

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 18-27

PROCEDURAL HISTORY

On March 19, 2018, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Seattle School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On March 20, 2018, 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 April 5, 2018, the District requested an extension of time to respond to the complaint. OSPI granted the request and extended the timeline to April 18, 2018 for the District to respond.

On April 18, 2018, OSPI received the District's response to the complaint and forwarded it to the Parent on April 19, 2018. OSPI invited the Parent to reply with any information she had that was inconsistent with the District's information.

On May 1, 2018, the Parent requested an extension of time to reply to the District's response. OSPI granted the request and extended the timeline to May 4, 2018 for the Parent to reply.

Also on May 1, 2018, OSPI requested clarifying information from the District. On May 3, 2018, OSPI interviewed the District attorney via telephone.

On May 3, 2018, OSPI requested additional information from the District. On May 9, 2018, the District provided additional information and OSPI forwarded it to the Parent on May 10, 2018.

On May 4, 7, and 8, 2018, OSPI received the Parent's reply. OSPI forwarded that reply to the District on May 8, 2018.

On May 11 and 14, 2018, the Parent provided additional information and OSPI forwarded it to the District on May 14, 2018.

On May 17, 2018, the Parent provided additional information and OSPI forwarded it to the District on the same day.

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

OVERVIEW

During the 2016-2017 school year, the Student attended a District school and was found eligible for special education services. In January 2017, the Student's individualized education program

FAPE and the parent provides consent as defined in WAC 392-172A-01040; (j) the projected date when the services and program modifications will begin, and the anticipated frequency, location, and duration of those services and modifications; (k) beginning no later than the first IEP to be in effect when the student turns 16, appropriate, measurable postsecondary goals related to training, education, employment, and independent living skills; and transition services including courses of study needed to assist the student in reaching those goals; (l) beginning no later than one year before the student reaches the age of majority (18), a statement that the student has been informed of the rights which will transfer to him or her on reaching the age of majority; and (m) the district's procedures for notifying a parent regarding the use of isolation, restraint, or a restraint device as required by RCW 28A.155.210. 34 CFR §300.320; WAC 392-172A-03090.

IEP Implementation: At the beginning of each school year, each district must have in effect an individualized education program (IEP) for every student within its jurisdiction who is eligible to receive special education services. 34 CFR § 300.323(a); WAC 392-172A-03105(1). 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, case manager, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105.

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).

Related Services: Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a student eligible for special education to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in students, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training. 34 CFR §300.34(a); WAC 392-172A-01155(1).

Choice of Personnel: As a general rule, districts have discretion in personnel decisions, such as staffing assignments or hiring. *Gellerman v. Calaveras Unified Sch. Dist.*, 37 IDELR 125 (9th Cir. 2002); *see also, In the Matter of the Clover Park School District*, OSPI Cause No. 2004-SE-0072 (WA SEA 2004); *In re Los Altos Elementary School District*, 38 IDELR 111 (CA SEA 2002); *In re Freeport School District*, 34 IDELR 104 (IL SEA 2000). To show a denial of a free appropriate public education, it must be shown that the staff member was unqualified. *Letter to Anonymous*, 49 IDELR 44 (OSEP 2007).

Functional Behavioral Assessment (FBA): An FBA focuses on identifying the function or purpose behind a child’s behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP team in developing a behavioral intervention plan (BIP) that will reduce or eliminate the misbehavior. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-2). The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP, which includes behavioral intervention services and modifications that are designed to address and attempt to prevent future behavioral violations. *Letter to Janssen*, 51 IDELR 253 (OSERS 2008).

An FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. As with other evaluations, to conduct an FBA, the district must obtain the parents’ consent and complete the FBA within thirty-five (35) school days after the district received consent. 34 CFR §300.303; WAC 392-172A-03015. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-4). Once the need for a reevaluation is identified, a district must act “without undue delay and within a reasonable period of time;” and the U.S. Department of Education, Office of Special Education Programs (OSEP) has indicated that waiting several months to seek consent is generally not reasonable. *Letter to Anonymous*, 50 IDELR 258 (OSEP 2008). The IDEA does not specify who is qualified to conduct an FBA, for example there is no requirement that a board-certified behavior analyst, or any other specific individual, conduct an FBA. *Letter to Janssen*, 51 IDELR 253 (OSERS 2008).

