

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 19-41

PROCEDURAL HISTORY

On May 17, 2019, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Bellingham School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On May 21, 2019, 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 May 28, 2019, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on the same day.

On June 10, 2019, OSPI received the District's response to the complaint and forwarded it to the Parent on June 11, 2019. OSPI invited the Parent to reply with any information he had that was inconsistent with the District's information.

On June 18, 2019, OSPI received the Parent's reply. OSPI forwarded that reply 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.

ISSUE

1. Did the District follow procedures to implement the Student's individualized education program (IEP) on May 10, 2019, regarding use of the 1:1 paraeducator when the paraeducator had to leave the Student with other staff while the paraeducator used the restroom?

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. 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, special education teacher, related service provider, and any other service provider who is responsible for its implementation.

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 disabled child and those required by the IEP. *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

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. Related services include paraeducator support, 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).

Supplementary Aids and Services: Supplementary aids and services means aids, services, and other supports that are provided in general education classes or other education-related settings to enable students eligible for special education to be educated with nondisabled students to the maximum extent appropriate in accordance with the student's least restrictive environment. 34 CFR §300.42; WAC 392-172A-01185.

IEP Team Consensus: The IEP team should work toward consensus, but the district has ultimate responsibility to ensure that the IEP includes the services that the student needs in order to receive FAPE. It is not appropriate to make IEP decisions based upon a majority "vote" and no one team member has "veto power" over individual IEP provisions or the right to dictate a particular educational program. If the team cannot reach consensus, the district must provide the parents with prior written notice of the district's proposals or refusals, or both, regarding the student's educational program and that parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12, 472, 12,473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 9). *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). *See also, Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1182-83 (9th Cir. 1984) (Holding that a school district is responsible for providing a student with a disability an education it considers appropriate, even if the educational program is different from a program sought by the parents.)

FINDINGS OF FACT

Background

1. During the 2018-2019 school year, the Student attended a District high school and was eligible for special education services under the category intellectual disability.
2. The District's 2018-2019 school year began on August 29, 2018.
3. On January 14, 2019, following OSPI's corrective action and recommendation in a prior special education citizen complaint (SECC), filed by the Parent regarding the Student's education, the

Student's IEP team met to discuss issues raised in the previous complaint.¹ The Student's behavioral intervention plan (BIP) was amended. The prior written notice from the meeting indicated the "family requested that the Student have a single, dedicated 1:1 paraeducator throughout the entire school day." The notice stated the Student's IEP team rejected this proposal and stated:

after reviewing and discussing classroom data, the team is in agreement that [Student] has made progress towards his academic and behavioral goals with the use of multiple, varied support staff throughout his school day. The staff who work with Student must be trained in the use of his medication and the components of his health plan regarding grand mal seizures. They must also be trained in the use of positive behavior intervention strategies per his behavior plan. His success is based on a consistent schedule with predictable routines and people. The most success has been achieved when [Student] works with 3 different paraeducators over the course of the day (1 for morning, 1 for lunch, 1 for the afternoon). This type of schedule allows for cross-training of paras should changes to staffing need to occur and builds the number of people familiar with [Student's] needs.

4. On January 30, 2019, the Student's IEP team met again and considered the Parent's requests regarding the Student's BIP.
5. The District was on break February 11-15, 2019.
6. On March 1, 2019, the District and Parent signed a mediation agreement, which added "phased implementation to the BIP and a written communication goal to the IEP."
7. Also, on March 1, 2019, the Student's IEP team met and amended his IEP. The March 2019 amended IEP noted the Student was "prone to four different types of seizures" and "he has a medical plan to follow if he has a grand mal seizure at school." The IEP included annual goals in the areas of adaptive skills, social-emotional, behavior, math (coins, count dollar amounts, elapsed time, and multiplication facts), reading ("wh-" questions and functional sight words), written expression (write a sentence and name signature), and an extensive list of accommodations.

