

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-54**

### **PROCEDURAL HISTORY**

On May 6, 2022, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Spokane 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 11, 2022, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On May 20, 2022, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on the same day.

On May 27, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent on June 2, 2022, except for videos as disclosing them would violate other student's right to privacy. OSPI invited the Parent to reply.

On June 6, 2022, OSPI requested that the District provide additional information. The District provided the requested information on June 8, 9, 13, and 16, 2022. OSPI forwarded the information to the Parent on June 9, 10, 13, and 16, 2022.

On June 6, 2022, the OSPI complaint investigator spoke with the Parents, and separately, with the District's student services coordinator and director of special education.

On June 8, 2022, the OSPI complaint investigator spoke with the Parents' legal counsel that represented the Parents on a prior matter and had attended school meetings with them.

On June 8, 2022, OSPI received the Parent's reply. OSPI forwarded that reply to the District on June 10, 2022.

On June 13, 14, 15, and 16, 2022, the OSPI complaint investigator conducted videoconference interviews with District staff, including the school principal, a MTSS support specialist, the case manager/resource room teacher who served the Student during the entirety of the complaint period, and the Student's fifth grade teachers in the 2021–2022 school year for homeroom/ELA, social studies, math, and music.

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 the interviews.

## SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on May 7, 2021. These references are included to add context to the issues under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.

## ISSUES

1. Did the District implement the Student's individualized education program (IEP), including the behavioral intervention plan (BIP) since May 7, 2021?
2. Did the District follow procedures when the Student was placed in isolation since May 7, 2021?

## 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. 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. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105.

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

Diagnostic Placements: Neither the IDEA nor its implementing regulations define "diagnostic placement." In practice, such a placement is generally a structured program to assess the needs of a student for whom an IEP may be needed but for whom either the current evaluation is inconclusive, or the data is insufficient. It is a temporary placement to learn more about a student's unique needs and/or the appropriateness of a particular placement. The U.S. Education Department explained that an IEP must precede placement; however: "This requirement does not preclude temporarily placing an eligible child with a disability in a program as part of the

evaluation process -- before the IEP is finalized -- to assist a public agency in determining the appropriate placement for the child. However, it is essential that the temporary placement not become the final placement before the IEP is finalized." The U.S. Education Department previously provided the following guidance regarding the use of diagnostic placements:

1. Develop an interim IEP for the child that sets out the specific conditions and timelines for the trial placement.
2. Ensure that the parents agree to the interim placement before it is carried out and that they are involved throughout the process of developing, reviewing, and revising the child's IEP.
3. Set a specific timeline (e.g., 30 days) for completing any necessary evaluations, finalizing the IEP, and determining the appropriate placement for the child.
4. Conduct an IEP meeting at the end of the trial period in order to finalize the child's IEP.

See, Appendix A to the IDEA Part B regulations, Question 14 (1999).

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 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).

Behavioral Intervention Plan (BIP): A BIP is a plan incorporated into a student's IEP if determined necessary by the IEP team for the student to receive a free appropriate public education (FAPE). The BIP, at a minimum, describes: the pattern of behavior(s) that impedes the student's learning or the learning of others; the instructional and/or environmental conditions or circumstances that contribute to the pattern of behavior(s) being addressed by the IEP team; the positive behavioral interventions and supports to reduce the pattern of behavior(s) that impedes the student's learning or the learning of others and increases the desired prosocial behaviors and ensure the

consistency of the implementation of the positive behavioral interventions across the student's school-sponsored instruction or activities; and the skills that will be taught and monitored as alternatives to challenging behavior(s) for a specific pattern of behavior of the student. WAC 392-172A-01031.

Positive Behavioral Interventions: Positive behavioral interventions are strategies and instruction that can be implemented in a systematic manner in order to provide alternatives to challenging behaviors, reinforce desired behaviors, and reduce or eliminate the frequency and severity of challenging behaviors. Positive behavioral interventions include the consideration of environmental factors that may trigger challenging behaviors and teaching a student the skills to manage his or her own behavior. WAC 392-172A-01142.

Isolation: Isolation as defined in RCW 28A.600.485 means: Restricting the student alone within a room or any other form of enclosure, from which the student may not leave. It does not include a student's voluntary use of a quiet space for self-calming, or temporary removal of a student from his or her regular instructional area to an unlocked area for purposes of carrying out an appropriate positive behavioral intervention plan. WAC 392-172A-01107.