FINDINGS OF FACT

Background Facts

1. During the 2016-2017 school year, the Student attended school in the District and received accommodations under a Section 504 plan.
2. In the fall of 2016, the Student was referred for a special education evaluation and the District evaluated the Student. The initial evaluation included assessments in the areas of study/organizational skills and written language and a review of existing information in the areas of adaptive/life skills, communication, motor skills, social/behavior skills.
3. On December 15, 2016, the Student’s evaluation group met and determined that the Student was eligible for special education services under the category of other health impairment. The Parent participated in the meeting by phone and the Student’s father attended the meeting in-person. The evaluation report stated the Student’s diagnosis of attention deficit hyperactivity disorder (ADHD) had a significant impact on his school and academic performance, and recommended that the Student receive specially designed instruction in the area of study/organizational skills. The Parent disagreed with the evaluation, requested an independent educational evaluation (IEE), for which the District agreed to pay.

65. On February 14, 2018, the Student's case manager responded to the Parent's February 13, 2018 email, requesting data with some information about the Student's attendance. The case manager asked the Parent to provide documentation on "what is happening in the evening and at home prior to an absence or tardy" and stated that this is something a counselor could work on with the Student. The case manager also gave an update on the Student's assistive technology and stated that counseling was set to start after mid-winter break. The parent responded with additional questions about the FBA. Additionally, the Parent asked the case manager to send a separate email to counselor 1, with the Parent and the Student's father copied, confirming coverage.
66. On February 15, 2018, the Parent forwarded the case manager's February 14, 2018 email to counselor 1 to confirm that counseling was scheduled. Later, the case manager also emailed counselor 1 that the Student should start counseling as soon as possible and that the principal had "worked out the behind the scenes details."
67. On February 16, 2018, counselor 1 emailed the case manager, principal, and Parent, asking for an update on statements from the Parent's February 8 and 9, 2018 emails that read:
- [Provider 1] is separate from the school district and cannot provide mental health counseling that is part of our son's IEP on [the District's] behalf.
 - If we could get the billing department of [provider 1] to get confirmation.
- The case manager responded and asked the principal if these questions could be addressed. Later in the day, the principal responded and stated that "everything is worked out for [the Student] to start counseling with [the counselor] after break."
68. Also on February 16, 2018, provider 1's administrator emailed the principal and clarified that counselor 1 could not provide counseling services listed on an IEP, but could provide private counseling to students with IEPs.
69. The District was on break February 19-23, 2018.
70. On February 22, 2018, the Parent emailed director 1 and the case manager and requested a consent form so that the Parent could sign consent for the FBA. The Parent also stated that "We consented to special education placement on 1/30 and from what [the case manager] has been saying since then, the FBA is being conducted. It is strange that we were not asked to sign an evaluation consent form prior to FBA initiation."
71. On February 23, 2018, the Parent resent her February 22, 2018 email about the FBA and included a link to the State special education regulation on consent.
72. On February 23, 2018, the Parent emailed counselor 1 and asked if she had received confirmation from provider 1's billing department that the billing question was resolved. The Parent also asked if counselor 1 had been invited to the Student's IEP meeting that was scheduled for February 27, 2018, and provided information about the Student's social skills

and behavior. Counselor 1 forwarded the Parent's email to her supervisor and asked if she should begin services.

73. On February 27, 2018, counselor 1's supervisor emailed the principal and stated, "there seems to be longstanding and significant confusion about the role that [counselor 1], [provider 1's] mental health therapist, can play in serving [the Student.]" The supervisor stated that the provider 1's policy did not allow for its services to be part of an IEP. The supervisor also stated that she assumed the District would then name someone on the IEP as responsible for whatever counseling services are listed as part of the IEP, and that that person would be the "one working on the IEP stated goals and serving the student for the required number of minutes." The supervisor stated that counselor 1 could provide "ADDITIONAL (unrelated to the IEP) services to this student," but that the Student would need to access these services as any other student would. The supervisor stated that the Parent seemed to be reluctant to sign the consent form because then the Parent's insurance would be billed. The supervisor went on to state that the District was "under no obligation to pay for these services, particularly since the district will be providing the IEP required services," but that if the District chose to pay for the services, the provider would need written documentation of the arrangement. The principal responded and stated that when he and the supervisor had previously spoken "it seemed as if a solution could be found that would create an opportunity for a child to be served" and asked if they could meet to discuss.⁷ The supervisor responded that she would be happy to meet to discuss the principal's concerns.

