

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 21-77**

### **PROCEDURAL HISTORY**

On September 28, 2021, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Tacoma 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 September 28, 2021, 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 October 18, 2021, OSPI received the District's response to the complaint and forwarded it to the Parent on October 19, 2021. OSPI invited the Parent to reply. The Parent did not submit a written reply.

On November 2, 3, and 9, 2021, OSPI requested that the District provide additional information, and the District provided the requested information on November 12, 2021. OSPI forwarded the information to the Parent on November 15, 2021.

On November 3, 2021, OSPI spoke with the Parent via phone and conducted an interview with the private behavior technician that worked with the Student during the 2020–2021 school year.

On November 17, 2021, OSPI conducted interviews with the Student's special education teacher, two paraeducators, and the District's legal counsel.

OSPI considered all information provided by the Parent and the District as part of its investigation. It also considered the information received and observations made by the complaint investigator during interviews.

### **SCOPE OF INVESTIGATION**

This decision references events that occurred prior to the investigation period, which began on September 29, 2020. 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.

### **ISSUE**

1. Has the District implemented the Student's individualized education program (IEP) since September 29, 2020, including providing paraeducator services, applied behavior analysis (ABA) therapy, and specially designed instruction?

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

## FINDINGS OF FACT

### 2020–2021 School Year

1. During the 2020–2021 school year, the Student attended a District elementary school and was eligible for special education services under the category autism.
2. The Student's January 2020 individualized education program (IEP) was in effect at the beginning of the 2020–2021 school year. The IEP indicated there were concerns about the Student's unsafe and disruptive behavior, including aggressive and self-injurious behaviors, which occurred frequently throughout the day. The IEP included annual goals and objectives in cognitive/pre-academic (reading, math, writing), adaptive/self-help, social emotional/behavioral, and functional communication. The IEP provided the following specially designed instruction and related services in the special education setting:
  - Speech: 20 minutes per week
  - Occupational Therapy: 20 minutes per week
  - Adaptive/Self-Help: 100 minutes per day
  - Cognitive/Pre-Academic: 110 minutes per day
  - Social Emotional/Behavioral: 100 minutes per day

The IEP included 390 minutes per day of additional adult support and the IEP noted the Student required a 1:1 paraeducator at all times to ensure his and other students' safety, and two adults to help with his toileting routine. The Student also had a behavioral intervention plan (BIP) that targeted "aggressive, unsafe behaviors" that included "lunging toward an adult and pinching, scratching, grabbing, hitting, or pulling."

3. The District stated, in its response, that the Student's IEPs have not included applied behavioral analysis (ABA) therapy, but that the District permitted the Student's private behavior technicians (BTs) from a private academy<sup>1</sup> to provide "medically-based services" to the

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<sup>1</sup> The academy referenced in this decision is an organization that provides in home services, telehealth, and remote learning, along with having physical school program campuses in Washington and Florida. See generally, <https://www.carpediemacademy.org/>. The school is an approved Washington nonpublic agency (NPA). As noted in the decision, the NPA staff were providing the Student with ABA therapy while he

Student at school. The District noted that during the 2020–2021 school year, the Student's private BTs provided these services in the classroom while school staff provided the Student's educational services and implemented his IEPs.

4. The Student's private BT began working with the Student in August 2020. When he first started working with the Student, the BT noted this was the first time the Student had received ABA therapy, so he started by getting a baseline of the Student's behaviors and then developed a behavioral intervention plan to target academic and social skills. The BT stated he worked with the Student's special education teacher to develop the plan and to ensure it aligned with the Student's IEP, but that he was the primary person implementing the plan. The BT stated the Student was initially supported by a 1:1 paraeducator as well, who he trained on the behavior plan. The BT stated the plan was that his time working with the Student would be gradually decreased as he trained District staff; however, he felt the teachers and paraeducators were reliant on him because he worked well with the Student and because he felt the paraeducators did not have the skill set to work with the Student independent of his supervision. The BT stated he worked with the Student on the subjects in his IEP and that the Student made progress on some of his goals; for example, the BT stated the Student was working on matching numbers and counting, and that through working with him, the Student progressed to matching up to numbers 1-30. He stated he also worked with the Student on tracing his name and the Parent's name.

The BT stated he felt he worked very collaboratively with the teacher and District staff. At the same time, the BT stated he felt his work with the Student was necessary to enable the Student to access education and that he was the primary person working with the Student during the 2020–2021 school year. The BT stated he did not think the District could meet the needs of the Student and that the Student needed a different placement to support his needs.