## **FINDINGS OF FACT**

### **2020–2021 School Year**

1. At the start of the 2020–2021 school year, the Student was eligible for special education services under the category of other health impairment, was in the fourth grade, and attended a District elementary school.
2. In the 2020–2021 school year, the Student attended much of the year virtually and with his general education class. A reevaluation was conducted on November 24, 2020, and at that time, the Student was exited from speech services because he had met his goals related to articulation. When fourth grade returned to school in person in the spring of 2021, the Student attended and spent time in the general education class, and initially received special education services in the behavior intervention (BI) classroom.
3. In the complaint, regarding information about the Student's fourth grade year, the Parent included an email she sent to the District on June 7, 2021, expressing concern that the District was not following the Student's individualized education program (IEP) and behavioral intervention plan (BIP). The Parent also stated a "Tier 2 Plan" was implemented without her input. The District denied the Parent's allegations.
4. At the beginning of this investigation period, on May 7, 2021, the Student's November 23, 2020 IEP was in effect. The Student's IEP had three goals, one goal in each area of reading, writing, and behavior/social skills. Of the 1,460 minutes of building instructional time, the Student was to receive 150 minutes per week of special education services provided by a special education teacher in the school's BI program classroom. The Student spent 89.73% of his time in general education classrooms. The Student's services were as follows:

- Reading: 30 minutes per week (provided by a general education teacher in the general education setting)
- Reading: 60 minutes per week (provided by a special education teacher in the special education setting)
- Behavior: 30 minutes per week (provided by a special education teacher in the special education setting)
- Writing: 30 minutes per week (provided by a general education teacher in the general education setting)
- Writing: 60 minutes per week (provided by a special education teacher in the special education setting)

The Student's IEP also included accommodations and modifications in the areas of presentation, time/scheduling, setting, response, and other. The other area referenced a behavior plan/contract.

5. The November 23, 2020 IEP also incorporated a BIP, which had been developed on August 28, 2019. The BIP included a visual schedule, access to highly preferred activities (Legos, extra time outside, drawing, etc.) and following every academic task. It also indicated that when the Student earned 25 points on his daily point sheet, he would get access to the prize box and a paraeducator would check in with him daily to see if he has met his point goal. It also included:
 

[Student] can request a preferred person during the activity to pair attention with items. His schedule should be faded as successful with the ultimate goal to be successful on a typical academic schedule with breaks. Thus, while the initial start time is of 3 minutes or less on task, his time on task should be increased as he become successful with academic tasks.

The BIP listed the following consequence interventions:

Should [the Student] arrive at school and escalate to aggressive behavior and property destruction, staff should implement planned ignoring to the extent it is safely possible to do so. Any attempts at physical aggression or property destruction should be blocked as is safe to do so. [The Student] should be allowed to continue through his escalation cycle (see attached) and then have time to process without adult intervention. Once he has calmed (as evident, for example, by [the Student] giving staff a visual signal), he should be required to do one small, easy, mastered academic task (i.e., ask him what is two plus two) prior to accessing a preferred item for a period of ten minutes. After this, his visual schedule should again be implemented.

6. On May 6, 2021, the District sent the Parent a prior written notice (PWN), stating that the IEP team had discussed the Student's progress in the area of behavior and the team wanted the Student to begin accessing resource room instead of the BI program. The PWN stated the team would begin to transition the Student into the resource room to support his IEP goals "over the next few weeks and monitor progress to give us information for the upcoming annual IEP." The PWN continued, "If data demonstrates that [the Student] is still maintaining progress in the area of behavior with the transition to resource room, the team will reflect this [least restrictive environment] change on his new IEP that is due this June." The PWN documented that the team discussed that the Student's regular recesses with peers cannot be taken away for work refusal but that an extra recess incentive can be added for work

completion, which would be added to his IEP “at the next annual IEP meeting.” The PWN also noted the Student’s “BIP will also need to be updated to reflect current interventions.”