¹ SECC 18-91 was received by OSPI on October 5, 2018, and a decision was issued December 4, 2018. OSPI found the following: "the District properly implemented the Student's IEP regarding the 1:1 paraeducator supplementary service. However, because of the ongoing confusion noted in the documentation provided regarding the role, scope, and implementation of the 1:1 paraeducator, OSPI strongly recommends the District hold an IEP meeting to discuss these issues if it has not yet had one and that the District provide prior written notice for those issues in which it disagrees with the Parent's requests...[and] OSPI finds the District failed to properly implement the Student's BIP on September 25, 2018, because the Student was left unattended in the elevator and was not provided access to a phone to call his Parent according to his BIP...Therefore, the District must reconvene an IEP meeting to discuss the Student's need for access to a phone on his BIP to ensure the Student will have timely access to a phone in all settings when needed for its intended purpose."

The IEP provided for 1,400 minutes of “individual paraprofessional² support” per week as a related service and an additional 450 minutes per week as a supplementary aid and service. The IEP stated the Student “requires 1:1 paraeducator support to meet his health, medical and instructional needs.”³

8. The prior written notice, dated March 1, 2019, noted the Student’s IEP was amended to include an adaptive goal regarding written communication and that the team agreed upon a “phased implementation of the Behavior Intervention Plan.”
9. On March 4, 2019, the Student’s IEP team amended the Student’s BIP. The BIP described the target behavior (unsafe behaviors) and intervention strategies. The BIP included interventions, such as being in a safe environment with a trusted adult and working with a trusted adult. The BIP did not specifically address the use of a paraeducator, but does reference “trading staff” as a strategy under antecedent strategies and the response plan.
10. On March 28, 2019, OSPI received a request for a SECC investigation from the Parent, which was opened as SECC 19-24. The identified issue was: “Did the District implement the following accommodation in the Student’s individualized education programs (IEPs) on November 30, 2018 and January 15, 2019: ‘access to call home (see behavior intervention plan)’?”⁴
11. The District was on break April 1-5, 2019.
12. On April 10, 2019, the Student’s IEP team met for a facilitated IEP meeting. In the team considerations section, the April 2019 amended IEP stated the Student “benefits from individual paraeducator support,” and in the “present levels of educational performance medical-physical” section, the IEP noted that a “staff member should be within an arm’s length away when walking with [Student].”⁵

The IEP continued to provide 1,400 minutes of “individual paraprofessional support” per week as a related service and an additional 450 minutes per week as a supplementary aid and service. The Student’s IEP team also updated the Student’s BIP.

² This decision uses paraprofessional and paraeducator interchangeably; in general, language quoted from the District uses the term paraprofessional. Both terms refer to the same classification of staff.

³ The IEP also provided specially designed instruction and other related services, but as those elements of the IEP are not at issue in this complaint, they will not be detailed in this decision.

⁴ On April 22, 2019, OSPI placed SECC 19-24 in abeyance pending the outcome of the due process request filed by the Parent (No. 2019-SE-0060). On June 18, 2019, OSPI confirmed that the Parent has withdrawn his due process request and 2019-SE-0060 was dismissed. On June 20, 2019, OSPI notified the District and the Parent that the investigation would resume and a decision will be issued on or before August 16, 2019.

⁵ OSPI notes this IEP was amended in several areas. As these areas are not relevant to the issue under investigation and because this IEP was not being implemented during the relevant incident, no further detail is included in this decision.

13. On April 16, 2019, the District issued a prior written notice, which summarized that "it was noted that a staff member should be within an arm's length way when walking with [Student] in medical/physical present levels of performance, based on parent input," among other amendments that were made to the IEP. The prior written notice also noted several "action steps," including, "physical therapy assistants will create some sort of brace to protect [Student] from a fall if he has a seizure on the trike."
14. Due to the "stay put" in the due process and the fact that the April 10, 2019 IEP was disputed, the April 2019 amended IEP was not implemented. The District's director of teaching and learning, special education (director) notified the Parent on April 24, 2019, that the District would not "be implementing the IEP discussed by the team on April 10," due to the IDEA's "stay-put provision [that] requires that a student remain in his or her current educational placement while a due process hearing is pending, unless the parties agree otherwise." The District noted the previous IEP would remain in effect.