5. To implement the January 2020 IEP, the District stated the Student's special education teacher and school staff worked with the Student on the following:
  - Adaptive/Self-Help: Worked on a bathroom routine, staying with the group, transitioning from location to location, and washing hands.
  - Cognitive/Pre-Academic: Worked on identifying letters and numbers, tracing his name, tracing horizontal, vertical, and diagonal lines, tracing shapes, and identifying colors and shapes.
  - Social Emotional/Behavioral: Worked on using picture cards and sign language to communicate needs appropriately and minimize frustration and worked on other strategies to use when frustrated or agitated.
6. On December 16, 2020, the District emailed the Parent the Student's progress report. The progress report indicated the Student was at the emerging skill level for each goal. The comments indicated the following:
  - Functional Communication: Student was "spontaneously using signs to request with an accuracy of 49% during his Speech time" (goal was to move from 0% to 80%) and noted the gains the Student made since starting intensive ABA therapy.

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attended school in the District and the Parent also wanted to the District to place the Student at the NPA, at its local campus.

- Cognitive/Pre-Academic Reading: Student was consistently identifying 6 out of 26 letters.
  - Cognitive/Pre-Academic Math: Student struggled to consistently identify numbers, but "is able to match numbers using file folder activities for numbers 1-20."
  - Cognitive/Pre-Academic Writing: Student was unable to independently trace letters in his name, but "can trace straight lines and...trace his name with hand-over-hand instruction."
  - Adaptive/Self-Help: Student consistently follows 3-4 steps of the bathroom routine independently.
  - Social Emotional/Behavioral: Student made great progress with sign language; however, the Student "continues to have meltdowns regularly."
7. On January 16, 2021, the Parent and principal emailed regarding concerns the Parent had about the Student being alone in a classroom. The Parent also stated that the school was using the "ABA therapist to be his teacher..." The principal responded that they would have a meeting to discuss the Parent's concerns.
8. On January 25, 2021, the Student's IEP team met, reviewed a reevaluation that had been recently conducted, and developed a new IEP for him. The team reported the Student was frequently demonstrating unsafe and disruptive behaviors (e.g., hitting, kicking, biting, grabbing, eloping, head banging, and pinching). The general education teacher report noted the Student required 1:1 or 2:1 adult support to be successful in the self-contained classroom and across all school settings. The team agreed the Student needed 1:1 or 2:1 adult to support to manage emotions, self-regulate, and keep the Student and others safe.

The IEP included updated present levels, which indicated the Student made some progress since the last IEP. The IEP included annual goals in reading, writing, math, adaptive, social emotional/behavioral, and functional communication. The IEP provided the following specially designed instruction and related services in the special education setting:

- Speech: 20 minutes per week
- Occupational Therapy: 20 minutes per week
- Reading: 60 minutes per day
- Written Expression: 30 minutes per day
- Math: 45 minutes per day
- Adaptive/Self-Help: 100 minutes per day
- Social Emotional/Behavioral: 100 minutes per day

The IEP included 390 minutes per day of additional adult support. The IEP team also updated the Student's BIP.

The prior written notice documenting the meeting recorded that the IEP team agreed to provide 2:1 paraeducator support for an eight-week trial. The team agreed to reconvene to review data collected and discuss if the IEP should be amended to include the 2:1 paraeducator. The prior written notice documented that the team "agreed to allow the family's ABA therapist, [therapist], to continue to work with the student and the district BIS (Behavior Intervention Specialist). The BIS will assist the team in creating a behavior plan to support the student."