74. Also on February 27, 2018, the principal emailed director 1 and asked for assistance. After some discussion over email, director 1 responded the principal should:

Share that [the] protocol for [provider 1] mental health services is that they have a signed "disclosure" or consent form specific to [the counselor's] counseling services. If she won't sign (and have them subsequently bill the family's insurance, which has already been explained to them), then he will go to the school counselor for services. There is no denial of services, just different avenues regarding providers and their protocols.

The principal responded that there was no "school counselor" who could provide services.

75. On February 27, 2018, the Student's IEP team met and amended the Student's IEP (February 2018 IEP amendment). The principal informed the Parent of the misunderstanding with provider 1 and that counselor 1 would not be able to provide IEP counseling. According to documentation provided by the District, the principal discussed the option of having the school-based psychologist provide counseling services, but the Parent rejected this offer and emails from the school psychologist indicated that he believed he would not necessarily be a good fit unless issues such as workload were resolved. The IEP team also amended two of the Student's annual goals and added an accommodation (access to sensory fidgets). Additionally, counselor 1 attended the IEP meeting in order to have the Parent sign a consent

⁷ The principal is likely referencing his conversation with provider 1's administrative manager on or around January 24, 2018, after which the principal believed that he had worked out a way for counselor 1 to provide counseling services under the Student's IEP. However, this is contradicted by the administrative manager's email on February 16, 2018, which stated that counselor 1 could not provide IEP-based counseling.

form for private services, which according to documentation provided by the District, the Parent signed.

76. On February 28, 2018, the Parent emailed various IEP team members following up on the IEP meeting. The emails are summarized below:

- The Parent emailed the principal that “hopefully the FBA will soon be finished” and also that “the supposedly already initiated FBA is just like any other evaluation and requires parent consent and explanation of this evaluation.” The Parent asked again for a consent form to sign. The Parent also wrote that there was nothing “in the regulations preventing a school district from contracting for outside services. I verified this with OSPI today.”
- The Parent emailed director 1 and expressed frustration that the “arranged mental health counselor coverage, which was supposedly already arranged two weeks ago by [the principal], cannot happen.” The Parent stated that “what happened in yesterday’s IEP meeting regarding the already agreed upon counseling is shocking. Suddenly, [the counselor] cannot provide counseling because it is on [the Student’s] IEP.” The Parent stated that the school psychologist was not the appropriate person to provide counseling. The Parent said that she had not seen any data or evidence that the Student was making progress, even though the Student’s teachers stated he was making progress, but also said that the Student’s writing was improving and that he was making progress in his English language arts class.
- The Parent emailed director 1 again and stated that on February 16, 2018, the principal told them that everything was set for the Student to begin counseling with the counselor and that the Parent had been told “repeatedly that the staff is ‘working very hard’ on setting up counseling.” The Parent wrote that the “sudden realization that this will not be possible, as per the school principal yesterday does not match up.”

77. On March 1, 2018, the Parent emailed the principal and asked for the school psychologist’s credentials.

78. Also on March 1, 2018, the case manager emailed the Parent and stated that he had brought the FBA consent form to the IEP meeting on February 27, 2018, but that the team did not have a chance to discuss the FBA. The case manager stated that he “had planned to confer with the counselor regarding the FBA and collecting data, however, as you well know, those plans changed rather suddenly yesterday. When I have more details I will email you the assessment consent form.” The Parent responded and stated that the case manager could email them the form, but also that “We still need an explanation, but we need to move on with this, we have lost a month (minus week of mid-winter break) since the supposed FBA initiation.”

79. Later on March 1, 2018, the Parent emailed director 1 and stated that she had not received the FBA consent form. Director 1 emailed the case manager and asked him to email the consent form to the Parent that day. The case manager responded to director 1 and stated that he would send the consent form, but that he had concerns about the scope of the FBA and the fact that he intended for the FBA data collection to be conducted by a mental health professional. The case manager wrote that the school “staff have no evidence of school based anxiety so I am unable to collect data from his teachers” and that the Student had not yet met with a counselor.

