaluation of the student. 34 CFR §300.305(a); WAC 392-172A-03025. If the student's IEP team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the student continues to be eligible for special education services, and/or to determine the student's educational needs, the school district must notify the parents of that determination, the reasons for the determination, and the parents' right to request an assessment to determine whether the student continues to be eligible for special education and/or determine the student's educational needs. 34 CFR §300.305(d); WAC 392-172A-03025(5). The review of existing data does not need to be conducted through a meeting, but if a meeting is held, parents must be provided with notice and afforded an opportunity to participate. 34 CFR §§300.305(b); 300.501(b); WAC 392-172A-03025(3); WAC 392-172A-05000(2).

## **FINDINGS OF FACT**

### **2020–2021 School Year**

1. The District's response included a narrative 'Progress Report' for the Student, dated May 27, 2021. It noted, in part:
  - Increased times in school and surrounding peers/stimuli correlated with an increase in maladaptive episodes and rates of target behaviors, albeit in spiking variability. At the same time, Student showed increasing ability to engage in replacement and desired behaviors at steadier upward trending rates. These trends in data show promise in that Student is proving receptive to finding more appropriate ways to get his needs met without being

dependent on maladaptive behaviors, as well as willing to accept praise and reinforcement from support staff. Further analysis of data will look for a plateauing of target behaviors as replacement/desired behaviors continue their upward trend.

### **2021–2022 School Year**

2. The District's first day of school was September 13, 2021.
3. At the start of the 2021–2022 school year, the Student was eligible for special education services under the category of developmental delay, was in the first grade, and attended a District elementary school. At that time, the Student's June 2021 IEP was in effect.

The June 2021 IEP read, in part:

#### **General Education Teacher Report**

Student has a one-on-one paraeducator that works with him throughout his day. The purpose of this paraeducator is to help Student control his impulses. There is also an outside agency, provided by the district, that works with Student; a Board Certified Behavior Analyst is here to do weekly checks on what is going well and on any necessary adjustments, and a behavior technician also works daily with Student. The behavior tech's role is to shape Student's behavior, but also to help train Student's one-on-one paraeducator. The district will continue to provide this level of support until there is data to support there is no longer a need. *This support, and the one-on-one paraeducator, is meant to be faded out and will end when Student has reached 80% independence (without needing direct support to manage his behavior). The outside agency Behavior Tech will be faded prior to the one-on-one paraeducator support.*

(Emphasis in original.)

The June 2021 IEP included, in part, the following annual goals:

- **Adaptive:** ability to engage in small group or academic activities with support, improving exhibiting behaviors such as turn-taking, rule-following, and sharing while refraining from any target maladaptive behaviors at an 80% success rate across 5 consecutive school days, from being able to do so with support, approximately 50% of the time.
- **Reading:** ability to read sight words.
- **Social/Emotional 1:** ability to transition between school activities without engaging in maladaptive behavior, improving from being unable to do so to an 80% success rate across 5 consecutive school days.
- **Social/Emotional 2:** ability to emotionally regulate and articulate feelings, improving from approximately 50% of the time to 80% of the time.

The June 2021 IEP stated progress on the goals was to be reported via a written progress report each quarter.

The June 2021 IEP provided the Student with the following support, "behavioral analyst consultation for team: will be faded when Student is at 80% independence." The June 2021 IEP included, in part, the following accommodations: breaks; "fidgets for transportation"; "behavior plan"; "calm down area"; and "positive behavior tracking chart." The June 2021 IEP

provided the Student with the following specially designed instruction (SDI) in a *special education setting*:

- **Social/Emotional:** 45 minutes 4 times a week (to be provided by special education staff)

The June 2021 IEP provided the Student with the following SDI in a *general education setting*:

- **Adaptive:** 40 minutes 4 times a week (to be provided by special education staff)
- **Cognitive:** 30 minutes 4 times a week (to be provided by special education staff)<sup>3</sup>

The June 2021 IEP did not provide the Student with any SDI, related services, or supports for staff related to occupational therapy (OT). (The District's response read, in part, "[When the June 2021 IEP was created], Student did not qualify for [OT] services based on the evaluation in place at that time.")

4. The District's response included a progress report with information on the Student's present levels for the 2021–2022 school year. See **Exhibit 1**, attached hereto.
5. The District's response included a behavior tracking chart for the Student, which documented, in part, the following: the time and setting behavior was demonstrated; the antecedent to the behavior; what the behavior was; the consequence that was implemented; and the duration of the behavior. A review of the behavior tracking chart shows, in part: common antecedents included transitions, engagement with a non-preferred activity, and/or an interaction the Student had with another student; and common behaviors included aggression and elopement.

The behavior tracking chart included information between October 5, 2021 and June 1, 2022. According to the behavior tracking chart, between October 5 and November 8, 2021, the Student demonstrated approximately 77 behaviors.

6. The District's response included discipline report entries for the 2021–2022 school year. According to the discipline report entries, between the start of the 2021–2022 school year and November 8, 2021, the Student had 12 discipline reports.
7. The District's response included 'Incident Report' forms for the Student. (The incident report forms tracked the Student's behavior.) According to the incident report forms, the Student demonstrated approximately 11 behavioral incidences in September 2021.
8. The District's response included invoices from September through November for an outside BCBA with whom the District contracted.<sup>4</sup>

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<sup>3</sup> The June 2021 IEP included an annual cognitive goal in math and two different rows in the service matrix for cognitive SDI. In its response, the District clarified that the reading goal was related to the 30 minutes 4 times a week service matrix. (The math reading goal related to the 50 minutes 4 times a week service matrix.) And, with this investigation, the Parent did not express a concern with implementation of math SDI.

<sup>4</sup> The District's response included a November 2022 email from another individual employed by the outside BCBA's company. That email stated, in part: the outside BCBA "provided consultation services...but was also

The District's response included an email from the outside BCBA. It read, in part:

My role working with Student...was mainly to check-in during the fall months with the teacher...to see what supports they might need in his new classroom. I provided instruction on the existing intervention strategies to the new 1:1 para and observed those strategies implemented, giving some follow-up notes.