9. To implement the January 2021 IEP, the District stated the Student's special education teacher and school staff worked with the Student on the following:
- Reading: Worked on making three letter words using self-correcting puzzle pieces, matching letters and sounds with hand-over-hand assistance, putting together puzzles, and completing matching activities. As an example, the teacher "presented Student with three flashcards with letters on them and asked him to hand them a particular letter. They also worked with Student on pointing to pictures in stories to answer comprehension questions."
  - Writing: Worked on identifying Student's name, holding writing implements independently, writing his first and last name, tracing shapes and tracing letters and numbers.
  - Math: Worked on matching activities with numbers 1-20, identifying quantities, tracing numbers, and identifying shapes. For example, "Student would be presented with three number cards in a random order and asked to hand the teacher the correct number."
  - Adaptive/Self-Help: Worked on using the bathroom independently, dressing himself, staying with the group, transitioning from location to location, and washing hands.
  - Social Emotional/Behavioral: Worked on using picture cards and sign language to communicate needs appropriately and minimize frustration and worked on other strategies to use when frustrated or agitated.
10. On March 11, 2021, the District reported on the Student's progress on his IEP goals and provided the report to the Parent via email. The progress report indicated the Student was at the emerging skill level for each of his goals, except for his social/emotional goal which was at the insufficient progress level. The comments indicated the following:
- Reading: Student was able to identify three letters with 11.5% accuracy when presented with letter flashcards.
  - Functional Communication: Student was using "1-word sign utterances with an accuracy of 51% at this time" but was still being unsafe during speech sessions.
  - Writing: The Student engaged in tasks with 1:1 support for 5-10 minutes and was "able to trace his full name with hand over hand assistance."
  - Math: Student "can identify numbers 1, 2, 3, and 4 consistently when presented with flashcards. He can match numbers 1-10 with some teacher prompting."
  - Adaptive/Self-Help: Student consistently followed 3 steps of the bathroom routine with some independence, although still needs two adults to perform all 10 steps of the routine safely.
  - Social Emotional/Behavioral: Student is being removed 6-10 times per day due to aggressive and assaultive behaviors.
11. On March 18, 2021, the Student's IEP team met to review behavior data related to the 2:1 paraeducator support. The team shared the Student was demonstrating "crisis level behaviors" 9-10 times a day, and the IEP noted the number of behavior incidents had been increasing. The team agreed the Student needed 2:1 paraeducator support because of these aggressive and assaultive behaviors. The IEP noted the team would be developing a plan to "decrease staffing from a 2:1 to 1:1...to support [Student] with increasing independence given success with learning replacement functional communication skills. We anticipate staffing will decrease to 1:1 by the spring of 2022."

The IEP team amended the Student's IEP to include the 2:1 paraeducator support.

12. On May 5, 2021, the Student's IEP team met again to discuss the Student's paraeducator support. The team reported the Student was continuing to demonstrate severe behaviors at school that significantly impacted his education and the education of others. The team agreed the Student continued to require 2:1 adult support.
13. On June 10, 2021, the District reported on the Student's progress on his IEP goals. The progress reporting indicated the Student was at the emerging skill level for most goals. The Student made sufficient progress on his math goal and insufficient progress on his social emotional behavioral goal. The comments indicated the following:
- Reading: Student identified four letters consistently.
  - Functional Communication: Student was working on expanding his vocabulary and knows "some of the color word signs," but is less familiar with signs for names of common animals. The Student's "accuracy with producing imitative one-word utterances at this time is 37%."
  - Writing: The Student showed increased participation with 1:1 support and traced 9 letters of his name with prompting and hand-over-hand support.
  - Math: Student "can match numbers 0-50 with minimal teacher prompting...[and] inconsistently identify #'s 1-5."
  - Adaptive/Self-Help: Student consistently followed 3 steps of the bathroom routine, although still needs 2:1 adult support and prompting.
  - Social Emotional/Behavioral: Student is being removed 6-8 times per day due to aggressive and assaultive behaviors. The Student has break areas in the classroom and alternate rooms to use throughout the school.
14. The District's 2020–2021 school year ended on June 21, 2021.
15. Regarding the implementation of the Student's IEP, the Parent stated that during the 2020–2021 school year, she would visit the Student's school, at times as much as twice a week. During these visits, she stated she would often find the Student in a separate room with only his BT. The Parent stated they discussed this at IEP meetings and the IEP team promised the Student would be back in the classroom, but instead the school started using the library as a place for the Student to go when escalated. The Parent also stated the Student did not have a routine or schedule at school and that District staff were not providing instruction, but instead the BT was supporting the Student's schedule and providing instruction.
16. With respect to the implementation of the Student's IEP, the Student's special education teachers and paraeducators who worked with him during the 2020–2021 school year provided additional information.<sup>2</sup>

First, as context, the teacher explained that during the 2020–2021 school year, due to the ongoing COVID-19 pandemic, the Student and the other students in his class were some of the only students back in-person at their school. Thus, they had more space to use for learning, which, combined with health and safety requirements to have only seven people in a room at a time (the Student's class had 11 students and five adults), meant the class used the main

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<sup>2</sup> The paraeducators interviewed had also worked with the Student in previous years.

classroom, the library, and the art room for learning. Students, including the Student, worked in all these spaces with the special education teacher and paraeducators.