The District also stated that "if there are aspects of the IEP discussed on April 10 that you would like to be implemented during this stay-put period, the District is willing to agree to implement those aspects of the new IEP" and that "it appeared that the full team was in agreement on changing services minutes to enable [Student] to participate in a general education art class." The District asked the Parent to let them know if he wanted "the school to implement this change while stay-put is in effect. This will not be implemented at this time without your agreement."

May 10, 2019 Incident

15. On May 10, 2019, the incident at issue in this complaint occurred.

16. According to the Parent's complaint:

[Student] was left alone in a classroom, without a dedicated 1:1 staff member present at his side. The staff member apparently went to use the restroom and [Student] was left unattended for a couple minutes (according to [Student]). When asked about the matter, [life skills teacher and case manager] replied via email, that: 'As the class was preparing to go on the field trip [paraeducator 1] used the restroom before heading out. There was other staff and students in the classroom getting ready for the outing. [Student] was not left unsupervised.' It should be noted that [Student] was in an attached classroom and not in the classroom with the other staff and students.

The Parent noted the Student was at risk for seizures and head injuries, should he fall. The Parent stated staff cannot be "in the next room or even in the same room, nearby. They need to be within arm's reach, to prevent falling injuries from grand mal seizures." The Parent stated the Student had, in the past, required emergency medical attention when he had a seizure, fell, and injured his head in eighth grade; thus, the Parent stated, "the risk of a fall and a seizure are current and always present."

After the incident on May 10, 2019, the Parent emailed the Student's life skills teacher and case manager (case manager) and stated, "I'll want copies of all incident notes from today's

trip to the airport, why he fell down and I didn't get a text about that, and why [Student] was left alone today at school, while staff took a break...I'll want printed copies, I'll expect to pick those up Monday." The Parent stated, "I'll inform you now that I was required to deescalate him via phone" and expressed concerns about the Student being told he could not ride in the front seat on the way to the field trip.

Also, on May 10, 2019, the Parent emailed the director, stating, "you will want to get a handle on your people," because the Parent had been called three times to pick the Student up "because [staff] couldn't deescalate him today. They didn't have a back up plan except to call me either." The Parent stated the Student was escalated because he was "left alone by staff, when they forgot to make a caregiver hand off."

On May 11, 2019, the Parent emailed the District's superintendent and a local family advocate his "incident notes." The notes included the following, summarized in part:

- "Before lunch, I got a text that [Student] had a small 'shake' (precursor to other seizure activity) and stumbled a bit."
- Concerns about transportation and not having a backup transportation plan.
- Concerns that staff is not adequately trained because there was no back up transportation plan and because they could not deescalate the Student.
- According to the Student, he was "left alone in the room for a couple minutes (by his account) while [paraeducator 1] went to the restroom before the field trip. Apparently [paraeducator 2] didn't hear that she needed a break from him. [Student] was very upset and rather fixated on this matter when talking with us about it, and later to his Mother as well. This very well could have been exactly the sort of trigger which we mean. This again raises the problem of accountability...We MUST be told about mistakes like this. They are not supposed to happen."

17. The District's response to the complaint presented a different version of events regarding the May 10, 2019 incident. First, the District noted that the Student's March 2019 amended IEP and the March 2019 amended BIP—not the April 2019 IEP—were in place on May 10, 2019. The District emphasized that the term "1:1 paraeducator" does not mean "a single individual throughout the school day" and that this issue was addressed in a previous complaint.⁶

Regarding the incident, the District stated the following:

Student was sitting in a chair at a table in a smaller classroom adjoining the main classroom when the paraprofessional ([paraeducator 1]) who had been working with him used the restroom as the class was preparing to leave school for an outing. Student was in the chair the entire time the paraprofessional was in the restroom, approximately 2 to 5 minutes. A second paraprofessional ([paraeducator 2]) was in the room with Student for part of the time and a third paraprofessional ([paraeducator 3]) was in the adjoining classroom with

⁶ This issue was addressed in SECC 18-91, which investigated, among other issues, "Did the District implement the Student's individualized education program (IEP), including the one-to-one-paraeducator and the behavioral intervention plan (BIP)?" The decision in SECC 18-91 found that the District "properly implemented the Student's IEP regarding the 1:1 paraeducator" and that "no documentation was found to support the Parent's allegation that there was agreement that the 1:1 paraeducator service would be or had to be provided by a single individual to receive a FAPE."

the Student. Both paraprofessionals were aware that [paraeducator 1] was using the restroom and that they had responsibility for the Student during these two to five minutes.