I didn't take any formal data during my few visits, the last of which occurred on 11/30/21.

9. According to the Student's schedule, the Student received his SDI in reading between 8:55 and 9:25 am.
10. The District's response included at least four documents that appear to represent the Student's work with sight words during the 2021–2022 school year, dated November 1, 2021, January 19, 2022, February 18, 2022, and March 23, 2022.
11. Documentation provided by the District indicated the Student demonstrated a couple incidences of aggressive behavior and/or task refusal on September 15, 2022.
12. The Student's IEP team met on September 16, 2021 to discuss whether the Student required an "assessment revision for OT concerns." Based on the notes for that meeting, the Parent and the speech language pathologist were unclear as to whether the Student had recently demonstrated either a sensory need or a behavioral need.
13. According to incident report forms, the Student demonstrated approximately six behavioral incidences in October 2021 and one incident in November 2021.
14. Documentation provided by the District indicated the Student demonstrated a couple incidences of aggressive behavior on October 4, 2021.
15. On October 5, 2021, the administrative assistant emailed the occupational therapist, stating, in part, "I am reviewing caseloads and see that the below students, [including Student], indicate OT consult. Could you please confirm that these students are consult only?"
16. The District's response included a November 3, 2021 assessment revision. It read, in part:

Occupational Therapy evaluation was conducted in the area of Sensory Processing by gathering information through use of the online version of the Short Sensory Profile. The profiles were completed by both parents, Kindergarten teacher (20-21 SY), First grade teacher (21-22 SY), Special Education teacher, and Special Education para. Each individual assessment summary is listed below.

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To further distill the most pertinent information, this OT noticed that 3/6 respondents reported that Parent experiences differences that fell in the MUCH MORE THAN OTHERS

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performing meetings, observations, and consulting with staff regarding 2–3 other students while checking-in to see how...Student was doing. Consultation was provided based on request/input from staff via email." This same email detailed the outside BCBA provided consultation services: five times in September 2021; two times in October 2021; and two times in November 2021.

range in Sensory Sensitivity/Sensor. Student is a Sensory 'sensor', who is sensitive to certain stimuli and can quickly detect it in his environment, and may act intensely to sensory input, when he has been exposed to more stimuli that his body requires.

In this area, this OT tallied responses on individual questions from all respondents which fell in the almost always or frequently range. These included the following: Distracted when there is a lot of noise around; Struggles to pay attention; and, Looks away from tasks to notice all actions in the room.

In the same manner, this OT noticed that 4/6 respondents reported that Student experiences differences that fell in the MUCH MORE THAN OTHERS range in Sensory Avoiding/Avoider. Student is a Sensory Avoider. Avoidance is an active strategy to control the sensory environment or keep the environmental stimuli away when it becomes too much. In this area, this OT tallied responses on individual questions from all respondents which fell in the almost always or frequently range. These included the following: Needs positive support to return to challenging situations; Can be stubborn and uncooperative; Has strong emotional outbursts when unable to complete a task; Has temper tantrums; Gets frustrated easily; and, Is distressed by changes in plans, routines, or expectations.

17. The District's response included notes from a November 3, 2021 IEP meeting. Said notes stated the Parent attended, and in part, the IEP team: discussed Parent and staff results from a sensory-related questionnaire; and believed the Student's sensory needs related, at least in part, to the Student's behavior-related needs. The notes further read, "[We] may look at calling another meeting to discuss...BCBA aid...Team discussed BCBA consult and having [the outside BCBA] get time to consult."
18. On November 4, 2021, the administrative assistant emailed the psychologist, stating, in part, "How soon would you like this meeting and is it in regards to getting a BCBA/RBT for this Student?" Later that day, the psychologist responded, stating, in part, "I see it becoming a bigger concern the longer it takes – as soon as possible – to make all schedules align."
19. A November 4, 2021 prior written notice read, in part, "It is necessary to recommend occupational therapy as a related service to support Student's sensory needs as they related to his social/emotional needs."
20. On or about November 9, 2021, following an assessment revision<sup>5</sup>, the Student's IEP team amended the Student's June 2021 IEP.

In relation to the related service of OT, the November 2021 amended IEP read, in part: Student is experiencing differences in sensory processing that may require the use of sensory strategies, tools, or accommodations to 1) help him identify the behavioral responses associated with his sensory processing and 2) to help him learn to self-regulate, so that he experiences an optimal environment for learning. OT will be provided on a Related Services basis, primarily consultative, to support Student's sensory needs in the educational environment.

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<sup>5</sup> The District's response read, in part, "[The] assessment revision was prompted due to concerns with [the Student's] sensory processing [needs]."



The November 2021 amended IEP provided the Student with the following support, "behavioral analyst consultation for team: will be faded when Student is at 80% independence." The November 2021 amended IEP also included the same language regarding the behavior technician as was found in the June 2021 IEP.

The November 2021 amended IEP included, in part, the same accommodations, adaptive, reading, and social emotional goals, and adaptive, reading, and social emotional SDI as listed in the June 2021 IEP, above.

The November 2021 amended IEP added the following related service, to be provided in a *special education setting* from November 9, 2021 through June 1, 2022: OT: 20 minutes a month (to be provided by an occupational therapist).

The District's response read, in part:

Services from a behavior technician were not included in the service matrix in the [November 2021] IEP amendment, and therefore were not provided to Student from November 2021-June 2022. A behavior technician [had been] provided to support the explicit goal toward independence...When BCBA consultation indicated such progress, services were faded and not included in the [November 2021] IEP.

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IEP revisions in November 2021 (November 3, 2021 and November 9, 2021) did not include change to reading goals or service time, and Student continued to receive the reading SDI included in the [June 2021] IEP.

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The [November 2021] IEP amendment...did not include goals for OT services, as the [IEP service] matrix designates the related services [as being for] consultation and sensory supports...OT services were related to goals in the SDI areas of social/emotional skills [and] behavior.