The special education teacher explained that school started around 9:30 or 10 am and that the Student had a schedule where he would work in the classroom with the whole group until around 10:30-10:45 (the teacher explained the Student, based on his disability, had the stamina to be in group setting for about an hour before he needed a sensory break); then the Student would take a break around 11 am to take his medication and do sensory activities in the sensory room, use the swings, work with the occupational therapist, or run around. After that, the Student had lunch and recess, and then would work in the classroom for another hour before taking a sensory break. The teacher noted the Parent did stop by once or twice a week, almost always at 11 am—the time the Student needed his medication. The teacher emphasized this was the Student's break time, which was why he was frequently in a learning space other than the main classroom when the Parent visited and not necessarily engaged in academic instruction, but instead in sensory activities.

Regarding instruction and support during the day, the special education teacher and paraeducator shared that the Student:

- Spent about 50% of his time in the main classroom and participated in whole group lessons;
- Would engage in 1:1 instruction for about 10-15 minutes at a time working with the teacher, paraeducators, and BT;
- Worked on matching, tracing, puzzles, colors, numbers, letters, and letter sounds;
- Was supported by the paraeducators when he took sensory breaks;
- Received sensory, safety, de-escalation, and academic support from the paraeducators;
- When in the art room worked with the BT and paraeducator on things like letters, shapes, and puzzles; and,
- When in the art room the Student sometimes worked 1:1 with a paraeducator and BT without other students there, and sometimes with another student.

Regarding the BT, the special education teacher and paraeducators shared that they had a collaborative relationship and that they did, at times, rely on the BT because he worked well with the Student. They noted the BT helped the Student stay safe. The special education teacher noted the BT acted like a 1:1 and was the main provider of safety and sensory support for the Student. For example, the special education teacher shared that when she was teaching a whole group lesson, the BT would be there to support the Student's safe participation. They characterized providing instruction and behavior support to the Student as a team effort, of which the BT was part of the team.

### **Summer 2021**

17. On July 29, 2021, the District reported on the Student's progress on his IEP goals during extended school year (ESY) services. The progress reporting indicated the Student was at the emerging skill level. The comments indicated the following:

- Adaptive/Self-Help: Student did well with transitioning to and from the bathroom and averaged 5/10 steps with moderate prompting.
- Social Emotional/Behavioral: Student "spent the majority of ESY safe and in class. He averaged 1 removal per day."

18. On August 2, 2021, the Parent emailed the principal at the Student's school and asked if the District would place the Student at the NPA for the 2021–2022 school year. The principal responded that any placement decisions would need to be made by the IEP team and that they could schedule an IEP meeting.
19. On August 13, 2021, the Parent emailed the Student's special education teacher, rescinding her request for placement at the NPA and stating the Student would be attending the elementary school.

### **2021–2022 School Year**

20. The District's 2020–2021 school year began on September 8, 2021. The Student continued to be eligible for special education services and his January 2021 IEP remained in place.
21. On September 8, 2021, according to the Parent, as recounted in an interview with OSPI, she brought the Student his medication on the first day of school and found the Student in a room working only with his BT on matching numbers. The Parent stated she did not see paraeducators or school staff supporting the Student. The Parent stated the Student was calm and not escalated, despite the Student's teacher telling the Parent that the Student was escalated. The Parent stated the teacher said the paraeducators were assisting other students while the Student deescalated. The Parent stated the principal assured her that the Student's paraeducators would be supporting him moving forward.
22. On Friday, September 10, 2021, according to the District's response, the Student's ABA therapist<sup>3</sup> "claimed that she had been at Student's school since 11:30 a.m. and school staff had not interacted with Student or provided any educational or instruction to him." Various emails sent that day provided information about what occurred (information in the emails was also reiterated in the Parent's complaint and interview with the Parent)—although the ABA therapist and school staff accounts differ:
  - According to the ABA therapist, she had been at the school "since 11:30 and not one school staff have interacted with [Student.]" The therapist stated that the BTs were there to "support his behavioral needs so he can access his education which is to be delivered by the school staff," but that day, the BTs found "educational activities to do with [Student] and they are doing it." The therapist stated, "if [Student] is going to be here, the school staff should be doing their job. Both of [Student's] paras have been working with other students and have not once engaged [Student]. [Student] has been out in the big open area this entire time except when [BT] took him to eat lunch in the classroom. Even then, none of the school staff engaged with [Student]."
  - The principal responded she would talk to the special education teacher regarding what happened.
  - The Parent stated "this is been going on all last year [BT] kept it a secret because he didn't want no problems...[Student] needs his para educators with him...[sic]"
  - The principal responded that she investigated and that: "my staff tried to interact many times and were redirected and that they weren't allowed to talk to [Student]...They did many holds and I was not reported to at all. I am really feeling like they aren't following procedures with

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<sup>3</sup> The ABA therapist worked at the NPA the Parent requested the District place the Student at (and then rescinded her request) in August 2021.



him and are lying to you. I want to bring all people to the table and work some things out...I need a serious talk as a team. Many of my team came to me and reported that they tried to interact with him and were redirected."

