

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-94

PROCEDURAL HISTORY

On June 21, 2023, the Office of Superintendent of Public Instruction (OSPI) received and opened a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Mukilteo School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On June 21, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on June 23, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On July 10, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent on July 11, 2023. OSPI invited the Parent to reply.

On July 20 and 24, 2023, OSPI requested additional information from the District. OSPI received the information on July 24, 2023, and forwarded it to Parent on the same day.

On July 25, 2023, OSPI requested additional information from the District. OSPI received the information on July 26, 2023, and forwarded it to the Parent on the same day.

On August 16, 2023, the Parent was interviewed by an OSPI investigator.

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

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on June 22, 2022. These references are included to add context to the issues under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.

ISSUES

1. Since June 22, 2022, has the Student's individualized education program (IEP) been implemented properly per WAC 392-172A-03105?
2. Since June 22, 2022, has the District followed the appropriate manifestation determination procedures to determine the relationship between the Student's behavior and disability according to WAC 392-172A-05146?
3. Since June 22, 2022, did the District appropriately follow WAC 392-172A-05147 in determining whether the Student needed a functional behavioral assessment (FBA) or otherwise address concerns regarding the Student's behavior?
4. Since June 22, 2022, did the District follow reevaluation procedures, including:
 - a. Obtaining written, informed Parent consent per WAC 392-172A-03000;

- b. Conducting a sufficient evaluation per WAC 392-172A-03020; and,
- c. Ensuring the Parent an opportunity to provide input into the Student's reevaluation per WACs 392-172A-03020 and 392-172A-03025?

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 served through enrollment who is eligible to receive special education services. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 34 CFR §300.323; WAC 392-172A-03105.

"When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a [child with a disability] and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

Disciplinary Removal that Results in a Change of Educational Placement: A change in placement occurs when a student is removed from his or her current placement because of discipline for more than ten consecutive days; or, when the student is subjected to a series of removals that constitute a pattern because the removals total more than ten school days in a school year, because the student's behavior is substantially similar to the previous incidents that resulted in removals, and because of additional factors such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another. 34 CFR §300.536; WAC 392-172A-05155.

Manifestation Determination: Within ten school days of the district's decision to change the student's placement through discipline, the district, parents and other relevant members of the IEP team (as determined by the parents and the district) must determine whether the behavior that led to the disciplinary action was a manifestation of the student's disability. In making the manifestation determination, the district, parents and other relevant members of the IEP team must consider all relevant information in the student's file to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or if the conduct in question was the direct result of the school district's failure to properly implement the student's IEP or behavior intervention plan. 34 CFR §300.530(e); WAC 392-172A-05146.

If the school district, parent(s), and other relevant members of the student's IEP team determine the conduct was a manifestation of the student's disability, the IEP team must either: conduct a FBA, unless the district had conducted a FBA before the behavior that resulted in the change of placement occurred, and implement a BIP for the student; or, if a BIP already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and, except for special circumstances, return the student to the placement from which the student was removed, unless the parent and the district agree to a change of placement as part of the modification of the behavioral intervention plan. 34 CFR §300.530(f); WAC 392-172A-05147.

When a disciplinary exclusion exceeds ten school days and the behavior in question is found not to be a manifestation of the student's disability, a district may apply the same relevant disciplinary procedures, in the same manner and for the same duration as it would to a student not eligible for special education, except that: the student must continue to receive services that provide a FAPE and enable the student to continue to participate in the general education curriculum and progress toward meeting annual IEP goals, even if services are provided in another setting; and receive, as appropriate, a FBA and behavioral intervention services that are designed to address the behavior violation so that it does not recur. 34 CFR §300.530(c)-(d); WAC 392-172A-05145.

IEP Development for a Student with Behavioral Needs: In developing, reviewing, and revising each student's IEP, the team must consider the use of positive behavioral interventions and supports and other strategies to address the student's behavior. 34 CFR §300.324(a)(2); WAC 392-172A-03110(2). This means that in most cases in which a student's behavior impedes his or her learning or that of others, and can be readily anticipated to be repetitive, proper development of the student's IEP will include positive behavioral interventions, strategies, and supports to address that behavior. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,475, 12,479 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 38). A functional behavioral assessment (FBA) and behavioral intervention plan (BIP) must be used proactively, if an IEP team determines that they would be appropriate for a child. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-1 and E-2).

Reevaluations-Parental Consent: A school district proposing to conduct an initial evaluation to determine if a student is eligible for special education services must provide prior written notice consistent with WAC 392-172A-05010 and obtain informed consent from the parent before conducting the evaluation. See WAC 392-172A-03000.

Evaluation/Reevaluation Standards: In completing an evaluation, the evaluation group must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parents. No single test or measure may be used as the sole criterion for determining the student's eligibility or disabling condition and/or determining the appropriate education program for a student. 34 CFR §300.304; WAC 392-172A-03020 and 392-172A-03025.

FINDINGS OF FACT

Background

1. On June 6, 2022, the Student's IEP team met. The Student was eligible for special education services under the category emotional behavioral disability. The Student's IEP provided specially designed instruction (SDI) delivered by a special education teacher, in a special education setting, from September 2–November 16, 2022, in the following areas:
 - Math: 260 minutes/1 times weekly
 - Reading: 27 minutes/5 times weekly
 - Social/Emotional/Behavioral: 520 minutes/1 times weekly
 - Written Language: 27 minutes/5 times weekly

The IEP also included 1,775 minutes of 1:1 paraeducator support as a related service. The Student received 1,775 minutes per week of building instructional time, with 1,050 minutes served in the special education setting. The percent of time in a general education setting was 40.85%. The Student's LRE was 40–79%.