7. The Student’s fourth grade resource room teacher, who was also his resource room teacher the following year, said the Student began going to her room instead of the BI program on May 13, 2021. According to the resource room teacher, the Student received his special education service minutes in reading, writing, and social emotional/behavioral in her classroom through the end of that school year.
8. Based on information provided by the District, the trial period in the resource room lasted less than 30 days, from May 13 to June 10, 2022.
9. On June 3, 2021, the Student’s IEP team—including the Student’s Parents, special education teacher/case manager, a general education teacher, a District representative, a special education resource teacher, a speech language pathologist, a “teacher substitute cert,” a District parent and school liaison, a teacher who was a principal assistant, and the elementary principal—met to discuss the Student’s upcoming annual IEP. During the meeting, the IEP team reviewed data, work samples, and discussed new reading, writing, and behavior goals.
10. After a June 4, 2021 email inquiry from the Parent about the Student’s accommodations and whether the Student was losing recess, the principal provided a response the same day. The principal responded to the questions about the Student’s accommodations and modifications. The principal explained that while the District conducted a “trial intervention” to see how the Student does in resource room and general education, the Student’s extra recess, which was an incentive, had been eliminated.
11. The principal clarified during an investigation interview that although most fourth grade students only received morning and lunch recesses, because of BI classroom’s schedule and staffing, the Student and other students in that classroom were able to earn a third recess as an incentive. The principal and resource room teacher both noted that the Student was never excluded from fourth grade morning and lunch recess with his peers and always had the option of asking for a break any time he needed one. The principal said that when the Student moved to resource room for the trial period, there were “a few” instances when he did not get that extra third recess, because he had not earned it, but “99% of the time” he received the extra third recess.
12. On June 10, 2021, the IEP team met and developed a new IEP for the Student, which consisted of a total of 200 minutes of special education services to be provided by a special education teacher and noted the Student spent 1,600 minutes (88.8% of total time) in general education during a total of 1,800 weekly instructional minutes. The Student’s specially designed instruction included:
  - Reading: 80 minutes per week (provided by a special education teacher in the special education setting)
  - Writing: 80 minutes per week (provided by a special education teacher in the special education setting)

- Behavior: 40 minutes per week (provided by a special education teacher in the special education setting)

The IEP included three measurable annual goals in reading, writing, and behavior/social skills.

The IEP also called for accommodations and modifications in all classes, including:

- Audio digital books, a scribe, speech-to-text and text-to speech
- Study outlines/guides/graphic organizers
- Captions for video or audio content
- Oral responses to assignments/assessments
- Extra time on assignments and tests
- Individualized/small group instruction
- Time and space to allow for processing
- Rephrase questions
- Chunk assignments into smaller parts
- Modified grading
- No use of recess as a consequence for incomplete work
- Breaks
- Use of a "first/then" incentive system

Under consideration of special factors, the IEP answered the question "Does the Student's behavior negatively impact his/her learning or the learning of others?" with "Yes." The IEP stated, "If yes, consider the student's need for positive behavioral supports/interventions, a Functional Behavioral Assessment [(FBA)], and/or a [BIP]," and the box is checked next to the statement "[BIP] has been developed for this student (refer to the BIP) addendum."

13. According to all the interviewees, no BIP addendum was developed at the June 10, 2021 meeting. According to the Parent, the District wanted to remove the prior BIP. According to District staff, the Parent did not want a new BIP written until a new FBA of the Student's behavior in the new placement could be conducted the next school year. According to District staff, staff wanted some sort of behavior plan in place for the Student. So, the IEP team, including the Parent and her legal counsel, agreed that a "Tier 2 Plan" should be developed and put in place until a new FBA and BIP could be conducted and developed.
14. The District's MTSS support specialist explained in her interview that during the temporary placement, she and the resource room teacher collected behavioral data. And at both the June 3 and 10, 2021 IEP meetings, they discussed the Student's behavior. Specifically, they discussed the areas of behavior where he had the most difficulty, such as coming to school and his need for alternative assignments as options. And, she said, in the June 10, 2021 meeting, the IEP team specifically discussed those issues and how many incentive tickets certain behaviors should be worth. She said she took notes of the discussion and informed the Parent and her counsel that she would send out a final "Tier 2 Plan" after the meeting. And she said, "I told them that if it is not as we discussed, we could change it."
15. On June 11, 2021, the District's MTSS support specialist sent a "Tier 2 Plan" to the District's student support services coordinator after it had been reviewed with the Student's fourth

grade classroom teacher and incorporated strategies she had been using from the prior BIP. The "Tier 2 Plan" was then sent to the classroom staff for additional input.

16. On June 17, 2021, the District's MTSS support specialist sent the Parent, the District special education director, the school principal, the resource room teacher/case manager, and a general education teacher an email with a "Tier 2 Plan" attached. The email stated, "Here is a copy of the Tier 2 plan that will be in place until the new FBA/BIP is completed."
17. The District's 2020–2021 school year ended on June 22, 2021.