80. Finally, on March 1, 2018, the Parent sent multiple emails to the Student's case manager about the Student's behaviors and school anxiety. In response, the case manager emailed the Parent an FBA consent form to sign, which the Parent signed and emailed back the same day.
81. On March 2, 2018, the Parent emailed the school psychologist and asked to schedule a meeting to discuss his background, credentials, training, experience, and expertise in medication. In response, the school psychologist forwarded the Parent's email to a District special education supervisor, the District southwest regional supervisor, the principal, a school psychologist at a different District middle school, the case manager, and a school psychologist at a District elementary school. The school psychologist stated that there were several issues that needed to be resolved before he communicated with the family. Additionally, the school psychologist⁸ stated that the Student's October 2017 reevaluation report did not identify a need for counseling as a related services and its addition on the IEP was inappropriate.
82. According to the District, as a result of the school psychologist's belief that the Student's January 2018 IEP inappropriately included counseling, and due to the discrepancy with the October 2017 reevaluation report's recommendation page, the school psychologist removed the counseling service from an open electronic draft of the February 27 IEP amendment to the Student's January 2018 IEP stored in the District's computer system. The Student's case manager then noticed the mistake and reported it. As a result, the District believed a District employee corrected the error. However, the counseling services were not actually reinserted in the Student's IEP stored in the computer system, which resulted in the services being omitted from the February 2018 IEP amendment and an IEP amended later in March. The District stated that the "IEP team and the parents believed that the counseling services were in the February 27, 2018 and March 27, 2018 IEP [amendments], and the District continued to offer the services to the Student."
83. According to documentation provided by the District, on March 5, 2018, the Parent met with counselor 1 regarding the provision of private, non-IEP counseling services for the Student.
84. On March 5, 2018, the case manager emailed the Parent in response to the Parent's request for another IEP meeting and stated that, until they could meet again, the Student was being served as written in the Student's IEP.
85. On March 6, 2018, the Parent emailed the case manager and asked when counseling would be set up. The Parent stated that she wanted to meet with the school psychologist and that she wanted his background information.

⁸ The school psychologist is not the same school psychologist that completed the Student's October 2017 reevaluation report.

86. On March 7, 2018, the Parent, case manager, and assistant principal emailed back and forth about several incidents that the Student was involved in at school and the Parent's safety concerns. The Parent stated that this information should be considered in the FBA.
87. On March 7, 2018, the Parent emailed director 1 and stated that the Student's IEP was not meeting his needs.⁹
88. According to the documentation provided by the District, the Student met with counselor 1 on March 7, 2018 for private, non-IEP counseling.
89. Also on March 7, 2018, the District's regional supervisor contacted a mental health provider [provider 2] about the possibility of providing the Student with counseling services.
90. On March 9, 2018, director 1 emailed the Parent and stated that the District was gathering information on possible counselors to provide the Student's IEP counseling services. Director 1 also let the Parent know that the principal would contact the Parent regarding a new counselor and dates for another IEP meeting.
91. According to the District's documentation, on March 11, 2018, the Student's language arts teacher accidentally identified the Student's missing work with zeros in the gradebook.¹⁰ The language arts teacher addressed and corrected the grade as soon as it was brought to his attention. In emails about the issue to the Parent and director 1, the case manager confirmed that the mistake had been fixed and that all of the Student's accommodations were being followed every day.
92. On March 12, 2018, the Parent emailed the case manager about behavior the Student exhibited in the morning while getting ready for school. The case manager responded that the Parent's reports were helpful and that he would be "collecting them to work with the counselor in creating an FBA." In response, the Parent asked who the possible counselor was and whether a counselor was necessary to come to a conclusion in the FBA.
93. On March 13, 2018, the Parent emailed director 1 a series of concerns about the Student's education, including:
- That the Student was not being served or fully supported.
 - That counseling was on the Student's IEP and has not been provided.
 - That the Student's teachers are supposed to "pair oral instruction with written instruction" and that the Student had not received any written instructions.¹¹

⁹ Based on documentation provided in this complaint, it is likely that the Parent meant the IEP was insufficient and needed to be amended, not that the IEP was not being implemented.

¹⁰ The Student's IEP stated that "missing assessments/assignments are to be left blank in the grade book" and that "missing assignments should not be graded zero, only noted as missing."