21. On November 16, 2021, an outside BCBA contracted by the District observed the Student. The outside BCBA's notes from that observation record, in part, the following: generally, the Student did well that day with staying on task, not eloping, smoothly transitioning between activities, etc.; however, the Student did demonstrate at least a couple minor incidences related to not staying on task, elopement, and transition difficulties, etc.; and the outside BCBA noted some strategies and directives the Student's 1:1 paraeducator should utilize in working with the Student.
22. The District was on break November 24–26, 2021 and December 20, 2021 through January 3, 2022.
23. According to incident report forms, the Student demonstrated one behavioral incident in December 2021 and one behavioral incident in January 2022.
24. According to the Parent's reply:

Staff members...reported [to me] they did not have Student in a reading group until after January [2022]...One [staff person] thought he was in a general education [setting] reading group and the other [staff person] thought he was supposed to be in a special education

[setting] group. [Staff reported to me] they finally figured...out [the Student's appropriate reading group] after winter break.

25. According to incident report forms, the Student demonstrated one behavioral incident in February and approximately five incidences in April 2022.
26. The District was on break February 21–22 and April 4–5, 2022.
27. According to incident report forms, the Student demonstrated one behavioral incident in May 2022.
28. On June 6, 2022, a District staff person emailed the Parent, stating, in part, "Per my recent conversations with the building IEP team, Student's behavior was substantially improved until very recently."
29. On June 7, 2022, the outside BCBA emailed the Parent, stating, in part:

At the beginning of the 2021-22 academic year, the BCBA and internal school team met to discuss how best to continue providing Student individualized support and accommodation, given staffing availability at that time. It was determined that the BCBA would meet and provide the intervention plan to Student's new teacher and 1:1 para and allow that rapport to be built while keeping close observation and recording of how Student did towards his given behavior goals.

The BCBA met with the team on 09/10 and 09/21 before coming out on 09/29 for an extended observation session. During that observation, the BCBA observed zero occurrences of the top target behaviors, including engaging in unsafe behavior, forcing non-permitted access, or any property destruction/disruption. He engaged in a few, random out of seat behaviors but was easily redirected back to his seat by either the 1:1 para or the teacher.

The BCBA remained on call, should any spikes in behavior be reported, while continuing to routinely observe Student across the following months. During these observations, the BCBA continued to see low to zero rates of targeted behaviors, other than an occasional impulse to leave a given area without prior permission. The BCBA provided the observations to the team, as well as clinical recommendations, mainly involving how best to use prompting hierarchies and antecedent, environmental arrangements to help ensure Student can make the best choice during any given activity.

Based on Student's continuous observed adherence to his intervention plan and low rates of targeted behavior, the BCBA advised to retain the current level of support and remained on call, should any further support be necessary towards carrying out Student's Behavior Intervention Plan.<sup>6</sup>

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<sup>6</sup> An email from the outside BCBA, which accompanied this email, read, in part, "Attached is a qualitative report of my observations for Student during the [past] fall...citing low-to-zero levels of targeted behavior observed during my visits."

30. The Student's IEP team developed a new IEP for the Student on June 8, 2022. The Parent was listed as a participant in the June 8, 2022 IEP meeting.

The Parent's complaint request read, in part, "[At the June 2022 IEP meeting], I did not receive any data to support the discontinuation of [the behavioral technician] support [in November 2021 and] I was told by the occupational therapist that she did not collect any data on Student's OT consult for sensory needs."

The June 2022 IEP read, in part:

Parent: Some concerns include his withdrawal from situations when there are expectations he doesn't want to meet. This can be manifested by pouting, leaving the room, hiding under a desk, or even a piece of clothing. Another concern is inability to express his feelings or needs, resulting in frustration. He becomes overwhelmed with prompting and then has a hard time regulating.

Parent:...My concern for Student is his inability to verbalize his feelings and being able to regulate himself before just blowing up or running out of the area. He needs support to reset after being told no. He is still throwing baby fits to try to get his own way.

Special education teacher:...Student is learning to tell an adult when he is feeling overwhelmed and needs a break, however, he sometimes uses breaks to avoid academic work. He is learning to ask for breaks when he 'needs' one and not simply 'wants' one.

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An FBA will be recommended at the start of the 22/23 school year (along with his triennial reevaluation) and a BIP will be created following the recommendations from the FBA. There is also an emergency response plan, point sheets, and data collection processes that will be followed to ensure the plan is being implemented with fidelity.

#### **Adaptive**

Student made significant growth in the area of Adaptive Skills, however, he did not meet his annual goal. Student's goal has been to engage in academic and social activities with support, and without maladaptive behaviors, 80% of the time. Data shows that Student engages in maladaptive behavior an average of 2.5 times per day.

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#### **Cognitive**

Reading: Student has made significant growth toward meeting his annual IEP goal in basic reading skills, however, he was 27 words short; his goal was to read 47 correct words per minute by 6/1/22. Student is able to read 20 correct words per minute. Student's reading fluency is affected by his lack of confidence. He does a lot of self-correcting when reading for fluency (this is a great skill), however, this habit slows him down and also affects his comprehension. Student is able to sound out each letter sound of words, but struggles with vowel combinations (diphthongs).

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#### **Sensory Processing**

Student is assisted in the classroom by a paraeducator, who provides scheduled sensory breaks for 15 minutes twice daily. He also has access to small fidget tools within the classroom setting. There are many activities that Student likes to do during his sensory break time. Student loves to go out of the classroom to take a break and outdoors when

possible. He enjoys the monkey bars, walking laps, finding certain trees. He likes kicking or passing balls, and carrying a heavy medicine ball, He likes to jump on the mini trampoline, tumble on a mat, use the mat to make a tunnel or to turn himself into a taco. He likes using a yoga ball to roll himself over or to have rolled over him. He is using a suspended swing to move in all directions while sitting or prone on his tummy. He also enjoys listening to music, playing a small piano keyboard, using a big squishy toy, light and bright toy, kinetic sand, and a 3D stacking puzzle.

While Student says he love doing crafts and using markers, he gets super focused on these tasks and becomes frustrated when he doesn't have time to finish or has to leave markers for others to use. This type of activity was tried but was found to be counter productive to helping him get ready to learn from a sensory perspective, due to time constraints.