- The principal reiterated that she spoke with her staff and staff reported they tried to interact with the Student and "were denied citing that they were 'reinforcing bad choices.'" The principal stated staff were "very distressed and upset" at the response from the private ABA/BT, and that it is the responsibility of the District to provide education to the Student. The principal said they may have to reconsider whether the private providers could be on campus if they were not following procedures. The principal also emailed that she observed the Student that day working with his paraeducator, including during PE.
- The ABA therapist stated again that she was with the Student from 11:30 to 3:30 and that the Student was calm and compliant the entire time. The ABA therapist reiterated that "not one of his classroom staff attempted to engage [Student] in any activities" and that she observed the Student's paraeducators working with other students. The therapist further stated that "at no time did myself or my staff tell the school staff to not engage with [Student]."
- The Parent further responded that she felt the private ABA therapist's statements were not dishonest because the Parent stated that every time she visited the Student's class last year, the Student's paraeducators were never with him.

23. The District stated in its response that the principal immediately investigated the ABA therapist's allegations, spoke with the Student's special education teacher, and spoke with the Student's paraeducators.

According to the District's investigation, the school staff stated: "they tried to work with Student, but [ABA/BT] staff repeatedly interfered with their ability to serve Student." The District noted school staff were "very distressed about how [ABA/BT] staff responded to Student's behaviors and prevented school staff from [providing] support." And, in addition, "[ABA/BT] staff restrained Student multiple times, but did not report any of the restraints to [principal]."

The principal informed the Parent that she had observed the Student's paraeducator working with the Student on September 10, 2021, and that until an IEP meeting could be held to discuss expectations and procedures, the NPA staff would no longer be allowed at the school. The principal scheduled a meeting for Monday, September 13, 2021.

24. On September 13, 2021, the Parent emailed the principal, stating the Student came home with injuries and attached photos. The Parent stated she was concerned this occurred because the private ABA therapists were not at the school with the Student that day. The Parent requested a new IEP and that the Student be transferred to the NPA.

The principal responded that she contacted the special education teacher and director of student services (director) to set up a meeting.

25. On September 14, 2021, the Parent stated the Student would no longer be attending the District elementary school and requested the District place the Student at the NPA. The District responded it would schedule an IEP meeting.

26. On September 15, 2021, the special education teacher emailed the Parent a copy of the Student's IEP and BIP. The Parent responded and alleged the District removed the services of the private ABA therapist from the IEP.

The special education teacher replied that what she sent was the Student's current IEP and BIP that the team developed in May 2021. The special education teacher stated they could schedule an IEP meeting to discuss the Parent's concerns.

27. On September 20, 2021, the special education teacher and the Parent emailed about scheduling an IEP meeting that week. The Parent stated she was available, reiterated her request that the District place the Student at the NPA, and requested the District include the ABA therapist on all emails.

The special education teacher replied that the IEP team would decide the Student's placement. Ultimately, the District stated the meeting needed to be rescheduled so that the director could attend.

28. On September 21 and 22, 2021, the Parent and the director emailed, recapping a phone call in which they discussed the Student's educational experience. The director noted she had "observed and interviewed the staff [at the elementary school] and have reached out to [NPA] as well." The director stated she wanted to schedule a time to discuss next steps. The Parent and director later emailed, on October 6, 2021, and further discussed setting up a time to meet.

29. On September 28, 2021, the Parent filed this complaint with OSPI. The Parent alleged in her complaint that the District was not implementing the Student's IEP, specifically the IEP provision that the Student have two dedicated paraeducators. The Parent alleged the District failed to provide the supports needed to keep the Student safe. And the Parent stated that during the 2020–2021 and 2021–2022 school years, the Student's ABA therapists accompanied the Student to school and the ABA therapist stated the school staff did not engage with the Student or provided "any academics."

30. On October 2, 2021, the Parent emailed the special education teacher, in response to an all-class email, and asked to be removed from the class email list. The Parent stated the Student would never be returning to the school.

31. On October 4, 2021, the Parent emailed the principal, in response to an all-school email, and stated she would not be sending the Student back to the elementary school and asked the principal to stop emailing her.