2022–23 School Year

2. On September 7, 2022, the District held its first day of instruction. During the 2022–23 school year, the Student was a sixth grader in a District middle school in the District's "Behavioral Support Center" (BSC). According to the District, BSC is a specialized program designed to serve students with significant social/emotional/behavioral needs and is an "integrated program that allows students to access...supports within their general education classes and across all settings, as appropriate. [Student] had a 1:1 paraeducator that supported his needs as well as program paraeducator support that is available to all BSC students."
3. In the Student's daily behavior plan, his behavior was monitored for four values (safe, respectful, responsible, and compassionate). During each class period, the Student would earn either zero or one point per value, depending on his behavior. Each point the Student earned equaled five minutes of screen time at home. The Student could potentially score 24 points per day for his in-class behavior. The Student also had the opportunity to earn bonus points for processing and making new plans to address his misbehaviors, and for asking to take a break and then returning to work.

The data sheets documenting the Student's behavior had entries for approximately 70 dates from September 21, 2022 until February 13, 2023.

4. On October 24, 2022, the Parent's advocate emailed the District as follows:

I will be joining you tomorrow morning for [Student's] meeting.

...

A few concerns I'd like to address now in preparation for the meeting.

...

4. I do not see a new FBA conducted.

...

Given that he's already had 6 days of suspension¹ this year, I think we can surmise that his current programming, either fidelity of implementation of current services or effectiveness of current services, is not resulting in successful outcomes. A comprehensive review of his needs is necessary...

Regarding the suspensions, on July 24, 2023, the District emailed OSPI as follows:

Student received in-school suspension for two days on 9/14 and one day on 9/29, all three of which were served in the [BSC]. Student received out-of-school suspension for two days on 10/6, two days on 10/10, two days on 11/22 and three days on 3/1. He was emergency expelled for four days on 4/20.

¹ According to the District, at this point in the school year, the Student had been suspended seven days.

In a separate email, the District informed OSPI as follows, "Student was sent home at 9:37 on 3/23 and 1:45 on 3/30 for behavioral issues, but was not formally suspended.^[2]...The District does not have any records of Student being sent home at the beginning of the school year prior to the 9/15 in-school suspension."

5. On October 25, 2022, there was a reevaluation meeting for the Student, and he was found to continue to be eligible for special education services under the category of EBD and the evaluation report included recommendations for SDI in math, reading, writing, and social/emotional/behavioral.
6. A PWN, dated October 25, 2022 stated, in part:
 - 1) Advocate & parent requested student complete a BASC-3 Self Report and Parent Report.
 - 2) Advocate & Parent requested cognitive assessments in the supplemental areas including processing speed and memory....
 - 1) The Evaluation Team determined Self-report BASC-3 would not aid in the eligibility decision. Significant data collection from Teacher/Staff rating scales and classroom based daily behavior tracking demonstrated continued need, and suggested areas of growth. Parent report would not aid in determining educationally relevant impact.
 - 2) The Evaluation Team determined [Student] has significant social/emotional/behavioral needs that do not require cognitive assessments or supplemental cognitive assessment data. Cognitive assessment completed in 2016 demonstrated a consistent pattern of performance. Cognitive assessments are not required for determining continued need and eligibility.
7. On October 25, 2022, the Student's IEP team met. The Student's IEP provided SDI delivered by a special education teacher, in a special education setting, from November 1, 2022–October 31, 2023, in the following areas:
 - Math: 260 minutes/1 times weekly
 - Reading: 27 minutes/5 times weekly
 - Social/Emotional/Behavioral: 550 minutes/1 times weekly
 - Writing: 27 minutes/5 times weekly

The IEP also included 1,775 minutes of 1:1 paraeducator support as a related service. The Student received 1,775 minutes per week of building instructional time, with 1,080 minutes served in the special education setting. The percent of time in a general education setting was 39.15%. The Student's LRE was 0–39%.

² An internal District email from November 23, 2022 stated that the District asked the Parent to pick up the Student at 2:25 pm. See Finding of Fact #13.

OSPI would like to remind the District that whenever a parent is asked to pick up a student before the end of the school day because of behavior, the time the student misses in school is a classroom exclusion that must be documented as discipline and considered to assess whether a disciplinary change of placement has occurred and whether a manifestation determination is required.

8. The Student's IEP team also reviewed a behavioral intervention plan (BIP) for the Student. The Student's BIP, dated October 25, 2022,³ stated:

Target Behavior: Disruptive Aggressive Behaviors

...

When dysregulated, [Student] displays disruptive and/or aggressive behaviors which can include: noncompliance, inappropriate and unsafe language (including sexualized language and racial slurs) yelling, throwing objects and destroying classroom property, knocking over desks and chairs, eloping from his expected area, and physical aggression towards staff and/or peers (hitting, kicking, shoving).

...

INTERVENTION STRATEGIES

...

[Student] will continue to receive instruction in how to recognize when he is becoming dysregulated and to choose a self-calming strategy or tool (e.g., take a break, use noise reducing headphones, ask for a walk, etc.).

...

Antecedent Strategies...

[Student] will have a staff member in close proximity at all times throughout his day to help [Student] remain in activities, meeting his need for attention. He is often triggered by academic tasks that he perceives as challenging. Academic tasks presented to [Student] must be at his instructional level, and he requires 1:1 adult support during all academic tasks.