Student does enjoy adult attention. However, he is functioning well with greater independence in his classroom setting, with the paraeducator fading into the background. She sometimes thinks that her presence is more of a distraction for him, because it signals to him that its time for a break, when he might have been successful in persisting longer with the academic task.

### **Social/Emotional**

Student made significant growth in the area of Social Skills, however, he did not meet his annual goal. Student is learning how to ask for help before he acts physically aggressive toward his peers and/or adults, or is verbally aggressive to his peers and/or adults when he is frustrated or angry. One of Student's Social Skills goals has been to ask for help, with support, to identify his feelings and regulate his emotions around those feelings by using previously taught strategies, 80% of the time. Data shows that instead of asking for help and using previously taught self regulating strategies when angry, he sometimes resorts to physical and/or verbal aggression. Student engages in either physically aggressive behavior and/or verbally aggressive behavior an average of 1.2 times per day. The goal will be for Student to engage in the aforementioned behaviors no more than 1 time per week. The expectation is that he perform these skills with the assistance of his one-on-one paraeducator.

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### **Description of Services**

OT will be provided on a Related Services basis to support Student's sensory needs in the educational environment through consultation with school staff and provision of sensory accommodations, strategies, and tools for self regulation.

Behavior Technician and 1:1 para support will be available while in both special education and general education environments.

The June 2022 IEP included, in part, the following annual goals:

- **Adaptive 1:** ability to utilize adaptive skills and avoid maladaptive behaviors.
- **Adaptive 1:** ability to initiate and complete tasks.
- **Reading:** ability to exercise reading skills, improving from 20 correct words per minute on first grade material to 50 correct words per minute on second grade material.
- **Social/Emotional:** ability to self-regulate.

The June 2022 IEP stated progress on the goals was to be reported via a written progress report each quarter.

The June 2022 IEP included, in part, the same accommodations as listed in November 2021 amended IEP, above. The June 2022 IEP provided the Student with the following support, "behavioral analyst consultation for team: will be faded when Student is at 80% independence."

The June 2022 IEP provided the Student with the following SDI in a *special education setting*:

- **Cognitive (reading):** 35 minutes 4 times a week (to be provided by special education staff)

The June 2022 IEP provided the Student with the following SDI in a *general education setting*:

- **Adaptive:** 40 minutes 4 times a week (to be provided by special education staff)
- **Social/Emotional:** 40 minutes 4 times a week (to be provided by special education staff)

The June 2022 IEP provided the Student with the following related services in a *special education setting*:

- **OT:** 20 minutes 1 time a month (to be provided by an occupational therapist)
- **1:1 Staff Assistance:** 1,725 minutes 1 time a week (to be provided by a registered behavior technician)<sup>7</sup>

The prior written notice for the June 2022 IEP read, in part, "RBT/BCBA support to be initiated in the fall and reviewed at the triennial review and ongoing as needed. Triennial review will include FBA and development of updated BIP."

31. The District's response included meeting notes related to the June 8, 2022 IEP meeting. Those notes read, in part:

Strengths- imagination/curiosity, kind, sense of humor, smart, likes to please people, empathetic towards peers, helps in the classroom. Concerns- withdrawal when he doesn't want to engage in expectations, expressing his feelings, regulate before escalating, learning to ask for breaks...Parent advocate suggests putting more info in the behavior section of the team consideration page so an unfamiliar person would have more info...Parent advocate [noted] importance of documenting the [sensory] services Student is getting so we have the data to better support...Parent asks about stronger language about BCBA/staff support/training, stronger plan for data to help support fading of BCBA/para support. If BT is not available, would like BCBA to be accountable for that work. Parent is requesting for Student to receive the behavior support that was in his last IEP (kindergarten) that hasn't been implemented.

32. On June 16, 2022, the District's Section 504 coordinator emailed outside counsel, stating, in part:

The educational specialist attended a meeting regarding a student at [the] elementary [school] whose parents are requesting BCBA oversight and BT involvement in his program.

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<sup>7</sup> This related service was to be concurrent with the following related service: 1:1 staff assistance: 1,725 minutes 1 time a week (to be provided by a paraeducator).

I have attached the IEP from last year as well as the draft of the IEP & BIP that was discussed at the meeting this afternoon. Here is some additional backstory:

- This student had a number of behavioral issues and preschool was a very challenging year with a number of programmatic missteps.
- We had an agency consulting BCBA and BT last year when the student was in kindergarten. There was substantial improvement and there was discussion about fading the BT to provide support solely with a 1:1 para.
- The BT support was not addressed on the service matrix of the prior IEP and the agency was not able to secure that staff. The student has been doing well by all anecdotal information. (Given the building team, I am 100% certain that I would have heard about it if he wasn't.)
- In development of the current IEP the parents are fairly adamant that the student is entitled to that service and it should be on the IEP for the fall. In truth, we do not have quality written data as a basis for determining whether or not this service is necessary. All of our evidence that it is not necessary is anecdotal at best.

...

I know we have a meeting scheduled...to discuss a different issue, I am wondering if we could potentially extend the time of that meeting a little bit and invite the educational specialist to discuss our potential action steps related to Student...I...do not think we are in a solid position to hold a hard line [in terms of refusing the Parent's recent request that Student be provided a BT.]

33. The District's final day of school was June 20, 2022.

34. The District's response included a written statement by the occupational therapist, detailing the therapist's work with the Student during the 2021–2022 school year. It read, in part:

As a related service provider, I support Student's Social/Emotional goals. I do not keep data on those goals. On 11/3/2021, I did share the Zones of Regulation visuals that I recommend with the team and parents. I did not check in monthly with staff. When it became known to me that his 1:1 para was seeking more resources, I met with her and offered that she use the OT portable and equipment.

### **Summer 2022**

35. The District's response read, in part, "The District offered additional OT services [to Student] during summer 2022 – to ensure service time obligations were met. Student participated in OT sessions weekly during summer 2022."

The Parent's complaint request stated she did agree to an offer made by the District to provide the Student with OT-related "compensatory services" in summer 2022. And the District's response included an occupational therapy service log for extended school year services for summer 2022.