### **Summer 2021**

18. The District also provided OSPI a copy of a June 28, 2021 email the Parent's counsel sent the District's student services coordinator. The Parent's counsel said that she thought they were adding to the accommodation section two things: (1) a communication system with the Parent, teacher, and Student, and (2) a monthly meeting until the FBA is done. The Parent's counsel also asked about the "Tier 2 Plan" and asked if it was a final plan as she thought the Parents were going to provide input.
19. On August 10, 2021, the District's student services coordinator replied to the Parent's counsel that both the communication system between the Parent and teacher and monthly meetings should have been included in the IEP. She then included an IEP amendment and PWN, dated August 10, 2021, to make those additions and amended the Student's IEP accommodations and modifications section to reflect the addition of those two items under "other."

Regarding the "Tier 2 plan" the District's student services coordinator said:

The Tier 2 plan reflects the first/then incentive system that is noted in the accommodations/modifications page. This plan can and should be reviewed every time we meet to review his progress and make changes as appropriate. Input is always welcomed as this is a living document that can and should change as needed. If there are suggestions/recommendations, please communicate out with the team. This plan is only in place until the formal FBA and BIP is completed/implemented.

20. OSPI found no evidence that the Parent or their counsel followed up on the August 10, 2021 email and provided any additional input on the "Tier 2 plan" prior to the school year starting.
21. The school principal, MTSS support specialist, the case manager/resource room teacher, and the Student's fifth grade teachers for homeroom/ELA, social studies, and math all said in their interviews that they met in late August, prior to the 2021–2022 school year starting to review the Student's IEP "Tier 2 Plan" and data collection sheets to prepare for the Student's fifth grade school year. The music teacher said she did not attend that meeting, but she was made aware of the Student's IEP and "Tier 2 Plan" when the school year started.

### **2021–2022 School Year**

22. The District's 2021–2022 school year began on September 2, 2021.



23. The Parent alleged that during the Student's fifth grade year, the Student's social studies, math, and music teachers failed to implement his IEP and BIP (the "Tier 2 Plan"). The Parent also speculated that the Student's school resistance was due to the school staff's failure to implement the Student's IEP and BIP. Additionally, the Parent alleged the Student received several "lunch detentions" and was denied his lunch recess. She also alleged that a break table was removed, which caused him to roam the hallways.
24. In its initial response, the District stated that the Student's IEP was implemented and noted that in that school year, "[T]he Student has received three disciplinary infractions: lunch detention on November 15, 2021, an in-school intervention applied on December 7, 2021, and suspension on May 19, 2022. Two of the disciplinary actions occurred before the Student's BIP was implemented on December 16, 2021, with the third occurring last week." On June 7, 2022, the District's student services coordinator clarified that the "Tier 2 Plan" was used from the start of the school year until the December 16, 2021 BIP was put in place.
25. The Parent replied to the District's response and noted that her complaint had identified instances when the Student was removed from class by administrators on October 13, 14, and 18, 2021. The Parent also asserted that administrators and teachers gave the Student "lunch detentions" on October 11 and 22, and November 16, 2021 (the Parent's date for this differs that the District's), and "two lunch detentions" in March that occurred prior to March 17, 2022.
26. All school staff said in their individual interviews that they implemented the Student's IEP and "Tier 2 Plan." And during OSPI interviews, the provisions of the Student's plans were reviewed with staff and staff provided specific examples of how the Student's special education minutes, accommodations, and modifications were provided, including but not limited to modified and alternate assignments, speech and text options, oral responses, and access to scribes and partners. They also gave examples of using "if/then" statements, giving tickets for positive behavior, and low-level behaviors being ignored.
27. The District and staff also provided evidence that the District implemented the provisions of the Student's IEP that required monthly meetings and communication with the Parent, Student, and teacher. Regarding monthly meetings, the District provided evidence that beginning on September 16, 2021, and every third Thursday of the month at 3:15 pm thereafter, the District held monthly meetings with the Parents about the Student. The District also provided evidence that the Student's teachers communicated with the principal about the Student until the principal went out on leave. After that, the Student's resource room teacher and an interim principal communicated with the Parent between October 29 and December 8, 2021. On December 9, 2021, the system was changed from a weekly email to a daily "Parent Communication" sheet that was filled out by each teacher who rated the Student on a scale of one to four in five separate areas (on task, complete work, followed directions, respectful, and group participation) and provided comments about how the Student did that day. The District explained that daily logs served a dual purpose of increased communication with the Parent and obtaining and tracking data on the Student's behavior.