...

Teaching Strategies...

[Student] will receive direct instruction in how to appropriately take a break at school. He will be taught the steps of his break including:

1. Indicating the need for a break verbally or by placing his break card on his desk.
2. Choosing an appropriate break space depending on his location and what the class is doing.
3. Setting a timer for 3, 5, or 8 minutes.
4. Returning to his expected area when the timer goes off.

In addition to taking a break, [Student] will be taught about other self-calming strategies that are available to him such as deep breathing exercises, the use of a weighted blanket, a movement break, listening to music, and coloring. These will be taught and utilized frequently when [Student] is emotionally regulated so that he is better able to access them when he does become dysregulated.

Consequences Strategies...

When [Student] asks for a calming choice appropriately, his request will be honored and he will receive a high level of praise and positive reinforcement from staff.

Once [Student] has returned to baseline following an outburst, staff will validate his feelings of stress and frustration without validating his behavior. Staff will assist him in understanding what triggered his behavior, what he felt and thought about the triggering

³ This BIP was identical to the Student's BIP from November 4, 2021, which was in effect at the beginning of the 2022-23 school year.

event, how he reacted, and how his reaction impacted others. He will be expected to complete any work or task that was missed during the escalation.

9. On October 26, 2022, the Parent's advocate emailed a school psychologist (psychologist 1), "Could you please also include in the prior that we requested a new FBA be conducted and that the evaluation include classroom observations. Finally, we intend to write a rebuttal to be attached to this evaluation in his file."

School psychologist 1 responded:

There was not a request for an FBA made at the meeting. I was asked if one had been completed. FBAs are not conducted every 3-years. [Student's] FBA was reviewed as part of the Evaluation process and determined to still be an appropriate representation. Regarding classroom observations, [Student] had a full comprehensive evaluation completed and all information is outlined in the evaluation report.

...

I have CC'd my director...who can aid in attaching the rebuttal to the evaluation.

10. On November 1, 2022, the Parent sent the District a rebuttal to the evaluation, which stated, in part, "We request a new, comprehensive evaluation be conducted by a different school psychologist."
11. On November 9, 2022, the IEP team met. The Student's IEP provided SDI, delivered by a special education teacher, in a special education setting from November 16, 2022–October 31, 2023, in the following areas:
 - Math: 260 minutes/1 times weekly
 - Reading: 27 minutes/5 times weekly
 - Social/Emotional/Behavioral: 550 minutes/1 times weekly
 - Writing: 27 minutes/5 times weekly

The IEP also included, as a related service, a 1:1 paraeducator for 216 minutes per day, five times weekly to provide supervision during SDI in the special education classroom. The Student received 1,775 minutes per week of building instructional time, with 1,080 minutes served in the special education setting. The percent of time in a general education setting was 39.15%. The Student's LRE was 0–39%.

The Student's IEP provided supplementary aids and services from November 16, 2022–October 31, 2023, in general education in the following areas:

- 1:1 Paraeducator: 35 minutes/5 times weekly⁴
- 1:1 Paraeducator: 139 minutes/5 times weekly⁵

12. On November 18, 2022, the Director emailed the Parent, "The district will accommodate your request...School Psychologist [2], has been assigned to the case."

⁴ Supervision during lunch in the cafeteria.

⁵ Supervision during general education classes.

13. On November 23, 2022, an internal District email stated, “[Student] is out again on [out of school suspension] 1.5 days. We are close, if not at 10 days.⁶ (Is pick-up at 2:25pm considered a ½ day suspension?).”
14. On November 27, 2022, the Parent emailed the District:

It is my understanding that every time [Student] is sent home from school or asked to stay home, it is a suspension from school. I haven’t received any paperwork for the last two weeks. Could you please send me each day’s paperwork digitally on Monday? I believe this will result in more than 10 days of suspension. Please let me know when a manifestation meeting will be held. Thank you.
15. On December 1, 2022, school psychologist 2 emailed the Parent, “I wanted to reach out with the areas of testing for the reevaluation you are requesting...If you give permission to initiate this reevaluation, I will begin the evaluation process promptly.”
16. On December 2, 2022, the Parent’s advocate emailed school psychologist 2 as follows:

...One of our concerns from the last evaluation is the lack of parent participation or input. [Parent’s] input was not solicited, nor was it welcomed when given during the evaluation results meeting. We were hoping to conduct an assessment planning meeting so we could get feedback from his whole team and discuss the process to ensure everyone is on the same page. Could that be scheduled? In addition, we would like to request that a BCBA conduct the FBA portion. We look forward to hearing from you.
17. On December 5, 2022, school psychologist 2 emailed the Parent as follows:

...I can start collecting data and planning to work with [Student]. You can either print out the attachment, sign it, and scan it back or drop it off to the school, or you can respond via email giving consent and we have you sign in person to reflect consent when we meet.
18. On December 6, 2022, the District emailed the Parent, “Attached are the discipline letters for [Student’s] suspensions. He is currently at 8 days.”⁷
19. On December 6, 2022, the Parent emailed school psychologist 2 as follows, “Yes, I approve. I’m sorry I thought I had responded last night! Yes I give approval for Re-Evaluation and I will sign the initial form in person when I see you next!”
20. On December 8, 2023, school psychologist 2 emailed the Parent, “...I spoke with the OT in our district and she had mentioned wanting to do some fine motor/sensory testing...Can we add

⁶ Based on Finding of Fact #4, the Student had been suspended nine days, and possibly more depending on how many days the Student had been sent home early for behavior. The District’s records do not show what dates the Student was sent home early for behavior and the Parent also did not know the specific dates.