Paraprofessional [paraeducator 2] remembers needing to attend to another student who was leaving the classroom, and paraprofessional [paraeducator 3] remembers being with the Student and conversing as they prepared for the outing while [paraeducator 1] was in the restroom. [Paraeducator 3] also remembers communicating 'we've got this' to [paraeducator 1] when she let [paraeducator 2] and him know she needed to use the restroom prior to the outing, showing they understood they were taking on the paraprofessional support of the Student. Other students were also in the classroom during this time as the group prepared for the outing. The Student did not get up from his chair to leave the room during this time.

The District refuted the Parent's allegation, stating the Student was not left alone in the classroom, as there were other students and paraeducator staff in the classroom during this time. The District stated the paraeducators understood that they had primary responsibility for the Student while paraeducator 1 was in the restroom. The District stated the "principle and practice of having several staff share the 1:1 paraprofessional service throughout the day had been clearly established through the findings of SECC 18-91 and the subsequent IEP meeting of Jan. 14."

The District also provided a diagram to illustrate where the Student was seated during this incident and how the room connects to the main classroom (see appendix A). The District noted, "the door to the main classroom is always open...to allow continuous visual and auditory monitoring." The District stated the Student "often chooses to work in this space, consistent with the following strategies in his BIP:

- Setting Event Strategies: Prefers sitting at a table rather than a desk.
- Antecedent Strategies: Dimming the lights in the classroom.
- Reinforcement Plan: Calm, quiet space to problem solve.

Finally, the District's response addressed the Parent's statement in his complaint that staff "need to be within arm's reach, to prevent falling injuries from grand mal seizures." The District noted that during the incident, the Student was seated, not walking; and regardless, the March 2019 amended IEP—in place during the incident—does not address physical proximity of staff to the Student.

18. The District also provided statements from the following staff regarding the incidents on May 10, 2019:

- Life skills teacher: Statement about the field trip and the Student becoming escalated on the field trip.
- Paraeducator 1: Statement largely about the field trip. Statement noted things the Student said while in the vehicle back to school, including "you should have known this would happen" and "remember the bathroom." Paraeducator 1 stated, "I assumed he was referring to the incident that occurred earlier where he felt he was left unsupervised. I engaged in this conversation with him. I validated his concerns. I ensured [sic] [Student] that he was not left unsupervised, and again, that I was sorry he felt this way."

- Staff person driving the school vehicle: Statement largely about transporting the Student back to school after the field trip. Staff person did note that while in the car, the Student made the following statements: "you should have known this would happen...remember the bathroom...remember when I tripped earlier..."
- Paraeducator 2: "On our May 10th outing I was assigned to work with a student [other student] who is line-of-sight. As we left the back room [other student] was in front of me and as I passed [paraeducator 1], she said, 'I need to use the bathroom' so I slowed down hoping the student [other student] would stop. [Other student] hurried across the room, out the door, and I saw him run/walking toward the library. I said something like, 'There goes [other student], I can't wait,' and I rushed after [other student]. There were at least two other staff members in the back room with [Student] and another one or two in the classroom. [Student] was never left unsupervised to my knowledge. I did ride in the van with [paraeducator 1] and [Student]...he was in a good mood and nothing was said about being left alone at all. During the entire trip in the van, [Student] seemed in good spirits and did not show any signs of distress."
- Paraeducator 3: "During some unstructured time I was in the breakout room...attached to the classroom. [Student] was sitting at the table, we were having conversation. [Paraeducator 1] mentioned she needed to use the restroom, I said 'no problem, we got this', she returned within 5 minutes. [Student] remained sitting, and we engaged in conversation during her absence."