28. On October 11, 2021, the Parent's counsel reached out to the District to request an IEP meeting and alleged that the Student's IEP was not being implemented by at least one teacher and the Student was starting to refuse to attend school. The Parent and counsel indicated that this was the social studies teacher and that they believed the IEP was not being implemented based on behavioral feedback from the school and the Student.
29. The social studies teacher denied the Parent's allegation and said in her interview that since the start of the school year, she implemented the Student's IEP, including provisions related to offering him alternative work and modified assignments. The social studies said at the October monthly meeting with the Parent, which occurred on October 21, 2021, they discussed the Student getting work from the resource room teacher and allowing him to complete it in her class. And from that point forward, the Student had three options in her class: working on the assignments his classmates were doing, modified or alternate social studies assignments, or working on reading and writing packets provided by the resource room teacher. The social studies teacher noted that behavior was initially an issue in her class, but that changed over time and while he never did much work in class, he stopped being disruptive and disrespectful in her class.
30. On October 19, 2021, the Parent reached out to the District's parent and school liaison and said there was a "trigger" for the Student between 8:30 and 9:30 am as the Student does not want to attend school until resource room starts at 9:30 am. On October 20, 2021, the District's liaison noted "these are good conversations as we go through the FBA process, with that other data, we can come up with a BIP that addresses the behavioral level."
31. On October 21, 2021, the second monthly progress monitoring meeting for the Student was a full IEP team meeting. There was a PNW that resulted from this meeting that stated:  
The IEP team discussed adding additional minutes to the IEP in the Resource classroom for reading and writing instruction or shortening [the Student's] school day. We also discussed having [the Student] check in and connect with [the resource room teacher] at the beginning of each school day for the first 10 minutes. The IEP team also recommended that a new FBA should be conducted.
- The PNW also noted that in lieu of adding additional resource minutes at this time, the Student would be provided the opportunity to bring alternate reading/writing assignments from resource to his general education classroom.
32. At the October 21, 2021 meeting, the Parent also signed consent for an FBA. The District's FBA and information provided by the MTSS support specialist indicated that the District considered dated collected by her and the Student's teachers between October 18 and November 2, 2021.
33. When asked why consent for the FBA was not sought earlier, the MTSS support specialist explained that best practices require consideration of about six weeks of consistent data and they wanted the Student to be used to his new IEP and services before conducting the FBA. But in September, the Student missed nine straight days of school due to illness, so they got off to a late start having a baseline of behavior.

34. On November 18, 2021, there was a meeting to review the FBA. Present at the meeting were the District's MTSS Teacher, the Student's resource room teacher, the Student's Parents, the Parent's counsel, the principal, the principal assistant, and the Student's math, social studies, and reading/home room teachers.
35. On December 13, 2021, the Parent received a draft of the new BIP.
36. On December 16, 2021, the District held an IEP meeting via Microsoft Teams due to inclement weather. After the meeting, an "IEP Amendment without Reconvening the IEP Team" was issued because some participants were unable to attend. The purpose was to "Amend the IEP to update the BIP as indicated in the attached document." The amendment documentation noted, "Agreement was made via email per [the Parent's attorney] to add accommodations to the IEP that was finalized in June of 2021."
37. When asked why it took from the start of the school year to December 16, 2021 to get the FBA conducted and a BIP in place, the MTSS support specialist said consent was received at the October monthly meeting, collected data was reviewed at the FBA meeting in November meeting, and the BIP was created at the December monthly meeting. She and the principal said that these issues were discussed once a month, because there were difficulties scheduling the IEP team meeting, which included counsel for the Parent and for the District.
38. The school principal, MTSS support specialist, the case manager/resource room teacher, and the Student's fifth grade teachers for homeroom/ELA, social studies, math, and music each described in their interviews how they received, reviewed, and implemented the December 16, 2021 BIP.
39. The resource room/case manager provided information about how she implemented the special education service minutes in the Student's IEP, which consisted of 20 minutes of reading services in the resource room on Mondays, Tuesdays, Wednesdays, and Thursdays from 9:30–9:50 am (80 minutes total); writing services in the resource room Mondays, Tuesdays, Wednesdays, and Thursdays from 10:25–10:45 am (80 minutes total); and 20 minutes of behavioral services from 9:30–9:50 am on Fridays. The resource room teacher said that the other 20 minutes of the Student's 40 total minutes of behavioral skill instruction were provided in four "four to five minutes" at the start of each school day via a Student "check-in" with her in the resource room. But, she said, because the Student often arrived late at school, he often missed his resource room check-ins.
40. The Student's math, science, ELA, and music teachers all provided the OSPI investigator with specific examples of how they provided accommodations/modifications from the Student's IEP in their classes. The teachers also all said they implemented the "Tier 2 Plan" and then the December 16, 2021 BIP by frequently giving him positive reinforcements, "Pack 3" tickets, and they ignored lower-level behaviors, such as tearing paper, throwing paper, using profanity, and writing profanities on desks, and other items. They said they used "if/then" language with him and also gave him options for modified assignments, read aloud to him, gave him opportunities to provide oral answers one-on-one, and provided text-to-speech and speech-

to-text and audio books, via computer programs, Lexia, and Epic. They all also denied ever denying him any recess even when the Student's behavior was disruptive. The Student's ELA/Homeroom teacher explained to the OSPI investigator how the Student's tickets were redeemed in the "store" in his classroom on Fridays.