⁷ Based on Finding of Fact #4, the Student had been suspended nine days, and possibly more depending on how many days the Student had been sent home early for behavior. The District’s records do not show what dates the Student was sent home early for behavior and the Parent also did not know the specific dates.

this area to the consent form? I think it would be great to get some additional insight in this area.”

The Parent responded, “Absolutely!”

21. On December 14, 2022, school psychologist 2 emailed the Parent regarding the reevaluation and stated:

Here are some behavior rating forms for the reevaluation. The first one is the Behavior Assessment Scale for Children (BASC) which looks at big behaviors. The second is the Social Skills Improvement System Social-Emotional Learning System (SSIS-SEL). This looks more at relational skills with peers. You can access both of them by following the links.

22. On January 17, 2023, the District sent the Parent the following email, “Please click here to access this SPM-2 Child Home Form (5-12 years) and fill out all questions to the best of your knowledge.”

23. On January 25, 2023, school psychologist 2 emailed the Parent an updated evaluation report and the evaluation team met to review the evaluation. The evaluation summary provided, in part, as follows:

Student was reevaluated to determine:

- i. Whether he/she continues to be a special education student and continues to need special education and any necessary related services.
- ii. The present levels of performance and educational needs of the student; and
- iii. If any additions or modifications to the special education and any necessary related services are needed to enable the student to meet the measurable annual goals set out in the student's individualized education program and to participate, as appropriate, in the general curriculum.

...

After 5th grade...[Student] transitioned to...middle school continuing in the BSC program at the secondary level. [Student] was reevaluated according to his three-year timeline with a reevaluation meeting being held on 10/25/2022. Results indicated that [Student] continued to meet eligibility for special education with his category changing to Emotional-Behavioral-Disability with the same areas of service and behavior intervention plan. During the time of this evaluation cycle, a parent advocate created a rebuttal to the evaluation information and procedure. The district had agreed to redo the reevaluation with a different school psychologist bringing [Student's] educational history to the present time.

On November 5th, 2022...school psychologist [2] met with [Student's] mother and the parent advocate over zoom to gather updated information for the evaluation. The concerns brought up during that meeting include how [Student's] discipline has been handled. They are hoping for continued support with documentation of discipline and how often [Student] is removed from the learning setting due to behavior. Other information from this meeting can be found in the medical/physical section of this evaluation report.

A PWN documenting the January 25, 2023 meeting stated, in part, “Based on evaluation results, [Student] displays a disability being an emotional-behavioral disability [sic]. This disability adversely impacts his ability to meet grade level expectations and warrants specially designed instruction in order for him to access a free and appropriate education.”

24. The FBA, also dated January 25, 2023, recommended a BIP. The target behaviors documented were aggression and defiance.

25. On February 14, 2023, the Student's IEP team met. The Student's IEP provided SDI, delivered by a special education teacher, in a special education setting from February 21, 2023–February 20, 2024, in the following areas:

- Occupational Therapy: 15 minutes/1 Times Weekly (provided by an occupational therapist (OT))
- Math: 260 minutes/1 times weekly
- Reading: 27 minutes/5 times weekly
- Social/Emotional/Behavioral: 550 minutes/1 times weekly
- Writing: 27 minutes/5 times weekly

The IEP also included, as a related service, a 1:1 paraeducator for 216 minutes per day, five times weekly who provided supervision during SDI in the special education classroom. The Student received 1,775 minutes per week of building instructional time, with 1,095 minutes served in the special education setting. The percent of time in a general education setting was 38.31%. The Student's LRE was 0–39%.

The Student's IEP provided supplementary aids and services from February 21, 2023–February 20, 2024 in the following areas:

- 1:1 Paraeducator: 35 minutes/5 times weekly⁸
- 1:1 Paraeducator: 136 minutes/5 times weekly⁹

26. The Student's BIP, dated February 14, 2023, was largely similar to the October 25, 2022 BIP. Some of the changes included the following:

Consequences Strategies...

Replacement – if [Student] asks for a break, names a feeling or asks for help he will earn Bonus Points on his Daily Point Sheet and positive praise. Earns time in The Nest.

Target – If [Student] begins to elope, destroy things, or becomes verbally/physically aggressive, adults remind him of his expectations and what he's working towards (Time in the Nest, game room). Then state, 'you can have my attention again when you are safe, respectful, responsible and compassionate'. They will then walk away using long range proximity or video feed to monitor his behavior. Additionally, when [Student] is calm he will complete a Behavior Reflection sheet for his behaviors.

27. On March 1, 2023, according to District records, the Student:

Eloped all of 4th period. Threw staples all over the classroom. Ripped wall caddy off the wall, took into hall throwing it at lights and walls. Threw fire extinguisher multiple times toward staff, across foyer, and a wall almost hitting a window. Threw it on the ground breaking the pin and causing it to dispense contents. Tore down decorations in room tearing it to pieces. Threw staff computers on the ground. Threw a stool hitting the smart board. Flipped desks causing all contest to scatter. Threw bin of wipes and threw against

⁸ Supervision during lunch in the cafeteria.

⁹ Supervision during general education classes.

wall. Took materials off staff desks ripped materials apart. Destroyed classroom phone. Threw garbage cans across room.

For this incident, the Student was suspended three days.