¹¹ According to documentation provided in this complaint, the Student's 504 plan included an accommodation that required staff to "pair written instructions with oral instructions." However, the Student's IEP did not include an accommodation that specifically stated that all instructions would be oral and written. The Student's IEP did provide

- That the FBA was initiated before the Parent signed a written consent form; that the timeline for the FBA was improperly extended by delaying getting Parent consent; and that the accuracy of the data being collected was flawed.
- That “related services approved are not being delivered and many are still missing.”¹²

94. On March 14, 2018, the Parent emailed the Student’s case manager and director 1 about the Student’s behavior, social skills, and challenges getting the Student to wake up, get ready, and go to school. The Parent stated that the Student needed more social skills support and that the IEP counseling had still not been arranged. The Parent also forwarded the email to counselor 1, stated that she had sent reports to the Student’s case manager about the Student’s behaviors at home, and provided counselor 1 with information about the Student’s missed classes and instances of being tardy.

95. Also on March 14, 2018, the Parent emailed director 1 again and requested an IEE for the FBA because the Parent did not believe that the case manager was qualified to conduct the FBA. The Parent stated that the FBA needed to focus on more than the fact that the Student was missing classes, and should include an evaluation of the Student’s social skills, social interactions, and cognitive functioning. The Parent wanted the FBA to address her concerns that the Student was being bullied. The Parent also wrote that the Student was not making progress in “study/organizational skills, social skills or behavior,” that the Student’s IEP was not being followed because the Student had not received “instruction in writing ever that we would see, which in his case is like he received no instruction at all,” and because the Student was not using his assistive technology (i.e., his tablet) or being provided with a visual schedule.

96. By March 16, 2018, the District had arranged for a licensed social work associate (counselor 2) with a focus in mental health in the school setting to provide the Student with IEP counseling services. The District invited counselor 2 to the next IEP meeting. The District also notified the Parent that a new counselor had been arranged and invited the Parent to an IEP meeting.

97. On March 20, 2018, the Parent emailed the principal about scheduling the IEP meeting and asked for counselor 2’s contact information, background, and credentials. The principal responded and provided the Parent with a link to counselor 2’s employer’s (provider 2) website.

98. On March 21, 2018, the Parent emailed the principal, director 1, and director 2 that counselor 2 was not a good fit because she did not have the skills, experience, or appropriate background to work with the Student. The Parent asked if it would be better if the Parent tried to find a “suitable professional.” The principal responded and stated that counselor 2 was selected as “the best option based on all of the conversations about this and in

him with accommodations, such as a visual daily schedule; copies of notes and/or study guides; allowing the Student to repeat back instructions to ensure understanding; and modified, repeated, or modeled directions.

¹² Other than counseling, it is not clear what other related services the Parent believed were missing.

collaboration with our central [District] special education colleagues.” The Parent responded that she would not meet with counselor 2 and that she would start looking for an “adequate therapist [herself] since this seems to be a challenge for [the District].”

99. On March 26, 2018, the principal responded further to his email conversation with the Parent on March 21, 2018. The principal clarified that families “do not select who will be the service provider of the minutes on the IEP—that is the role of the school.” The principal stated that the District felt that counselor 2 was a good fit and that she would be attending the IEP meeting the next day. The Parent responded and reiterated the proposed IEP counselor was unacceptable because she was “inexperienced and does not have enough or appropriate training.”
100. Later on March 26, 2018, the Parent emailed director 1 and stated that it was not appropriate for the principal to invite counselor 2 to the IEP meeting. The Parent stated that counselor 2 was not qualified and that the Parent would not consent to her services. The Parent also stated that if counselor 2 came to the IEP meeting, the Parent would leave. The Parent emailed director 1 later that same day and stated that the Student needed a counselor who had “the skills to get [the Student] ready for the transition of lowering doses of his medication.”
101. On March 27, 2018, the Student’s IEP team, including the Parent, met to review the Student’s progress. The team also again amended the Student’s January 2018 IEP by revising a goal, adding a goal, and removing a goal from the IEP. Counselor 2 did not attend the meeting.
102. On April 2, 2018, director 1 emailed the Parent and reiterated that, as of March 27, 2018, the District had a counselor ready to serve the Student. Director 1 stated that because the Parent stated that she would not allow the Student to work with counselor 2, that the Parent “could identify a counselor who could serve the IEP minutes.” The Parent responded that she did not agree to the IEP.
103. The District was on break April 9-13, 2018.
104. On April 23, 2018, according to the Parent’s reply, the Parent provided the District the name of an “appropriately trained and experienced provider for counseling services, recommended by the [Student’s] pediatrician.” According to the Parent and the District, director 1 attempted to contact the counselor by phone, but that the counselor has not responded. The Parent also stated that she has contacted the counselor, but has not yet heard back. According to the District, counselor 2 remains ready to serve the Student.
105. On April 26, 2018, the timeline to complete the Student’s FBA ended. According to the District’s response to this complaint, the District “determined that an FBA to address the school-anxiety the Parents state the Student exhibits in the home environment cannot be done without the involvement of the Student’s counselor. The FBA therefore cannot be completed until the Student is receiving the counseling services identified in his IEP.” The

District stated that it may not be able to comply with the timeline because the Parent has not yet allowed the Student to receive counseling services from the District's selected provider.