32. The District noted that despite efforts to schedule an IEP meeting, a meeting was not held.

33. Based on the attendance records shared as part of this complaint, the Student remained enrolled in the District, at least through October 15, 2021, and was marked as having unexcused absences with the note "Mom is choosing to keep home at this time." The District

clarified that the Student was subsequently unenrolled from the District as he had been absent for 20 consecutive days.

34. In an interview with the Parent, the Parent stated the Student is currently continuing to get therapy from the private ABA therapist/BTs at the NPA campus. The Parent stated they are also looking for private occupational therapy and speech services.

## **CONCLUSIONS**

**Issue: Individualized Education Program (IEP) Implementation** – The Parent alleged the District failed to implement the Student’s IEP, including providing two dedicated paraeducators and failing to provide supports to keep the Student safe. Specifically, the Parent stated that during the 2020–2021 and 2021–2022 school years, the Student’s applied behavior analysis (ABA) therapist accompanied the Student to school and the ABA therapist stated the school staff did not engage with the Student or provide “any academics.”

A district must ensure it provides all services in a student’s IEP, consistent with the student’s needs as described in that IEP. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child’s IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a student with a disability and those required by the IEP.

First, OSPI notes that the Student’s IEP did not include ABA therapy or a support from behavior technicians (BTs); instead, the District explained that the District permitted the private ABA therapist and BTs to provided “medically-based services” in the classroom while District educators and staff provided the Student’s educational services and implemented his IEPs. As it was not included in the IEP, it was not the District’s responsibility to provide ABA therapy and thus not a violation of the IDEA. However, as discussed further below, the BT may have been a necessary support and at minimum, there likely should have been an IEP meeting discussion regarding whether ABA therapy and BT support was necessary to provide a free appropriate public education (FAPE), especially in light of the minimal progress made on the relevant IEP goals.

2020–2021 School Year: Specially Designed Instruction and Paraeducator Support: The Parent alleged that the District was using the “ABA therapist to be [the Student’s] teacher.” The Student’s IEPs in place during the 2020–2021 school year included specially designed instruction in cognitive/pre-academic (later split into reading, math, and writing), adaptive/self-help, social emotional/behavioral, and functional communication, all provided in a special education setting in a self-contained classroom. The Student also received occupational therapy as a related service.

The Parent stated that during the 2020–2021 school year, she would stop by the Student’s school and would often find the Student in a separate room with only his BT and no school staff. The Parent stated she raised the concern that the Student was being educated in a separate room several times with the IEP team and that the team discussed and promised the Student would be back in the classroom. The Student’s private BT, in an interview, stated that while he worked collaboratively with the Student’s special education teacher, the BT stated he developed a

behavior plan for the Student and was the primary person implementing the plan. The BT described working with the Student on behavior and social skills, and academic skills (e.g., the BT described working with the Student on matching numbers and counting, noting the Student progressed to matching numbers up to 30, and progress on tracing his and his Parent's names.) The BT also stated the plan was for him to train the Student's paraeducators on the behavior plan, which he did, and to gradually decrease his time as the District staff were to implement the plan; however, the BT stated he felt the teachers and paraeducators were reliant on him because he worked well with the Student and because he felt the paraeducators did not have the skill set to work with the Student independent of his supervision.

The Student's special education teacher and paraeducators acknowledged that they did have collaborative relationship with the BT, and at times, relied on him because he worked well with the Student and helped the Student stay safe. For example, the special education teacher shared that when she was teaching a whole group lesson, the BT would be there to support the Student's safe participation, and in that sense, he acted like a 1:1 paraeducator would and was the main provider of safety and sensory support for the Student. The teacher and paraeducators characterized providing instruction and behavior support to the Student as a team effort, of which the BT was part of the team.

The District's response, including a description of specially designed instruction and progress reporting, and interviews with the special education teacher and paraeducators, support the fact that the District was implementing the Student's IEP and providing instruction. Importantly, the teacher and paraeducators helped explain some of the Parent's observations as they noted the Student's classroom consisted of at least three learning areas—the main classroom, the art room, and the library. Students worked in all of the areas as there was a limited number of people that could be together in a room due to COVID-19 health and safety requirements, and given that the Student's class was one of the few in-person classes during the 2020–2021 school year, they had the ability to spread out and use more space. The special education teacher noted this was why the Parent saw the Student in a room other than the main classroom. The special education teacher further noted that the Student had a schedule where he would work in the classroom with the whole group until around 10:30-10:45 (the teacher explained the Student, based on his disability, had the stamina to be in group setting for about an hour before he needed a sensory break), then the Student would take a break around 11 am to take his medication and do sensory activities. After that, the Student had lunch and recess, and then would work in the classroom for another hour before taking a sensory break. The teacher noted the Parent did stop by once or twice a week, almost always at 11 am—the time the Student needed his medication and was taking a sensory break—which was why he was frequently in a learning space other than the main classroom when the Parent visited and not necessarily engaged in academic instruction, but instead in sensory activities.