28. On March 7, 2023, a manifestation determination meeting was conducted. The manifestation determination document stated that at this point in the school year, the Student had been suspended seven days.¹⁰ It was determined that the conduct in question was not a manifestation of the Student's disability. The manifestation determination document stated, in part:

5. What is the behavior for which disciplinary action is being proposed?

- Starting by eloping 4th period, was encouraged to come to the BSC to reset his day (including spending time with his WISE team member attending that day)
- Threw a chair at two paras -Hit staff members with a heavy metal object
- Threw fire extinguisher on the ground, at a window, and at the paras
- Parent was called to help 're-set' walked away from the phone call, proceeded to rip down staff artwork in the classroom, destroy staff computers, threw a stool at the classroom smart board.
- Targeted staff personal items including laptops, materials and destroyed them

Affect: was baseline, no visual sign of upset. Was not yelling, was able to have a conversation with staff while he was destroying property including talking about his responsibilities at home including chores.

...

[Student] demonstrated a level of intent, planning, and purpose with property destruction vs. a dysregulated destruction cycle. [Student] appeared in control of his actions including choosing what items he destroyed (staff personal property), laptops, and smart board. The behavior under review appeared to be within [Student's] control given the level of intent, planning, and purpose.

29. On April 20, 2023, the Student was suspended for throwing multiple items, including rocks at staff and students, and threatening to make a weapon and bring a weapon from home.

30. On April 26, 2023, a manifestation determination meeting was conducted. This manifestation determination document also provides that at this point in the school year, the Student had been suspended seven days. It was determined that the conduct in question was a manifestation of the Student's disability. The manifestation determination document stated, in part:

What is the behavior for which disciplinary action is being proposed?

- During 5th period [Student] was working on classwork from 1st period. [Student] was upset that he was going to miss 6th period due to previous day of sexualized behavior in the class.
- Eloped from the classroom - threw rocks at staff - banging on walls

¹⁰ Based on Finding of Fact #4, the Student had been suspended nine days, and possibly more depending on how many days the Student had been sent home early for behavior. The District's records do not show what dates the Student was sent home early for behavior and the Parent also did not know.

- throwing hangers at staff
- called a staff member a whore
- picked up a piece of wood and said 'Oh! I could make a shiv' and started sharpening it on concrete.
- piece of wood was removed and [Student] stated 'I can bring a weapon from home at any moment.

...
 In review of [Student's] daily behavior tracking, he had a rough start in morning and began his day dysregulated and had a difficult time re-setting the entire day. Parent noted that the fire alarm had gone off the morning of at 7:35 AM, causing the entire school to evacuate and have to wait outside until 8:00AM. As the day progressed, [Student] was unable to respond to redirects, coaching, reframes. He was unable to manage his emotions & behaviors. The behavior and incident under review presents consistent with [Student's] Emotional Behavioral Disability.

31. The Student's progress reports provided as follows:

Date	Goal	Progress
December 9, 2022	Self-calming	Insufficient Progress
December 9, 2022	Appropriate Social Boundaries	Insufficient Progress
December 13, 2022	Reading-Comprehension	Emerging Skills
December 13, 2022	Writing-Complete Sentences	Sufficient Progress
December 13, 2022	Basic Reading	Sufficient Progress.
December 12, 2022	Math-Problem Solving	Sufficient Progress
December 12, 2022	Math-Calculation	Sufficient Progress
March 31, 2023	Self-calming	Insufficient Progress
March 31, 2023	Appropriate Social Boundaries	Insufficient Progress
April 2, 2022	Reading-Comprehension	No Instruction
April 2, 2023	Writing-Complete Sentences	Sufficient Progress
April 2, 2023	Basic Reading	No Instruction ¹¹
March 28, 2023	Math-Problem Solving	Emerging Skill
March 28, 2023	Math-Calculation	Insufficient Progress
June 13, 2023	Self-calming	Insufficient Progress
June 13, 2023	Appropriate Social Boundaries	Insufficient Progress
June 16, 2023	Writing-Complete Sentences	Sufficient Progress
June 16, 2023	Basic Reading	Sufficient Progress.
June 12, 2023	Math-Problem Solving	Emerging Skill
June 12, 2023	Math-Calculation	Insufficient Progress

32. On June 21, 2023, the Parent filed this complaint, SECC 23-94, alleging, in part:

- According to the Student's daily reports, the Student was not doing anything.
- The District's manifestation determination on March 7, 2023 was incorrect.

¹¹ The progress report stated for reading comprehension and basic reading, "[Student] is currently eloping from his 4th period Reading and Writing class on a consistent basis. Due to this, his Reading and Writing teacher was unable to gather sufficient data on this goal."

- The District did not make any significant changes to help the Student with his behavioral issues, despite the Student's behavior becoming worse during the school year.
- The District's evaluation was not comprehensive, nor did it speak to the level of services the Student needed, and did not allow for the Parent's input.

33. On July 10, 2023, the District submitted its response to the Parent's complaint. Regarding the first issue, it stated it denied not implementing the IEP and stated, in part:

In this case, the District properly implemented Student's IEP because it provided him with SDI in the eligible areas of Reading, Math, Writing and Social/Emotional/Behavioral, along with the support of a 1:1 paraeducator, Occupational Therapy services following his January 2023 reevaluation and several accommodations.

Regarding the second issue, the District's response stated it followed manifestation determination procedures, explaining, in part:

...On March 7, 2023, six calendar days following Student's March 1, 2023 out-of-school suspension, the District held a Disciplinary Manifestation Determination meeting, reviewing all relevant information, including Student's evaluation and diagnostic results, observations, IEP and placement, FBA, BIP and relevant information provided by Parent ...In reviewing the relevant documentation, the IEP team reasonably determined that Student's conduct was not caused by or in direct relation to his disability, nor was the violation a direct result of the District's failure to implement his IEP.