All of the teachers interviewed stated that they are not to apply negative consequences to the Student's behaviors. If behaviors escalate, the teachers offered the Student a break. If the break was not taken, the teachers contact administrators and, in some instances, the administrators have asked the Student to leave the classroom and sit in the office or at a break table in the hall. The teachers denied the Parent's assertion that they removed the Student's break table from the hall. They explained the break tables are for all students, but it was moved a few feet so the Student could not bang the door or look in the class when he was at the table. They also said that a basket of toys on the table was removed after the Student destroyed some of them.

41. During the period at issue, the Student was never denied his pre-lunch recess or access to his food for lunch. As discussed above, the District noted that the Student was given a lunch detention on November 15, 2021. On October 11 and 27, 2021, the Student was removed from his homeroom classroom while his classmates ate lunch there due to his disruptive behavior. On those occasions, the Student was offered a choice of alternative locations in which to eat his lunch: a table in the hallway, the resource teacher's room, or the office. OSPI found the Student's teachers credible when they reported that they always delivered his lunch to him, but that he did not always eat it.
42. On October 22, 2021, the entire fifth grade class was given lunch detention for something that had occurred the day prior. However, the Student refused to sit with other students during the lunch detention, left, and wandered the hall. He was then located and given other options of where to eat his lunch. There is no documentation that the Student was given lunch detentions on any dates in March of 2022.
43. The Parent also alleged that because the District was unable to punish the Student with loss of recess, instead the principal told all students on May 2, 2022 that they could not play basketball, because they know it is something the Student enjoys and to punish him for the April 28, 2022 incident described below.

The principal denied removing basketball because of the Student. She said that they have had ongoing issues on the basketball court, and they do not have enough recess aides to assign one specifically to that activity. Therefore, none of the fifth graders get to play basketball at recess.

### **Facts Related to the Alleged Isolation Incidents**

44. The Parent's complaint alleged the Student was subjected to isolation on two dates: April 12 and 28, 2022.

45. The District denied subjecting the Student to isolation on those or any other dates in the 2021–2022 school year.
46. In response to the District’s denial, the Parents said that the Student may not technically have been put in isolation, but that the music teacher and principal’s refusal to follow the BIP and ignore low level behaviors, thus escalated incidents in a manner that caused the Student to subsequently engage in school resistance.
47. During her interview, the music teacher provided credible examples of how she implemented the Student’s IEP and “Tier 2 Plan” and BIP, including:
  - Using a computer program that had speech to text
  - Assigning him a buddy/scribe to work with and accepting oral answers
  - Giving him alternative, written versions of assignments
  - Using “if/then” language

But, the teacher said, the Student said he “hated music,” and those strategies were not effective for her. The teacher said the Student was regularly disruptive in her classroom by wadding paper, throwing paper airplanes, mumbling and cursing under his breath, getting out of his seat, knocking tissues off the table, pushing desks around, knocking over chairs, and making weird noises with mouth, hands, and feet. The music teacher said that ignoring the Student’s lower-level behaviors did not work because when he did not get attention, he escalated. And if she spoke to him, the Student refused to acknowledge her, except to leave the room when she spoke to him.

48. The Student and others in his fifth grade class had music from 2:15–2:45 pm on Tuesdays and Thursdays.
49. On Thursday, February 10, 2022, the Student was removed from the music class after being disruptive.
50. On February 15, 2022, the Student went to the office instead of the music class. The interim principal facilitated a resolution and repair with the Student and music teacher and the Student was allowed to return to the music class on or after February 17, 2022. Thereafter, to support the teacher’s classroom management practices, the principal assistant (PA), the principal, or the MTSS support specialist sat in on the class to ensure that the Student and other students were not disruptive.
51. The District was on spring break the week of April 4–8, 2022.
52. On April 12, 2022, the Student arrived late to school and missed his homeroom, reading, and resource room reading class, but attended other classes. At 2:15 pm when music class started, the PA and music teacher were already in the room when the fifth grade class arrived. According to the music teacher, as soon as the Student came in, he refused to follow instructions from the teacher and started to argue. The Student also started taunting her and said, “You can’t make me do anything, you have to be babysat by the principal.” When the

teacher tried to speak, he continued to interrupt her and his posture was such that his arms were at his side and tensed, which caused concern that his behavior was escalating.