On December 16, 2020, March 11, June 10, and July 29, 2021 (for goals worked on during extended school year (ESY) services), the District reported on the Student's progress. While the Student stayed at the emerging skill level for many of his IEP goals, the information on the progress report indicated the Student was receiving instruction and made small gains.

Overall, the documentation supports that the District staff—the special education teacher and paraeducators—were implementing the Student’s IEP and providing instruction. The information also indicated the private BT essentially acted as another 1:1 adult support for the Student. And there also appeared to be times when the Student’s private BT was the primary person providing the Student with behavior support and some academic instruction. There were also likely times when the BT was the only adult providing instruction; however, the paraeducators described that they provided support during sensory breaks so OSPI believes that any time the Student was alone with the BT was very minimal. Yet, this raises the question of whether the private BT’s support was necessary to ensuring the Student was provided a FAPE, which is a question the IEP team should have, but did not clearly answer here. It is possible the private BT was necessary for FAPE, and thus the IEP team should have decided whether that was something the District would provide—either by funding the private provider or providing the same service with District staff—or, if the IEP team determined the private BT was not necessary for FAPE, but was really an extra service and support, that should have been documented in a prior written notice and a plan should have been created that outlined roles, responsibilities, and other considerations for having private staff in the building. This did not occur.

The Parent also alleged the Student was not provided ABA therapy and 2:1 paraeducator support during the 2020–2021 school year.

Regarding 2:1 paraeducator support, this support was not on the Student’s IEP at the start of the 2020–2021 school year, but was instead discussed at the Student’s January 25, 2021 IEP meeting when the Student’s IEP team agreed to provide 2:1 paraeducator support for an eight-week trial to address his escalating unsafe and disruptive behaviors.<sup>4</sup> On March 18 and May 5, 2021, the Student’s IEP team met again to review the Student’s behavior data and discuss the 2:1 paraeducator support trial. The team noted the Student was continuing to demonstrate “crisis level behaviors” and continued to need 2:1 paraeducator support. The special education teacher and paraeducators described how the paraeducators worked with and supported the Student, including providing sensory, safety, de-escalation, and academic support and instruction. The information considered in this complaint indicates that for the majority of the time, the Student was supported by at least two adults while he was at school.

Given the information about the Student’s behaviors and the fact that his unsafe behaviors continued to escalate, it appears the paraeducator support was not an immediate or perfect solution. However, that does not necessarily mean the support was not provided. In fact, the multiple IEP meetings to discuss this support and review the Student’s behavior data indicate that the 2:1 paraeducator support was provided during the 2020–2021 school year. However, as described above, the documentation and information provided supports the fact that there were times the BT was the primary person providing instruction and support, and thus there were times the 2:1 paraeducator support was not provided.

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<sup>4</sup> Although, OSPI notes the Student’s January 2020 IEP did note that two adults were required to help with the Student’s toileting routine. However, the complaint did not seem to relate to this specific provision as the allegations specifically referenced the inclusion of 2:1 paraeducator support.

OSPI thus finds a violation because the private provider was, at times, the primary person implementing the IEP and providing instruction, and based on the fact that the IEP team did not clearly determine whether the private services were necessary for FAPE. The District will be required to create a guidance document/resource for when parents request a private provider be allowed in the classroom. Additionally, the District must offer to meet with the Parent and review the IEP to determine if additional services are needed for FAPE, if the Parent chooses to reenroll the Student.

2021-2022 School Year: During the 2021–2022 school year, the Student attended school approximately four days. The Parent’s allegations largely relate to September 10, 2021, on which date the Parent alleged—based on what the Student’s private ABA therapist reported—that the paraeducators and school staff had not interacted with the Student or provided educational instruction that day. The District disagreed—referencing the principal’s investigation and statements from the school staff—and stated the private ABA/BT staff prevented the school staff from working with the Student and were not following procedures, including restraint reporting procedures. The principal stated she had observed the Student’s paraeducators working with him that day and the ABA therapist responded she observed no school staff working with the Student while she was at the school.