Regarding the third issue, the District's response stated, in part:

The District appropriately followed WAC 392-172A-05147 in determining whether Student needed an FBA and otherwise addressing concerns regarding Student's behavior.

...

In this case, the District met the applicable regulatory requirements because it had previously conducted an FBA for Student in November 2019 and again in January 2023 and was implementing Student's February 2023 BIP prior to Student's two manifestation determinations in the spring of 2023...While Parent shared at the April 26, 2023 Disciplinary Manifestation Determination meeting that she wanted to review Student's program and school supports for the team to consider adjustments to increase Student's time within the program, when the District emailed her to schedule a meeting, she did not respond.

Regarding the fourth issue, the District's response stated, in part, that it did not obtain written consent for the October 2022 reevaluation, but believed this was a harmless error. The District stated it did obtain written consent for the January 2023 reevaluation and explained as follows:

Here, the District notified Parent of the October 2022 reevaluation through voicemail and email communication, with Parent acknowledging the email, but it did not obtain written parental consent...However, subsequent to the October 25, 2022 evaluation team meeting and Parent's rebuttal to the reevaluation, the District conducted a second reevaluation in January 2023, in which Parent provided informed, written consent for the District to conduct the reevaluation.

Therefore, lack of informed, written consent for the October 2022 reevaluation was harmless error due to the immediate reevaluation, which was completed in January 2023, with a different school psychologist at the request of Parent. Nonetheless, the District is proposing as a corrective action to conduct additional staff training on the issue of informed written consent.

Regarding the sufficiency of the evaluation, the District maintained the evaluations were sufficient, explaining:

Here, the District conducted an October 2022 reevaluation of Student after providing Parent with notice via both voicemail and email communication, describing the evaluation procedures...The District reviewed prior FBAs and the current BIP...It did not conduct a new cognitive assessment after determining that a new assessment was not necessary in order to support continued qualification for services...Parent provided medical-physical information to [school psychologist 1].

Additionally, [school psychologist 1] obtained general education information, along with information regarding Student's Social/Emotional/Behavioral skills, from [teacher 1] and through review of the daily behavior tracking sheets...Student was administered a WIAT-4 assessment, finding that he continued to qualify for SDI in the areas of Reading, Writing and Math...[Teacher 1] also completed a BASC-3 assessment and SSIS-SEL Rating Forms, which demonstrated Student's continued need for SDI in the area of Social/Emotional/Behavioral.

While Parent and her Advocate requested that Student complete a BASC-3 Self Report and that Parent also complete the BASC-3 Parent Report, along with cognitive assessments, the IEP team determined that the BASC-3 would not assist in the eligibility decision and a report from Parent would not aid in determining educationally relevant impact...The team also explained to Parent that Student had significant social/emotional/behavioral needs that did not require cognitive assessments or supplemental cognitive assessment data.

At the October 25, 2022 meeting, Parent also requested consideration for the first time of Occupational Therapy to be considered for the evaluation and, following the meeting, Parent submitted a rebuttal, requesting a second reevaluation by a different school psychologist.

The District then noted that it would send notice to the Occupational Therapist to determine the next steps and agreed to a second reevaluation, which was conducted in late 2022 and during which Parent provided feedback through a BASC-3 Parent Report, Student completed a BASC-3 Self Report and cognitive assessments of Student were completed. ... Based upon Parent request, the January 2023 evaluation also included Occupational Therapy.

Accordingly, the District conducted sufficient evaluations under WAC 392-172A-03020 in both October 2022 and January 2023. Further, to the extent the October 2022 evaluation could have gathered any additional data, the District's agreement to conduct the January 2023 evaluation remedied any error. Nonetheless, the District is proposing as a corrective action to conduct additional staff training on the issue of conducting a sufficiently comprehensive evaluation.

Finally, regarding Parent input in the reevaluation, the District stated it incorporated Parent input into the reevaluations, further stating:

In this case, the District properly communicated with Parent regarding both the October 2022 and January 2023 reevaluations. While Parent did not agree with the decision not to conduct certain assessments and the BASC-3 Parent Report and BASC-3 Self Report for the October 2022 reevaluation, [school psychologist 1] did obtain information from Parent

during the reevaluation process and explained to her why the assessments were not being done...Additionally, after Parent submitted the rebuttal to the reevaluation and requested a new reevaluation to be conducted by a different school psychologist, the District agreed to the request, and Parent's requests regarding the BASC-3 and cognitive assessments were conducted for the subsequent reevaluation.

Thus, the District did not violate WAC 392-172A-03020 and WAC 392-172A-03025 and, if there were any violations, such error was harmless due to the conduct of the January 2023 evaluation. Nonetheless, the District is proposing as a corrective action to conduct additional staff training on the issue of obtaining parent input as part of conducting a sufficiently comprehensive evaluation.

The District proposed the following corrective actions:

The District will conduct training by November 2023 with the...School special education staff and building administration on the appropriate procedures for informed, written consent in accordance with WAC 392-172A-05010.

The District will conduct training by November 2023 with the...School special education staff and building administration on the appropriate procedures for conducting a complete and sufficient evaluation, including obtaining parent input, under WAC 392-172A-03020.