36. On June 24, 2022, a District administrator emailed a District staff person, stating, in part:

I am guessing that Student has paraeducator support as the 1:1 assistance on first line (should be concurrent) and RBT as the next 1:1 assistance (should be concurrent), but I was not part of this discussion or IEP. This amendment needs to be completed to make sure the Student doesn't appear to be in negative percentages.

37. On September 9, 2022, the Parent signed consent for the Student to be reevaluated in the following areas: medical-physical; general education; adaptive; cognitive; communication; review of existing data; social/emotional/behavior (SEB); academic; observation; and sensory.

Meeting notes dated September 9, 2022 read, in part, "BCBA explains [the] role of [the] registered behavior technician – develop relationship first prior to implementing behavior chart...Team will start with anecdotal data and create a tacking sheet from that."

### **2022–2023 School Year**

38. The District's first day of school was September 12, 2022.
39. At the start of the 2022–2023 school year, the Student continued to eligible for special education services, was in the second grade, and attended a District elementary school. At that time, the Student's June 2022 IEP was in effect.
40. According to the Parent's complaint request, at some point in fall 2022, "The Student had a substitute for a couple days [and] Student destroyed the classroom – he threw items off the shelves and held a stool above his head, and, I believe, threw the stool at some point."
41. According to the Parent's complaint request and reply:  
[Prior to the October 2022 reevaluation meeting], I was met with more discussion about how Student's [behavior] had improved and that his reevaluation had showed this. I asked again for the data that supported [such] findings. There was no data presented...The data [at this point] consisted of only the assessment/checklists that the teachers and myself filled out...I told the special education teacher [the behavior-related forms that the teachers and myself had filled out were] not very good or applicable to Student...I am concerned the data and interpretation [of that data] written in my Student's reevaluation is neither valid, reliable, or accurate.
42. On October 18, 2022, the psychologist emailed the Parent a draft reevaluation report.
43. The District's response included a reevaluation report, dated October 19, 2022. The October 2022 reevaluation report included information in the following sections: medical-physical; general education; social/emotional/behavior; adaptive; cognitive; academic; communication; observation; and other. A copy of the October 2022 reevaluation report is attached as **Exhibit 2**.

The District's response included meeting notes from the October 19, 2022 meeting. Those notes detail, in part: the Parent was frustrated the RBT was not present, as the Parent believed the RBT needed to be present to explain some of the data the RBT had collected during the reevaluation process; the reevaluation group was able to meet for some period of time, even

though the RBT was not present<sup>8</sup>; but then the Parent believed the meeting needed to conclude and be continued at a later time with the RBT present.

On October 19, 2022, the Student's evaluation group met to review the results of the Student's reevaluation.

The Parent's reply read, in part:

[The BCBA that had collected the behavior-related data in the fall 2022 reevaluation was not present at the October 2022 reevaluation meeting.] I asked if the school psychologist could explain the data to me [and] the school psychologist responded 'no but maybe the general education teacher could.' I asked if the general education teacher [had been] there to take the data and [was told] 'no.'

44. On October 26, 2022, the Parent emailed District staff, stating, in part, "the proposed evaluation meeting never took place, as I requested the meeting be rescheduled right after I noticed the whole team was not present to review the date"; "I do not believe the proposed testing reflects the concerns...raised about my Student's performance in school"; "I [do no] know [how certain evaluators and District staff] came to some of the decisions that reflect Student's performance in cognitive, behavior, [and] sensory"; and "I would like to meet...to create a more appropriate evaluation plan."

According to the District's response, "The [evaluation] team has offered to reconvene [and] an assessment revision has been offered to review the entire comprehensive evaluation and multiple sources of data. A consent form to initiate that process was provided to Parent on November 3, 2022."

45. In its response, the District stated, "Consistent [and proper] use of...prior written notices may not have occurred [during the relevant time period and] the District proposes to remedy this [failure to follow proper procedures] with targeted professional development on prior written notices."

46. The District was on break November 23–25 and its winter break began December 19, 2022.

## CONCLUSIONS

**Issue 1: IEP Implementation** – The Parent alleged the District did not follow proper IEP implementation procedures from October 26, 2021 through the end of the 2021–2022 school year in the following service areas: behavior technician; and, specially designed instruction in reading.

A 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

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<sup>8</sup> The meeting notes stated the reevaluation group, including the Parent, met for approximately 70 minutes, and the District's response said the reevaluation group, including the Parent, met for "90 minutes."



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.

*Behavior Technician (BT)*

Here, the June 2021 IEP could have been clearer in relation to the BT support that was to be provided to the Student. For example, the June 2021 IEP included, in part, the following statement, "a behavior technician also works daily with Student"; but the 'Program Accommodations/Modifications and Support for School Personnel' and 'Special Education and Related Services' portions of the June 2021 IEP did not include any detail on the nature of the BT's work with the Student or the number of minutes the BT was to work with the Student. Based on the narrative portion of the June 2021 IEP, it appears the BT support was separate from, and in addition to, the paraeducator and BCBA consultation support that was to be provided to the Student.

According to the District's response, though, the BT support was removed beginning with the November 2021 amended IEP. For example, the District's response read, in part:

Services from a [BT] were not included in the service matrix in the [November 2021] IEP amendment, and therefore were not provided to Student from November 2021-June 2022. A [BT had been] provided to support the explicit goal toward independence...When BCBA consultation indicated such progress, services were faded and not included in the [November 2021] IEP.

This is a problematic assertion, though, as the November 2021 IEP included the same language regarding the BT as was found in the June 2021 IEP above.

IEP services must be written "in a manner that is clear to all who are involved in both the development and implementation of the IEP." Based on the foregoing, OSPI finds a violation in relation to the wording around the role of the BT in the June 2021 and November 2021 amended IEPs. The District will be required to provide a training to certain staff regarding writing IEPs "in a manner that is clear to all who are involved in both the development and implementation of the IEP."