The teacher offered the Student a break from the classroom as directed by the BIP. The Student did not accept the teacher's offer, so the PA offered him a break. The Student did not want to take a break and continued to be disruptive. The PA then told the teacher, "If you can't teach in this room, you can go in the multipurpose room and teach in there." So the teacher took the rest of the class out of the room and across the hall to the multipurpose room. The PA stayed in the music room with the Student until the class had entered the multipurpose room and shut that door. Then the PA left the music room and left the door open. A minute or so later, the Student left the music room, went to the multipurpose room door, and kicked it and banged on it from the hallway. He was ignored and not allowed in the room while the class continued their lesson in the alternate location. He then sat down in the hallway until the class came out of the multipurpose room, he went with them back to the music room as they got their binders, and followed them to homeroom for the last 15 minutes of the day.

53. The Student attended school every day the rest of that week (April 13, 14, and 15, 2022) and his daily log indicated he continued to attend music class and was often disruptive, but he remained in music class through the time this complaint was filed.
54. In the complaint, the Parent alleged the Student was slapped by his principal on April 28, 2022 and left outside of a locked building for one to two hours on the playground, while he knocked on the door trying to get in without success.
55. The District denied the Parent's allegations and provided security video of the incident. The video depicted the Student at recess, at almost 11:27 am, physically wrestling a basketball away from a younger and smaller student, and the younger student going to get another basketball. Within one minute, an adult came and talked to the Student while the Student continued to bounce the ball and stand with four other students. By 11:28 am, the adult and two students walked away. Shortly thereafter, another student left, and the Student and another student remained seated on a low, concrete block remain. At around 11:29 am, the Student began to bounce the ball and jump from another low, concrete block to a high, concrete block next to the remaining student, and continued this behavior for about three minutes until the principal approached the Student at 11:32 am. At that point, the Student was standing on top of a low, concrete block (about two cinder blocks high) bouncing the ball. Because the Student was elevated on the block and the principal stood on the ground, the ball was bouncing near the principal's face. The principal slapped the ball away from the Student while the ball was bouncing.
56. The District in its response and the principal in her interview, explained that the principal slapped the ball away from the Student because she was concerned she could be hit in the face with the ball as the Student had previously displayed aggressive behaviors.

57. The Parent asserted that the principal made contact with the Student's hand and left a red mark. The principal denied touching the Student and the video does not show the principal touching the Student.
58. Following this, in the video, the Student did not physically react and continued to stand on the concrete square. The video showed the principal started to walk away and the Student went and picked up the basketball again and bounced it in a nearby area. The principal then followed him and they both moved to an area not seen on the video for a little over 30 seconds before they returned to the same area with the Student bouncing the ball and the principal beside him. The Student returned to the concrete block and continued to bounce the ball while the principal stood next to him and occasionally spoke to him. Other staff and students came and went, and the Student continued to bounce the basketball. The Student left the area that could be seen on the video and the principal followed him until they both walked out of the video's frame just before 11:33 am. At 11:35 am, the Student returned, and the principal was not present. Two girls who appear to be the Student's age approached the Student and attempted, unsuccessfully, to take the basketball from him. He remained in the area for about 45 seconds, then walked out of video and returned a minute and a half later with the principal following him. He stepped on the concrete block again and continued to bounce the basketball, the principal spoke to him for about a minute, and then they both walked out of the video frame just after 11:37 am.

The video showed other students going into the building at 11:55 am, the end of fifth grade recess, while other students came out. According to District staff, the Student chose to stay outside when his classmates went inside.

Neither the Student nor the principal are again on the video until 12 pm when the principal came back into view. At around 12:01 pm, the Student came back in view of the video, a staff person spoke with him, and climbed back on the concrete block without a basketball, and then wandered off and returned with a basketball. Between 12:01 and 12:36 pm, the Student was mostly in view of the video, as are other students and staff. When other students went in at 12:36 pm, an adult man came and sat with and talked to the Student until 1 pm when the adult walked off and another class of students came out. The Student stayed outside until 1:15 pm when he went in the building.