CONCLUSIONS

Issue One: IEP Implementation – The Parent alleged generally, that according to the Student's daily reports, the Student was not doing anything and thus the District failed to implement the Student's IEP. The District's position on this issue is that it provided the Student with "SDI in his eligible areas...along with the support of a 1:1 paraeducator."

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.

The Student's progress notes from December 2022 show that the Student was making sufficient progress in reading, writing, and math. According to the Student's March/April progress notes, he was struggling with reading, writing, and math. This was partly due to the Student eloping from his reading and writing class on a consistent basis, which meant that while the Student was missing instruction, the District was attempting to implement the Student's IEP. The Student's June 2023 progress notes once again show an improvement in reading and writing, but that he was still struggling in math. Additionally, a review of the emails between the parties during the 2022–23 school year show that they all dealt with issues pertaining to the Student's behavior, and that the Parent did not raise concerns with the Student's SDI in reading, writing, and math throughout the course of the school year. While the Student's progress fluctuated throughout the year, the documentation supports that the Student's IEP was being implemented, although there were ongoing challenges related to behavior.

The Student's progress notes from the school year show the Student struggled with his social/emotional/behavioral goals. Regarding the Student's SDI in social/emotional/behavior, the District did attempt to address concerns with the Student's behavior during the 2022–23 school year. In the present case, on June 22, 2022, the date when the investigation period for the present case began, there was an IEP in place dated June 6, 2022, and a BIP in place from November 2021. For the 2022–23 school year, the Student was enrolled in the BSC, which is, according to the District, "a specialized program designed to service students with significant social/emotional/behavioral needs, and is an integrated program that allows students to access...supports within their general education classes and across all settings, as appropriate. The Student also had a 1:1 paraeducator."

The record shows that the Student's behavior was monitored daily during each class. Additionally, the Student, based on his IEPs, was receiving social/emotional/behavioral SDI for 110 minutes each day. Also, the Student had detailed BIPs (November 2021, October 2022, and February 2023) in place, which were meant to target the Student's disruptive aggressive behaviors. A reevaluation of the Student was performed in October 2022, and shortly thereafter, the Parent requested another reevaluation because she disagreed with how it was conducted, and the District performed a second reevaluation.

There are many reasons why a student may not make the progress desired on IEP goals and a lack of progress does not necessarily equate to an IDEA violation by the district. Based on the present case's facts, the District has not materially failed to implement the Student's IEP and OSPI does not find a violation regarding the first issue.

Issue Two: Manifestation Determination – The Parent alleged the District's manifestation determination on March 7, 2023 was incorrect.

Within ten school days of the district's decision to change the student's placement through discipline, the district, parents, and other relevant members of the IEP team (as determined by the parents and the district) must determine whether the behavior that led to the disciplinary action was a manifestation of the student's disability. In making the manifestation determination, the district, parents, and other relevant members of the IEP team must consider all relevant information in the student's file to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or if the conduct in question was the direct result of the school district's failure to properly implement the student's IEP or behavior intervention plan.

The District's position on this issue is that it followed appropriate manifestation determination procedures and stated:

...On March 7, 2023, six calendar days following Student's March 1, 2023 out-of-school suspension, the District held a Disciplinary Manifestation Determination meeting, reviewing all relevant information, including Student's evaluation and diagnostic results, observations, IEP and placement, FBA, BIP and relevant information provided by Parent...In reviewing the relevant documentation, the IEP team reasonably determined that Student's

conduct was not caused by or in direct relation to his disability, nor was the violation a direct result of the District's failure to implement his IEP.

In the present case, the Student was suspended on March 1, 2023, for three days for an incident that involved eloping from class, throwing objects all over the classroom, and ripping items off the wall. The manifestation determination that took place six days later determined that the Student's actions were not a manifestation of his disability for two reasons. First, the Student showed "no visual sign of (being) upset". Second, the Student "demonstrated a level of intent, planning and purpose with property destruction vs. a dysregulated destruction cycle."

OSPI notes that the standard to be used in a manifestation determination is whether the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability (or was due to a failure to implement the IEP). Determining a student's intent is generally not relevant in a manifestation determination. Behaviors can be intentional and still be caused by or have a relationship to the disability. Further, OSPI notes that determinations based on how a student "looks" when they are upset/dysregulated are concerning, as this would be very subjective and it is not clear this speaks to the behavior having a direct and substantial relationship to the student's disability. Here, it appears the group determined the behavior was "intentional" and does not appear the group considered whether the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability.

Further, in the present case, the Student's BIP states that when the Student becomes dysregulated, he "displays disruptive and/or aggressive behaviors which can include: noncompliance, inappropriate and unsafe language (including sexualized language and racial slurs) yelling, throwing objects and destroying classroom property." Based on the District's records, this is exactly what happened on March 1, 2023, and as such, the Student's actions were likely a manifestation of his disability. Based on the present case's facts, OSPI finds a violation regarding the second issue, and as a corrective action the District will be required to provide staff training on manifestations.

Finally, OSPI would like to remind the District that whenever a parent is asked to pick up a student before the end of the school day because of behavior, the time the student misses in school is a classroom exclusion that must be documented as discipline and considered to assess whether a disciplinary change of placement has occurred and whether a manifestation determination is required. Here there were several days that were uncounted when the Student was sent home early; thus, it is possible that the manifestation determination should have occurred earlier than it did.

Issue Three: FBA – The Parent's position is that the District did not make any significant changes to help the Student with his behavioral issues, despite the Student's behavior becoming worse during the school year. The District's position is that it "met the applicable regulatory requirements because it had previously conducted an FBA for Student in November 2019 and again in January 2023."