Regarding implementation, the documentation provided to OSPI suggests a BT did not "work...daily with Student" during the 2021–2022 school year. In its response, the District suggests the outside BCBA provided fulfilled the role of the BT. For example, the District's stated, "District records indicate behavior tech/BCBA invoice[s] from [an outside agency] in September, October, and November of 2021." The documentation, though, strongly suggests the outside BCBA provided the Student's District IEP providers with BCBA consultation, and that the outside BCBA did not provide the Student with daily BT services. For example, the District's response included an email from the outside BCBA, stating, "My role working with Student...was mainly to check-in during the fall months with the teacher...to see what supports they might need in his new classroom"; on November 16, 2021, the outside BCBA observed the Student and developed strategies for the 1:1 paraeducator to utilize when working with the Student; and in a June 7, 2022 email to the Parent, the outside BCBA stated his involvement with the Student related mostly to

fall 2021, and during that time, the outside BCBA conducted some observations of the Student and provided recommendations to the Student's providers.

In addition to documentation showing the outside BCBA did not serve as the Student's BT, there was additional documentation showing the Student may not have been provided any BT services during the 2021–2022 school year. For example: on November 4, 2021, the administrative assistant emailed the psychologist, stating, in part, "How soon would you like this meeting and is it in regards to getting a BCBA/RBT for this Student?"; and later that day, the psychologist responded, stating, in part, "I see it becoming a bigger concern the longer it takes – as soon as possible – to make all schedules align." Then, on June 16, 2022, the District's Section 504 Coordinator emailed outside counsel, stating, in part, "We had an agency consulting...[BT] last year when the student was in kindergarten. There was substantial improvement and there was discussion about fading the [BT] to provide support solely with a 1:1 para. The BT support was not addressed on the service matrix of the [November 2021 amended] IEP and the agency was not able to secure that staff."

In sum, the documentation suggests the Student was not provided with a BT, at any point during the 2021–2022 school year. This represents a material failure to implement the June 2021 IEP and a violation of the IDEA. Proper remedies for this violation will be discussed below, in the conclusions for Issue 3.

### *Specially Designed Instruction in Reading*

Here, both the June 2021 IEP and the November 2021 amended IEP provided the Student with 120 minutes a week of SDI in reading in a *general education setting*.

According to the Parent, at some point during the 2021–2022 school year:

One [staff person told Parent they] thought Student was in a *general education [setting]* reading group and the other [staff person] thought Student was supposed to be in a *special education [setting]* group. [Staff reported to me] they finally figured...out [the Student's appropriate reading group] after winter break.

Here, the Student was scheduled to receive SDI in reading from between 8:55 and 9:25 am. Assuming this was the schedule four days a week, the Student would have been provided 120 minutes a week of SDI in reading.

In terms of whether this was implemented, the documentation shows, in part: the District's response included at least four documents representing the Student's work with sight words during the 2021–2022 school year<sup>9</sup>; the Student made progress on the annual **reading** goal in the June 2021 IEP and the November 2021 amended IEP<sup>10</sup>; the June 2022 IEP included narrative information regarding the Student's work on his 2021–2022 reading goal; and the Parent's concern would suggest, even if, for a limited period of time, the Student was receiving reading

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<sup>9</sup> Said documents were dated: November 1, 2021; January 19, 2022, February 18, 2022, and March 23, 2022.

<sup>10</sup> The baseline for the June 2021 IEP was: 24 sight words at a kindergarten level. By March 2022, the Student knew 11 words at a first-grade level. By June 2022, the Student knew 20 words at a first-grade level.

SDI in an incorrect setting, the Student was likely still receiving SDI in reading. For the foregoing reasons, OSPI does not find the District materially failed to implement the Student's reading SDI during the 2021–2022 school year.

**Issue 2: OT-Related Progress Reporting** – The Parent alleged, from October 26, 2021 through the end of the 2021–2022 school year, the District did not follow proper progress reporting procedures in relation to the Student's OT IEP services.

The purpose of progress reporting is to ensure that, through whatever method chosen by an IEP team, the reporting provides sufficient information to enable parents to be informed of their child's progress toward the annual IEP goals and the extent to which that progress is sufficient to enable the child to achieve those goals.

Here, the Student was first provided OT services with the November 2021 amended IEP. Specifically, the November 2021 amended IEP provided the Student with the related service of OT – 20 minutes a month (to be provided by an occupational therapist). The November 2021 amended IEP did not include an annual goal specific to OT. Rather, the OT services were intended to support the Student's **social/emotional** and **adaptive** goals. For example: the November 3, 2021 assessment revision was conducted to determine the Student's "sensory processing" needs; a November 4, 2021 prior written notice read, in part, "It is necessary to recommend occupational therapy as a related service to support Student's sensory needs as they related to his social/emotional needs"; the November 2021 amended IEP noted the OT services were to assist the Student in "identify[ing] the behavioral responses associated with...sensory processing" and to "help Student learn to self-regulate"; and, the District's response included a written statement by the OT that read, in part, "As a related service provider, I support Student's social/emotional goals."

According to the Parent, "[at the June 2022 IEP meeting], I was told by the occupational therapist that she did not collect any data on Student's OT consult for sensory needs." (Indeed, the District's response included a written statement by the OT stating, in part, "I [did] not keep data on [the social/emotional] goals [I worked on with the Student during the 2021-2022 school year].")

Here, though, it is important to note a distinction between specially designed instruction and related services: specially designed instruction is provided to a student to permit that student to make progress on the goals included in the IEP and to be involved in and make progress in the general education curriculum; related services are provided to a student to assist that student in accessing and benefiting from the specially designed instruction. In other words, Washington state regulations do not require the creation of separate annual goals for related services.

And, here, the documentation shows the District reported the Student's progress on the **social/emotional** and **adaptive** goals that the OT related service was meant to assist the Student in accessing. Both the February and March 2022 progress report entries included IEP online summaries such as "sufficient progress," "emerging skill" etc., both the February and March 2022 entries included narrative detail on the Student's progress on the relevant goals, and the March 2022 entries provided present levels of performance in the same unit of measurement as that

which appeared in the goal itself. The Parent was also provided at least some information related to the Student's behavioral performance on June 6 and 7, 2022, and the June 2022 IEP included present levels for the adaptive and social/emotional goals in the November 2021 amended IEP. The June 2022 IEP also included a section devoted entirely to the Student's "sensory processing" needs and performance.