Following this, the District stated the private ABA/BT staff could no longer be at the school, until the IEP team could meet and discussed expectations and procedures. The Parent stopped sending the Student to the District elementary school on September 14, 2021, and the Student has not returned (the Parent sent several emails, indicating the Student would not be returning), and the Parent requested the District place the Student at a nonpublic agency (NPA). The Parent and District’s director of student services (director) spoke on the phone about the Parent’s concerns and the District attempted several times to schedule an IEP meeting to address the Parent’s concerns and placement request. Ultimately, an IEP meeting was not held; it appears because the Parent stated she was never sending the Student back to school and did not engage with attempts to schedule a meeting. The Student has subsequently been unenrolled from the District following 20 days of consecutive absences, and the Parent indicated the Student is now attending the NPA.

While districts should strive to implement a student’s IEP fully and completely, the district does not violate the IDEA unless it is shown to have materially failed to implement the IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a student with a disability and those required by the IEP. Here, even if the Student was not provided 100% of the services on his IEP on September 10, 2021, this would not represent a material violation of the IEP. Still, while not a violation of the IDEA, the alleged events on September 10 clearly cause concern. Importantly, the District responded immediately when the concerns were raised and the principal spoke with staff, investigated the concerns, and attempted to schedule an IEP meeting. It is within the District’s discretion to limit whether private providers can be in the classroom, and the District’s move to state the private ABA/BT staff could not be in the classroom until a meeting could be held to discuss procedures and expectations was allowable. OSPI finds no violation.

## CORRECTIVE ACTIONS

By or before **December 3, 2021, December 30, 2021, and January 14, 2022**, the District will provide documentation to OSPI that it has completed the following corrective actions.

### STUDENT SPECIFIC:

By or before **November 29, 2021**, the District must contact the Parent by phone and email to offer the Parent an opportunity for an IEP meeting. If the Parent wants to meet, the District should schedule a meeting as soon as possible at a mutually agreeable time, but to occur no later than **December 30, 2021**.

By **December 3, 2021**, the District will notify OSPI if an IEP meeting has been scheduled. If the Parent declines to meet, the District will provide OSPI with: 1) documentation of the attempts to offer/schedule the meeting, utilizing multiple methods of communication; and, 2) documentation of the Parent's refusal to meet.

If an IEP meeting is scheduled, the IEP team will discuss the Student's IEP and the plan to provide the Student a free appropriate public education (FAPE), should he reenroll in the District. This discussion should include consideration of the services provided by the private provider, whether those services represent an unmet need and thus something that should be part of the IEP/provided by the District, and if not necessary for FAPE, the IEP team should document that.

By or before **January 14, 2022**, the District will provide OSPI with documentation from the IEP meeting, if applicable, including: 1) a copy of the agenda or meeting notes (if used); 2) an amended IEP, if applicable; 3) prior written notice; and, 4) any other relevant documentation.

### DISTRICT SPECIFIC:

#### Guidance Resource

The District will create a guidance document/resource that addresses when parents request a private provider be allowed in the classroom. This document can be in the format the District finds most useful, for example, a Q&A, a list of considerations and best practices, a checklist, etc. The guidance should include considerations for when this request is made by the parent of a student eligible for special education, for example:

- Is the parent's request based on a potential unmet need of the student?
- Does the IEP team need to meet and discuss the student's needs, what is necessary for a FAPE, and how a FAPE will be provided, including who is providing a FAPE?
- If private services are not needed for FAPE, how will that be documented?
- What are the roles and responsibilities of the private provider?
- Who needs to be involved in the decision?

The resource should also include considerations that are broader than just special education, for example considerations for:

- School safety and provider background checks.
- Confidentiality.
- Supervision of the private provider.

- Other insurance and liability concerns.
- Whether a written agreement needs to be drafted between the District and provider.

The resource should be available as a reference to IEP teams and those staff who this type of request may be made to, and should include who staff should contact to include in decision making, such as the principal, special education director, and/or District legal counsel.

OSPI notes that WSSDA has a model policy regarding school grounds that would apply to private providers and may be a useful resource.

By or before **December 30, 2021**, the District will provide OSPI with a draft copy of the guidance resource. By January 7, 2021, OSPI will review and offer feedback.

By or before **January 14, 2022**, the District will provide OSPI with documentation regarding how this guidance/resource will be shared with necessary staff within 10 school days. This could be either through distribution to relevant staff for review and/or that necessary staff are alerted to the existence of the guidance for reference and where to find it, e.g., posted on the District's intranet, or that staff should contact a certain person to receive guidance if they get a request related to a private provider.

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 \_\_\_\_ day of November, 2021

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.)