19. On May 13, 2019, the case manager emailed the Parent and stated the Student "did have a stumble at school. At 11:08 am, [paraeducator 1] texted you; '[Student] had a small shake. He was standing and stumbled a bit but is totally fine!'" The case manager also stated paraeducator 1 used the restroom before everyone left for the field trip and that there were "other staff and students in the classroom getting ready for the outing. [Student] was not left unsupervised."

The Parent responded, stating:

...He reports he was left alone in a room. Describe where he was, and for how long? Was there a staff member within arm's reach? Be aware that his perception of things matters. Facts also matter, but how he sees those facts can affect him greatly. He will respond to what he perceives.

The case manager replied and stated she spoke with paraeducators 1, 2, and 4 and: regarding supervision, [Student] was sitting in his chair when [paraeducator 1] used the restroom before the class left for the outing. [Student] was in his chair the entire time...approximately 2 minutes. [Paraeducator 2] was in the room with [Student] for part of the time, and [paraeducator 3] was also in the classroom and aware that [paraeducator 1] was using the restroom. Other students were also in the classroom. [Student] did not get up from his chair to leave the room during this time.

The Parent emailed back and stated, "that description is not how his 1:1 works" and that he was filing a complaint with OSPI.

20. On May 17, 2019, the Parent emailed the case manager, director, superintendent, and a local family advocate regarding the notes from the incident on May 10, 2019. The Parent asked where the notes were "about the issue with [Student] being left alone? (Which room was he

in, how far away were other people? How did staff initially respond?)” The Parent went on to state:

We have said, again and again and again that someone has to be arms reach from him at all times. Not in a chair, or in another room, not just while walking, all the time. We are nearly one full year into school here, and somehow this detail keeps being interpreted inappropriately by the [District] ‘Arms reach, all the time.’ We cannot be more clear about this...

The Parent further repeated concerns about the field trip and stated all of this indicated a pattern of ignoring parental input. The Parent stated, “we still don’t have anything appropriate to protect [Student] with, while he’s in school. His entire IEP and BIP plus transition services need to be fixed, and yet we can’t get anyone to be serious about what [Student’s] needs are.”

21. On May 17, 2019, the case manager responded to the Parent and stated the Student was not left unsupervised, two staff members knew paraeducator 1 needed to use the restroom, both “acknowledged and confirmed that they knew she needed to step out of the classroom,” that the Student was sitting down the entire time, and the Student was safe and supervised.

The Parent replied and repeated questions about which classroom the Student was in, why the Student reported he was sitting alone, and whether staff were at arms reach at all times. The Parent stated, “Do you understand why we gave that input to begin with? He became upset about this incident, and it was about 15 minutes later.”

22. Also, on May 17, 2019, OSPI received the request for this special education citizen complaint.

23. On May 25, 2019, the Parent emailed OSPI with additional notes regarding the May 10, 2019 incident. The Parent stated the following regarding staff being an arm length from the Student:

- “Staff handoffs to [Student] and to we his family mean that, one staff member who stays at arm’s length hands off to another staff member who stays at arm’s length with [Student], until the first staff member returns.”
- “We have never suggested that staff be at arm’s length ONLY while he’s walking. That would be questionable in light of the fact that he had a grand mal seizure in class at [District high school], while seated.”
- Staff must be arm’s length at all times: 1) It’s necessary to prevent injury should a seizure occur, and he falls. 2) It’s also behaviorally necessary to convey to [Student] that his safety matters.”

The Parent also stated the incident later in the day—“when he had a frontal lobe seizure while on a field trip”—was because the Student was “upset about being left alone in the attached but separate classroom, and manifested this stressful situation in a frontal lobe seizure around 15-20 minutes later.”