Based on the foregoing, OSPI does not find a violation: Washington state regulations do not require an OT-related annual IEP goal be created and therefore separate OT progress reporting was not required; and progress was reported for those annual IEP goals the OT services were designed to support.

**Issue 3: IEP Development** – The Parent alleged the Student's IEP team did not have sufficient, relevant data on the Student's behavior needs in November 2021, so as to justify removing the provision of a BT from the Student's IEP.

When developing each child's IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child. Generally speaking, an IEP team's decisions must be based on a student's needs resulting from that student's disability. An IEP team should base its decisions on appropriate programming for a student on sufficient, relevant data on the student's needs resulting from the student's disability.

Here, OSPI identified several problems in relation to the removal of the BT in November 2021.

**First**, as discussed above, in Issue 1, the November 2021 IEP included the same language regarding the BT as was found in the June 2021 IEP, and consequently, it is likely that at least some individuals involved in the development or implementation of the IEP would be confused as to whether a BT was to be provided to the Student.

**Second**, the prior written notice corresponding to the November 2021 amended IEP does not discuss discontinuation of the BT service. Rather, the prior written notice corresponding to the November 2021 amended IEP consists of an explanation for why OT services were being added to the Student's IEP – to address the Student's sensory-behavior needs.

Prior written notice ensures that the parent is aware of the decisions a district has made regarding implementation of the IEP. Prior written notice must be given to the parent within a reasonable time before the district initiates a proposed change to the provision of a free appropriate public education (FAPE). The prior written notice must explain why the district proposes or refuses to take action. It must describe any other options the district considered, and it must explain its reasons for rejecting those options. Accordingly, for the above-stated reasons, OSPI finds a violation of prior written notice requirements in relation to the November 2021 amended IEP. The District will be required to provide certain District staff with a training on the same.

**Third**, as also discussed above, it appears administrative and contractual considerations were a significant factor in the Student not being provided a BT beginning with the November 2021

amended IEP. For example, on June 16, 2022, the District's Section 504 Coordinator emailed outside counsel, stating, in part:

We had an agency consulting...[BT] last year when the student was in kindergarten. There was substantial improvement and there was discussion about fading the [BT] to provide support solely with a 1:1 para. The BT support was not addressed on the service matrix of the [November 2021 amended] IEP and the agency was not able to secure that staff...I... do not think we are in a solid position to hold a hard line [in terms of refusing the Parent's recent request that Student be provided a BT.]

Generally speaking, an IEP team's decisions must be based on a student's needs resulting from that student's disability, not on administrative and/or contractual considerations. Accordingly, while a close determination, OSPI finds a violation of the IDEA, in terms of administrative and contractual considerations being an impermissibly significant factor in determination of whether the Student required a BT.

**Fourth**, it is not clear the information available to the IEP team in fall 2021 regarding the Student's behavior needs supported the fairly significant change of complete removal of a BT that previously worked with the Student each day.

An IEP team should base its decisions on appropriate programming for a student on sufficient, relevant data on the student's needs resulting from the student's disability.

OSPI does acknowledge there was some evidence to suggest the Student had made progress on behavior-related goals as of November 2021. For example, on June 7, 2022, the outside BCBA provided the following written statement regarding his work with the Student in fall 2021:

The BCBA met with the team on 09/10 and 09/21 before coming out on 09/29 for an extended observation session. During that observation, the BCBA observed zero occurrences of the top target behaviors, including engaging in unsafe behavior, forcing non-permitted access, or any property destruction/disruption. He engaged in a few, random out of seat behaviors but was easily redirected back to his seat by either the 1:1 para or the teacher.

The BCBA remained on call, should any spikes in behavior be reported, while continuing to routinely observe Student across the following months. During these observations, the BCBA continued to see low to zero rates of targeted behaviors, other than an occasional impulse to leave a given area without prior permission. The BCBA provided the observations to the team, as well as clinical recommendations, mainly involving how best to use prompting hierarchies and antecedent, environmental arrangements to help ensure Student can make the best choice during any given activity.

Based on Student's continuous observed adherence to his intervention plan and low rates of targeted behavior, the BCBA advised to retain the current level of support and remained

on call, should any further support be necessary towards carrying out Student's Behavior Intervention Plan.<sup>11 12</sup>

In contrast, there was some significant evidence to suggest the Student had not made progress on behavior-related goals as of November 2021. For example, in part: according to the behavior tracking chart, between October 5 and November 8, 2021, the Student demonstrated approximately 77 behaviors; according to the discipline report entries, between the start of the 2021–2022 school year and November 8, 2021, the Student had 12 discipline reports; according to incident report forms, the Student demonstrated approximately 17 behavioral incidences between the start of the 2021–2022 school year and November 2021<sup>13</sup>; and as of November 2021, the Student was continuing to demonstrate behavioral incidences, such that the evaluation team believed a sensory reevaluation was warranted and the IEP team believed the addition of OT services—to address behavior-related sensory needs—was needed. (It is also significant that, with the June 2022 IEP, the IEP team began providing the Student with 1,725 minutes a week of 1:1 staff assistance, to be provided by a RBT.)<sup>14</sup>

Accordingly, OSPI finds the District failed to follow proper IEP development procedures in completely removing the BT in November 2021. It appears administrative and contractual considerations were a significant factor in the Student not being provided a BT beginning with the November 2021 amended IEP, and there was some significant evidence to suggest the Student had not made progress on behavior-related goals as of November 2021. And OSPI notes: this violation is connected to the failure to follow proper prior written notice procedures, as discussed above; if a prior written notice had accompanied the November 2021 amended IEP, explaining the data that supported removal of the BT, it would have been easier for OSPI to evaluate whether proper IEP development procedures were followed.

OSPI must next determine whether compensatory education is warranted. Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would

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<sup>11</sup> Though, on this point, OSPI notes that during this investigation, the outside BCBA provided the District with a written statement that read, in part, "I did not take any formal, [contemporaneous] data during my few visits [in fall 2021], the last of which occurred on November 30, 2021."