In developing, reviewing, and revising each student's IEP, the team must consider the use of positive behavioral interventions and supports and other strategies to address the student's behavior. This means that in most cases in which a student's behavior impedes his or her learning or that of others, and can be readily anticipated to be repetitive, proper development of the student's IEP will include positive behavioral interventions, strategies, and supports to address that behavior. An FBA and BIP must be used proactively, if an IEP team determines that they would be appropriate for a child.

In the present case, in late October 2022, a meeting was held to review the Student's reevaluation, IEP, and BIP. On October 26, 2022, the Parent's advocate emailed the District as follows, "we requested a new FBA be conducted and that the evaluation include classroom observations." Then on November 1, 2022, in her rebuttal, the Parent requested "new, comprehensive evaluation be conducted by a different school psychologist," and on November 5, "school psychologist [2] met with [Student's] mother...to gather updated information for the (second) evaluation. The concerns brought up during that meeting include[d] how [Student's] discipline has been handled."

On November 18, 2022, the District granted the Parent's request for a comprehensive evaluation with a different school psychologist. Over the next three months, the record shows that school psychologist 2 conducted a comprehensive evaluation of the Student and requested significant input from the Parent. This included the District completing an FBA, dated January 25, 2023, which recommended a BIP. The target behaviors were aggression and defiance. Additionally, the record shows that consistent with the Student's BIPs, the District kept detailed data regarding the Student's behavior for each class and that data was used to allow the Student to earn preferred activities. The fact that the Student had ongoing behavior challenges and made inconsistent progress in this area does not automatically mean the District incorrectly handled this situation and violated the IDEA. Based on the present case facts, the District has not committed a violation regarding the present case's third issue.

Issue Four: Evaluation Procedures – The Parent made several allegations regarding the reevaluation conducted during the 2022–23 school year.

Written, Informed Consent

A school district proposing to conduct an initial evaluation to determine if a student is eligible for special education services must provide prior written notice and obtain informed consent from the parent before conducting the evaluation.

Regarding informed consent, the "District admits that it did not obtain written, informed consent for the October 2022 reevaluation...but [t]he District obtained written, informed consent prior to conducting Student's January 2023 reevaluation." The record shows that on December 6, 2022, the Parent emailed school psychologist 2 as follows, "Yes, I approve. I'm sorry I thought I had responded last night! Yes I give approval for Re-Evaluation and I will sign the initial form in person when I see you next!"

Based on the present case's facts, there is a violation regarding the District failing to obtain consent for the October 2022 evaluation. OSPI accepts the District's proposal to conduct additional staff training on the issue of informed written consent as a corrective action.

Sufficient Evaluation & Parent Input

The Parent alleged the District's evaluation was not comprehensive, nor did it speak to the level of services the Student needed, and did not allow for Parent's input.

In completing an evaluation, the evaluation group must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parents. No single test or measure may be used as the sole criterion for determining the student's eligibility or disabling condition and/or determining the appropriate education program for a student.

In the present case, the District conducted an evaluation in October 2022, but the Parent was not satisfied with this evaluation and requested another evaluation, in part, because of the lack of her input. The District granted that request. For the second evaluation, the record shows the District sought the Parent's input multiple times beginning on November 5, 2022, and including, but not limited to, December 1, 5, 8, and 14, 2022, and January 17, 2023. Based on the January 2023 comprehensive evaluation, the Student's February 2023 IEP and BIP were drafted. Finally, the record does not show that the Parent objected to the January 2023 evaluation as she had objected to the October 2022 evaluation. Thus, based on the present case's record, OSPI does not find a violation regarding the sufficiency of the evaluations. The Parent objected to the October 2022 evaluation because she believed it was insufficient, and the District addressed the Parent's concerns within a reasonable amount of time and produced a second, more comprehensive evaluation by January 2023.

Despite the District's position that their evaluations of the Student were sufficient, the District is proposing additional staff training on conducting sufficiently comprehensive evaluations. While OSPI always encourages such training, in the present case, it will not order it as a corrective action.

CORRECTIVE ACTIONS

By or before **September 15, 2023, September 29, 2023, and December 15, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

The District, in cooperation and collaboration with a non-District employee (e.g., the ESD or other trainer), will co-develop and jointly conduct a training on the topics below. The District will provide the trainer with a copy of this decision, SECC 23-94.

The following District staff will receive training: District special education administrators and psychologists, and the following at the Student's school: principal, assistant principal, counselor, and special education certified staff (teachers). The training will cover the following topics:

- Evaluation procedures as provided in WAC 392-172A-03020 and WAC 392-172A-03025.
- Written consent procedures as provided in WAC 392-172A-05010.
- Manifestation determination procedures as provided in WAC 392-172A-05146.

By or before **September 15, 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.

The training will also include post-training implementation activities for staff to demonstrate their learning and the District to support implementation. The District will propose the plan and OSPI will review and provide input. The implementation support could include job-embedded coaching, additional trainings or development of a training series, exploring policy and procedure revision, development of a District monthly audit to ensure discipline is being properly tracked, etc. By or before **September 29, 2023**, the District will provide OSPI with the training plan and post-training activities for review, input, and approval.

By or before **September 29, 2023**, the District will submit a draft of the training materials for OSPI to review. OSPI will approve the materials or provide comments by October 12, 2023.

By or before **November 30, 2023**, the District will conduct the trainings regarding the topics raised in this complaint decision.

By or before **December 15, 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 17th day of August, 2023

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.)