24. As part of the investigation, the Parent also provided a reply to the District’s response. In his reply, the Parent stated the District “has not invested in ensuring that our son’s behavioral needs are met so that he can access FAPE” and reiterated that the issue was about interpretation—specifically, the 1:1 paraeducator and being at “arm’s length at all times.” The Parent stated, “To clarify (again), a dedicated 1:1 staff member, means someone working with

[Student], not other students too, and at arm's length at all times." The Parent stated that this had been communicated to the District several times and that the District "finally acknowledged this need" on March 10, 2019, "but they did so poorly." The Parent further stated:

We asked that staff be at arm's length at all times. The [District] only included language which requires them at arm's length when [Student] is walking. This is not our language. This was written by the [District] after the IEP meeting, and was locked from changes via Prior Written Notice. It's not correct, needs to be changed, and the [District] has refused any and all changes to the IEP and BIP. As they point out, that set of changes was stayed by due process, and wasn't in place when the incident occurred. It wouldn't have been correct, even had it been in place though; because the wording is wrong.

The Parent stated the need to be within an arm length of the Student is a medical necessity based on the potential that the Student may have a seizure and fall during the seizure. Regarding the incident, the Parent also stated that regardless of how "the [District] sees this, interprets his needs, etc., they remain wrong...HIS response was to become upset that he had been left alone (by his perception and ours). The [District] cannot simply write up whatever it likes, then claim they are providing FAPE anyway. [Student did not feel safe]."

The Parent stated, "when the paraeducator left to go to the bathroom, she handed off to another paraeducator. That person should have been dedicated to him at that time, and should have been at arm's length for the duration of that time." According to the Parent, the Student "was upset by this lack of concern for his well being, and manifested his behavioral disability about 15 minutes later, during a field trip."

The Parent ended his reply by stating, "The violation is in the lack of accountability for preparing inadequate IEP accommodations. The information has been there all along, best practices for prevention of falling injuries requires it...the district must fix [its] documents."

CONCLUSIONS

Issue One: IEP Implementation – The Parent alleged that on May 10, 2019, the Student's individualized education program (IEP)/behavioral intervention plan (BIP) were not implemented when the Student was left in the classroom, alone, and without a dedicated 1:1 paraeducator with him. All services outlined in a student's IEP should be provided, consistent with the student's needs as described in that IEP. The IEP should be accessible to all teachers and providers who are responsible for its implementation. Paraeducator support can be included in an IEP as a related service or a supplementary aid and services; and, as part of the IEP, related services and supplementary aids and services should be implemented. However, when a school does not perform exactly as called for by an IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the student's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a student and those required by the IEP.

March 2019 IEP Implementation

Here, the March 2019 IEP, which was in place at the time of the incident, included 1,400 minutes of individual paraeducator support per week as a related service and an additional 450 minutes a week of paraeducator support as a supplementary aid and service. The IEP noted the support was one-to-one (1:1) paraeducator support, meaning that one paraeducator worked only with the Student at any given time (for this Student, there were generally three paraeducators who worked with him over the course of the day—one for morning, one for lunch, and one for afternoon). The March 2019 IEP did not address physical proximity.

On May 10, 2019, an incident occurred in which the Student's 1:1 paraeducator went to use the restroom prior to leaving for a field trip. According to the Parent's complaint, the Student was "left alone in a classroom, without a dedicated 1:1 staff member present at his side" and the Student was left "unattended for a couple minutes (according to [Student])." According to the Parent, this incident resulted in a delayed reaction on the part of the Student as he became escalated approximately 15 minutes later while the class was on the field trip.

The District maintains the Student was never left alone on May 10, 2019, and the Student was safe and supervised. According to the District, the Student was sitting in a chair in the smaller attached classroom (see appendix A), when his paraeducator (paraeducator 1) needed to use the restroom. While the paraeducator was out of the room for approximately 2-5 minutes, a second paraeducator was in the small room for part of the time and a third paraeducator was near the Student, having a conversation with him while they all prepared for the field trip (see e.g., statements from the case manager and paraeducators 1, 2, and 3). The District stated the other paraeducators were aware paraeducator 1 had left the room and that they were responsible for the Student.

OSPI finds, based on the documentation from multiple different staff persons, that the Student was not left alone or unsupervised for the several minutes his 1:1 paraeducator used the restroom. Another paraeducator remained in the small attached classroom and had a conversation with the Student as the Student remained seated at a table. Absent further specifics in the March 2019 IEP about proximity to the Student, the documentation in this complaint indicates the IEP was implemented on this occasion. Accordingly, OSPI finds no violation.