<sup>12</sup> While minimally relevant to the issue of what information was available to the IEP team as of November 2021, the 2021–2022 progress reporting does note the Student made sufficient progress on the following IEP goals as of February 2022: **social/emotional 1** and **2**; and **adaptive**. (The November 2021 amended IEP did not appear to include present levels on the foregoing goals.)

<sup>13</sup> OSPI acknowledges that the behavior tracking chart, discipline report entries, and incident report forms likely captured, at least in part, information related to the same incidences.

<sup>14</sup> OSPI does acknowledge that based on progress reporting, emails, and the various behavior-related tracking documents, it does appear the Student demonstrated fewer behavioral incidences from November 2021 through at least May 2022. This likely indicated the addition of the OT related service in the November 2021 amended IEP was a helpful intervention for the Student.

have been, but for the district's violations of the IDEA. Here, as discussed above, the Student likely should have continued to receive some BT services past November 2021. Therefore, some compensatory BT services are warranted.

In determining the appropriate level of compensatory BT services, though, OSPI notes: according to progress reporting, from at least February through May 2022, the Student appears to have made progress on his **adaptive** and **social/emotional 1 and 2** goals; according to the various behavior-related tracking documents, it does appear the Student demonstrated comparatively few behavioral incidences from November 2021 through at least May 2022; and the documentation does show the Student's IEP team was provided with BCBA consultation. Accordingly, OSPI finds the following to be an equitable compensatory education requirement: 10 hours of work with a BT.

Additionally, the training the District will be required to provide to certain District staff will also address proper IEP development procedures, in addition to proper prior written notice procedures.

**Issue 4: Reevaluation Procedures** – The Parent alleged the October 2022 reevaluation was not sufficiently comprehensive to address all areas of the Student's potential need in the area of behavior.

In part, a reevaluation must be conducted in all areas of suspected disability and must be sufficiently comprehensive to identify all of the student's special education needs and any necessary related services.

Here, the documentation did not provide clarity on whether there were certain behavior-related assessments that should have been administered to the Student as part of the October 2022 reevaluation, or whether there were specific aspects to the Student's behavioral needs that was not sufficiently examined with the assessments and data that did comprise the October 2022 reevaluation.

In fact, the documentation strongly suggests the Parent's principal concern with the October 2022 reevaluation process was that a BT was not present at the reevaluation meeting to explain certain behavior-related data in the October 2022 reevaluation report.

As it is, OSPI notes, the October 2022 reevaluation report appears to have fairly comprehensively examined the Student's potential need in the area of behavior. For example, the October 2022 reevaluation included, in part: Parents and "Student's resource and general education teacher (both from last year and general education teacher) both from last year and currently this year) all completed the Behavior Assessment System for Children, Third Edition (BASC-3)"; results from a behavior technician's sampling of the Student's demonstrated behavior; present levels on the Student's behavior-related goals in the June 2022 IEP; "a review of [Student's] previous functional behavior assessment (FBA) and current [school referral] forms [for behavior]"; the results of the "Vineland-3 assessment to assess Student's current adaptive skills", completed by the "Student's parents and teachers"; present levels on the Student's adaptive goals in the June 2022 IEP; an

observation by the school psychologist; and an "OT evaluation [related] to the area of sensory processing...through use of the online version of the Short Sensory Profile 2." In sum, OSPI finds the October 2022 reevaluation to have been sufficiently comprehensive in terms of the Student's behavioral need. OSPI does not find a violation.

OSPI notes, though: the evaluation team, including the Parent, is reconvening on January 18, 2023. OSPI recommends the District reach out to the Parent prior to that date to clarify whether there are certain behavior-related assessments that the Parent believes still need to be administered to the Student, or whether there are additional aspects to the Student's behavioral needs that need to be further examined.

### **CORRECTIVE ACTIONS**

By or before **January 13, 2023, January 18, 2023, February 3, 2023, February 21, 2023, and May 5, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

##### **Compensatory Education**

By or before **January 13, 2023**, the District and the Parent will develop a schedule for providing the following compensatory education to the Student: 10 hours of compensatory education with a BT.

The District will provide OSPI with documentation of the schedule for services by or before **January 18, 2023**.

The instruction will occur outside of the District's school day and may occur on weekends or during District breaks. If the District's provider is unable to attend a scheduled session, the session must be rescheduled. If the Student is absent, or otherwise does not attend a session without providing the District with at least 24 hours' notice of the absence, the District does not need to reschedule. *The services must be completed no later than **May 5, 2023**, including those needing to be rescheduled.*

No later than **May 5, 2023**, the District shall provide OSPI with documentation that all of the compensatory education has been completed. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled by the District or missed by the Student.

The District either must provide the transportation necessary for Student to access these services, or reimburse Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must provide reimbursement for round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **May 5, 2023**.



## **DISTRICT SPECIFIC:**

### **Training**

The following District staff will receive training: special education administrators, the principal, the assistant principal, and special education certified staff, including educational staff associates (ESAs), at the school that the Student was enrolled in during the 2021–2022 school year. The training will cover the following topics:

1. IEP drafting;
2. Prior written notices; and,
3. IEP development.

The training will include examples. The District, in cooperation and collaboration with a non-District employee (e.g., the ESD or other trainer), will develop and conduct a training on the above topics.

The District will provide the trainer with a copy of this decision, SECC 22-129. By or before **January 13, 2023**, the District will notify OSPI of the name of the trainer and provide documentation that the District has provided the trainer with a copy of this decision for use in preparing the training materials.

By or before **February 3, 2023**, the District will submit a draft of the training materials for OSPI to review. OSPI will approve the materials or provide comments by February 8, 2023.

By **February 17, 2023**, the District will conduct the training regarding the topics raised in this complaint decision.

By **February 21, 2023**, the District will submit documentation that required staff participated in the training. This will include 1) a sign-in sheet from the training, and 2) a separate official human resources roster of all staff required to attend the training, so OSPI can verify that all required staff participated in the training.

The District will submit a completed copy of the Corrective Action Plan (CAP) Matrix, documenting the specific actions it has taken to address the violations and will attach any other supporting documents or required information.

Dated this 23rd day of December, 2022

Dr. Tania May  
Assistant Superintendent of 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.)