CONCLUSIONS

Issue 1 – IEP Implementation: The Parent alleged that the District failed to implement the Student's individualized education program (IEP) during the 2017-2018 school year, and specifically that the District failed to provide the Student with counseling and accommodations. Once a parent consents to the initial provision of special education services, a district is responsible for making a free appropriate public education (FAPE) available to a student, through an IEP; and, the district must ensure that it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. A student's IEP must contain a statement of the special education services and related services to be provided to the student and the modifications and accommodations that will be provided to enable the student to advance appropriately toward attaining IEP goals, and be educated and participate with other students. A student is entitled to receive related services that are required to assist the student to benefit from the special education services. As a general rule, districts have discretion in personnel decisions, such as staff assignments or hiring, which includes related service providers.

Related Services (Counseling)

On January 30, 2018, the Parent signed consent for the initial provision of special education services, and the District was required to begin implementing the Student's January 2018 IEP, which provided the Student with thirty minutes of counseling as a related service, twice a week. However, the District did not have a person in place to begin providing the Student's counseling services at that time, due to confusion about who would provide the services. Initially, the District believed that counselor 1 from the school's partner health center (provider) could provide the IEP counseling minutes. However, per the provider's policy, counselor 1 could not provide IEP counseling services, which was communicated to the District and the Parent, but the parties misunderstood. After notifying the Parent of the misunderstanding, the District attempted to assign a school psychologist to provide the Student's counseling services. The Parent felt that the school psychologist was not qualified to provide counseling and there is some indication that the school psychologist himself did not think it would be a good fit. The District then identified another mental health provider (counselor 2) to provide the Student with his IEP counseling minutes. The Parent objected to counselor 2 because she felt counselor 2 did not have the skills, experience, or background to work with the Student. The District stated that as of March 27, 2018, it had a counselor ready to serve the Student. On April 2, 2018, the District reiterated that it had a counselor ready to work with the Student, but that because the Parent would not allow the Student to work with counselor 2, the Parent could identify a counselor who could provide the IEP mandated counseling. On April 23, 2018, the Parent provided the District with the name of a counselor she felt was appropriately trained and experienced. Both the District and the Parent have attempted to contact the suggested counselor, but have not heard back.

The District admitted that it was not initially able to engage a service provider to deliver the Student's counseling as stated in his IEP and offered to provide the Student with compensatory counseling services for the times a service provider was not available. OSPI agrees that the District failed to provide the Student's IEP counseling minutes, and notes that this failure seems to have stemmed from a series of significant misunderstandings, an ongoing lack of communication between all involved individuals, and a lack of a clear process for engaging private providers to deliver related services. The Student's January 2018 IEP provided for two, thirty (30)-minute counseling sessions or sixty (60) minutes of counseling per week. From January 30, 2018 through March 27, 2018, there were seven (7) weeks of school. During that time period, the Student should have received seven hours of counseling. The District will provide the Student with seven (7) hours of compensatory counseling. As of March 27, 2018, the District was ready to provide services; however, the Parent would not allow the Student to see the new counselor. The District has discretion over staff assignments, including related service providers, and therefore is not required to compensatory services for the time period after March 27, 2018. It is also noted that the District has made an attempt to resolve the Parent's concerns about counselor 2, by allowing the Parent to provide the name of a counselor she feels is appropriate to work with the Student and by attempting to contact that counselor, which is not required under the IDEA.

The District will also develop a policy and procedures for adding, identifying, and including private (non-District) service providers in IEPs.