Other Implementation Concerns

Upon investigation, it appears the Parent's complaint is largely that the Student *perceived* he was left alone, that the paraeducator was not within an arm's length of the Student, and that the Parent continues to disagree with the District regarding the development of the Student's IEP and BIP (specifically, inclusion and interpretation of specific supports).

The Parent, in his communications to the District and information provided to OSPI, implied that even if the Student was not left unsupervised, it would not matter because the Student's *perception* was that he was left alone (e.g., "HIS response was to become upset that he had been left alone (by his perception and ours)" and the Student "was upset by this lack of concern for his

well being.”) While the Parent’s concern is valid, especially given the documentation that strong emotional reactions can trigger seizures in the Student, it is incredibly challenging to anticipate how someone will perceive an event or address a person’s *potential* perception. Given this, OSPI believes staff here acted appropriately and attempted to address how the Student felt—for example, paraeducator 1 engaged the Student in a conversation about what happened and “validated his concerns. I ensured [sic] [Student] that he was not left unsupervised, and again, that I was sorry he felt this way.” While OSPI finds that the District’s follow up was appropriate, in future, OSPI recommends the District consider strategies to help the Student become more comfortable with unscheduled staff transitions.

Additionally, throughout the documentation, the Parent raised concerns that staff was required to be within an arm’s length of the Student and that during the incident, staff was not an arm’s length from the Student. The Student’s April 2019 IEP did include a statement that staff “should be within an arm’s length away when walking with [Student].” However, due to disagreement over the April 2019 IEP, the request for a due process hearing filed by the Parent, and a “stay put”, this IEP was not being implemented at the time of the incident. Thus, because this portion of the April 2019 IEP was not in effect on the date of the incident, OSPI cannot find the District at fault for failing to implement an IEP that it was not obligated to implement.

It is clear the Parent continues to disagree with the development of the Student’s IEP, the inclusion or lack of certain supports, and what specific supports mean. As these allegations were not made by the Parent in the original complaint, OSPI will make no conclusion regarding the development and interpretation of the April 2019 IEP. OSPI does note that in situations such as this, mediation or a due process hearing may be a more appropriate venue to resolve disagreements about interpretation.

In conducting this investigation, OSPI sees no glaring errors with how IEPs have been developed and does not necessarily see that parental input has been ignored. While IEP teams should strive for consensus, this is not always possible. And, a district has the ultimate responsibility to ensure an IEP includes the services the student needs in order to receive a free appropriate public education (FAPE). No one member—including the parent—has the right to dictate a particular educational program. If the team cannot reach consensus, the district must provide the parents with prior written notice of the district’s proposals or refusals, or both, regarding the student’s educational program and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.

Building consensus seems to be a key tension in this situation. The Parent stated in several communications that “this is not our language” and “it’s not correct, needs to be changed” regarding the District’s incorporation of language about the paraeducator walking an arm’s length from the Student. It is unclear and not possible for OSPI to determine in this investigation whether the IEP team agreed and the agreed upon language was not included in the IEP, or whether the Parent disagrees with the decision made by the rest of the IEP team. OSPI reiterates that no one member of the team, including the Parent, has the right to dictate language in an IEP; although, the IEP team should, of course, consider the Parent’s input. This is not the first time this sort of disagreement has occurred (e.g., ongoing disagreement regarding the “cell phone” provision that

is, in part, at issue in SECC 19-24). OSPI reminds all parties that while consensus is the goal, disagreement does not necessarily mean a compliance violation has occurred or that a parent has been prevented from participating in the process. Ultimately, the District must offer the Student a FAPE, even if the Parent disagrees with elements of the educational program. OSPI encourages the District to consider whether an additional IEP meeting is needed to address the Parent's ongoing concerns and build common understanding of what supports the Student needs, possibly with the involvement of an IEP facilitator or mediator.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this ____ day of July, 2019

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

THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

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