Accommodations

On January 9, 2018, prior to the implementation of the Student's IEP on January 30, the Student participated in testing for the District's advanced learning opportunities program and the principal emailed the test administrator a list of the Student's 504 plan accommodations. On January 30, 2018, the District implemented the Student's IEP, which provided the Student with a series of accommodations. On February 1, 2018, the Student participated in additional testing for the advanced learning opportunities program with the same test administrator. According to the District's response to this complaint, the Student was provided with his accommodations, the testing went well, and the Student qualified for highly capable programming. On March 11, 2018, the Student's language arts teacher mistakenly identified the Student's missing work with zeros in the gradebook, despite the Student's IEP providing him with the accommodation that "missing assessments/assignments are to be left blank in the grade book." The language arts teacher addressed and corrected the grade as soon as it was brought to his attention, and the case manager confirmed that all of the Student's accommodations were being provided. On March 13, 2018, the Parent emailed director 1 a concern that the Student was not receiving any written instructions and that the Student's teachers had never provided the Student any written instructions. The Parent also stated that the Student was not being provided with a visual daily schedule and was not using his assistive technology (i.e., his tablet). The Student's IEP provided him with accommodations such as a visual daily schedule, copies of notes and study guides, allowing the Student to repeat back instructions to ensure understanding, and

modified/repeated/modeled directions. The Student's IEP did not specifically provide him with an accommodation that all instructions be written and oral.

The District's documentation in this complaint indicates that it provided the Student with substantially all of the accommodations listed in his IEP. Additionally, during the first testing session for the advanced learning opportunities program, the Student was provided accommodations under his 504 plan, because his IEP had not yet been implemented. The District substantiated that it implemented the Student's IEP accommodations.

Issue 2 – Functional Behavioral Assessment: The Parent also alleged that the District failed to follow procedures for conducting a functional behavioral assessment (FBA) during the 2017-2018 school year. An FBA focuses on identifying the function or purpose behind a student's behavior and is generally understood to be an individualized evaluation of the student. As with other evaluations, to conduct an FBA, the district must obtain the parents' prior consent and complete the FBA within thirty-five (35) school days after the district received consent. Once the need for a reevaluation is identified, a district must act without undue delay and within a reasonable period of time. Federal and State special education regulations do not specify who is qualified to conduct an FBA; therefore, it is a district's responsibility to select staff.

At the beginning of January 2018, the Parent asked about a behavioral intervention plan (BIP) or behavioral assessment; however, the Parent did not specifically request a functional behavioral assessment (FBA) until January 29, 2018. The District informed the Parent that an FBA was part of an IEP and would be initiated after the Parent consented to the provision of special education services, which occurred on January 30, 2018. During February 2018, the Parent emailed the District several times with information about the Student's school refusal behaviors and anxiety about going to school, and the District indicated that it was collecting information and behavior data that could be used by whoever conducted the FBA. The Parent and the District then had ongoing discussions about who was conducting and qualified to conduct the FBA; when the FBA would be completed; and whether there was data to review. On February 8, 2018, the Parent indicated that she could sign consent for an FBA, and on February 22, 23, and 28, 2018, the Parent again requested that the District provide a consent form. On March 1, 2018, the District provided and the Parent signed consent for the FBA. However, at this point, the Student's case manager expressed concerns about the scope of the FBA and the fact that he intended for the FBA data collection to be conducted by a mental health professional. According to the District, it anticipated not being able to complete the FBA within the required timeline (by April 26, 2018, thirty-five school days from March 1, 2018) because the FBA could not be completed until the Student was receiving counseling services and the Student had not yet received counseling.

The District sought and received the Parent's consent for the FBA eighteen (18) school days after the Parent requested an FBA. While an eighteen school day delay in getting signed consent is not necessarily unreasonable, the Parent indicated a potential need for behavioral supports at the beginning of January 2018 when she asked about a BIP or a behavioral assessment. Whether a parent requests that the District provide supports, services, or conduct assessments, the District is required to take steps to respond within a reasonable amount of time, and either agree

to the request or provide a parent with prior written notices, documenting why the District is refusing the request. Waiting two months to address the Parent's request for behavioral supports was not a reasonable amount of time. Additionally, an FBA is not part of an IEP or a BIP. An FBA is an assessment that can be used to inform an IEP team's decisions about a student's need for behavior services or a BIP. Given that the Parent specifically asked for an FBA consent form to sign at least four times, which demonstrates the request for assessment, OSPI believes that the District should have either obtained the Parent's written, signed consent for the FBA earlier than March 1, 2018, or provided the Parent with prior written notice, stating the reason it did not think an FBA was appropriate at that time. The District did not substantiate that it followed the procedures for responding to and/or conducting an FBA and the District will be required to conduct training on the topic.

CORRECTIVE ACTIONS

By or before **June 15, 2018, June 29, 2018, July 13, 2018, August 31, 2018, September 14, 2018,** and **October 5, 2018,** the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

By or before **June 8, 2018,** the District will meet with the Parent to develop a schedule for a total of seven (7) hours of counseling. The District will determine the personnel to provide the counseling services, as per district policies. If the Parent disagrees with the District's selection of a counselor, the District is not required to provide additional options as it is within the District's discretion to select the service provider. Services will occur outside of the District's school day and may be accessed over the summer months. If the 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 **September 7, 2018.** The District will provide OSPI with documentation of the schedule for services by or before **June 15, 2018.**

The District must provide OSPI with documentation by **July 13, 2018,** of the compensatory services provided to the Student. 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. By or before **September 14, 2018,** the District must provide OSPI with documentation that it has completed compensatory services for the Student.

The District must either provide transportation necessary for the Student to access these services, or reimburse the Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must reimburse the Parent for round trip mileage at the District's privately owned vehicle rate. The District must provide OSPI with documentation by **September 14, 2018.**

DISTRICT SPECIFIC:

1. By **September 7, 2018**, the District will provide training regarding the procedures for responding to a parent's request for a functional behavioral assessment (FBA) and the procedures for conducting an FBA. The training will be for all District special education administrators and the following staff at the Student's current school: all special education certificated staff, including education staff associates (ESAs), school principals, and assistant principals. The trainer will not be an employee of the District. The training will also include examples.

By **June 15, 2018**, the District will notify OSPI of the name of the outside 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 **June 29, 2018**, the District will submit a draft of the training materials to OSPI for review. OSPI will approve the materials or provide comments by July 6, 2018 and additional dates for review, if needed.

By **September 14, 2018**, the District will submit documentation that staff participated in the training. This will include 1) a sign-in sheet from the training, and 2) an official human resources roster of all District special education administrators and all special education certificated staff, including education staff associates (ESAs), school principals, and assistant principals at the Student's school, so OSPI can verify that all required staff participated in the training.

2. The District will develop a policy and procedures regarding private, non-District service providers (e.g., counselors) providing services stated on IEPs. The procedures should address when a private service provider is needed, how to identify a private provider, and the process for setting up and implementing private services. By **June 29, 2018**, the District will submit a draft of the policy and procedures. OSPI will approve the policy and procedures or provide comments by July 13, 2018 and provide additional dates for review, if needed.

By **August 31, 2018**, the District will provide OSPI with documentation showing that the policy and procedures have been provided to all District special education administrators and all building principals. This will include an official human resources roster of all required staff members, so OSPI can cross reference the list with the actual recipients.

By **September 28, 2018**, all District principals will review the policy and procedures with all building certificated special education staff, including educational staff associates (ESA). ESAs include school psychologists, physical therapists, speech language pathologists, school counselors, school nurses, and other services providers. By **October 5, 2018**, the District will provide OSPI with documentation that the principals have reviewed the policy and procedures with all required staff. The documentation will include an official human resources roster of all principals, so OSPI can cross reference the list with the actual recipients.

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.

RECOMMENDATION

Given that there is no indication that the District completed the Student's FBA, OSPI recommends that the District complete the Student's FBA regardless of the status of the Student's IEP counseling. If the District is unable to complete the FBA, the District should communicate with the Parent regarding next steps.

Dated this ____ day of May, 2018

Glenna Gallo, M.S., M.B.A.
Assistant Superintendent
Special Education
PO BOX 47200
Olympia, WA 98504-7200

THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

IDEA provides mechanisms for resolution of disputes affecting the rights of special education students. This decision may not be appealed. However, parents (or adult students) and school districts may raise any matter addressed in this decision that pertains to the identification, evaluation, placement, or provision of FAPE to a student in a due process hearing. Decisions issued in due process hearings may be appealed. Statutes of limitations apply to due process hearings. Parties should consult legal counsel for more information about filing a due process hearing. Parents (or adult students) and districts may also use the mediation process to resolve disputes. The state regulations addressing mediation and due process hearings are found at WAC 392-172A-05060 through 05075 (mediation) and WAC 392-172A-05080 through 05125 (due process hearings.)