59. The MTSS support specialist explained in her interview that she talked with the Student for a few minutes before this and after she confirmed the Student was in view of the cameras, she told him she was going to lunch and invited him to come join her by knocking on the door when he was ready. She then watched him on video and when he headed to the door, she went and greeted him and opened the door.
60. The Parent asserted that during the time when the Student and the principal were outside of the security camera's view, the principal followed the Student over to the basketball court and slapped the ball out of his hands again and toward another child, and in so doing hit the Student's hand and left a red mark. However, the Parent was not an eyewitness to these events and her information was based on what was reported to her by the Student. The video and

other evidence indicated that the Student was not an accurate reporter about other details of the incident, such as that he was left alone, he was locked out of the building, and he was not allowed to eat lunch.

61. The principal denied slapping the Student or hitting the basketball toward another child. And the video only showed that the principal slapped the ball when it was bouncing and engaged with the Student and remained near him for brief periods of time. There are some brief periods of time when they were off camera, but none of the reactions of the children or staff on the video reflect anything attention-worthy occurring outside the camera's view.
62. The District also had an independent investigator investigate this allegation. Based on the investigator's notes of the interviews conducted in that investigation, staff reported that the Student was never left alone, the incident of slapping did not occur, and the Student was not seen or heard knocking on other windows or doors to try to get inside.

### **Facts Subsequent to the Complaint being Filed**

63. According to the MTSS support specialist, even before the Parent filed the OSPI complaint on May 6, 2022, the District was aware that the Student's behavior was devolving. She said, for example, he was starting to be rude to other staff at school and bullying younger students. Therefore, they determined a new FBA and BIP were needed and because staff were unable to give any consequences for negative behavior. Because they felt the Parent would be unlikely to trust a District process, the District brought in a private, board-certified behavior analyst (BCBA) to conduct an FBA.
64. The Parent provided OSPI with a copy of the BCBA's behavior support summary with her June 8, 2022 reply to the District's response. The summary indicated the BCBA observed the classroom on May 5, 2022, the day before the Parent filed this complaint.
65. The BCBA's behavior support summary, which is based on review and observation of behavior between May 5 and 25, 2022, addressed school refusal behaviors at school. It does not address the Student's refusal to go to school in the mornings when his school day starts and when he is to receive 20 of his weekly behavioral support minutes. Most notably, the BCBA's report noted that the Student is not being given any feedback about his negative behaviors, and so he is not able to make a connection between his behavior and the results of that behavior.
66. On May 17, 2022, as he left the music class, the Student walked up to the music teacher's face and said "Fxxx Yxx!" to her as he left the class. The Student was asked to write a "repair" statement to the music teacher and has not been allowed to return to her class since then as he refuses to do the "repair."
67. On May 18, 2022, the Student was given a "pink slip" for "backtalking" to a second grade teacher.
68. On May 19, 2022, the Student was sent home for pulling a mask off of a younger student.



69. On June 8, 2022, the District convened the Student's IEP team, and a new IEP is being developed. The MTSS support specialist said that during the meeting, the District presented the BCBA's report to the Parent and suggested a new BIP with those suggestions in place in the fall. Then, they will see how he does with that for six weeks and will likely do another FBA and BIP then. In the interim, the staff are following the December 16, 2021 BIP.

## CONCLUSIONS

### **Issue 1: Individualized education program (IEP) and behavioral intervention plan (BIP)**

**Implementation** – The Parent alleged that the District did not follow the Student's IEP and BIP. Specifically, regarding the 2020–2021 school year, she expressed concern that the Student was denied recess when he was moved from the BI classroom to the resource room classroom. The Parent further alleged that a "Tier 2 Plan" was developed without her input and that the Student's IEP and BIP were not implemented in the 2021–2022 school year.

The IDEA requires that a district provide all services in a student's IEP, consistent with the student's needs as described in that IEP. For a student with behavioral needs, when reviewing and revising each student's IEP, the IEP team, including the parent, must consider the use of positive behavioral interventions and supports and other strategies to address any student behavior that impedes the student's learning or that of others to address that behavior. This could include conducting a functional behavioral assessment (FBA) and developing a BIP, which like the IEP must be implemented.

2020–2021 School Year: At the beginning of this investigation period, May 7, 2021, the Student's November 23, 2020 IEP was in effect. The day prior, May 6, 2021, the District sent the Parent a prior written notice (PWN) regarding the IEP team's decision to place the Student in a temporary placement in the resource room instead of the behavior intervention (BI) program for his special education services. The PWN stated the team would begin to transition the Student into the resource room to support his IEP goals "over the next few weeks and monitor progress to give us information for the upcoming annual IEP." The PWN continued, "If data demonstrates that [the Student] is still maintaining progress in the area of behavior with the transition to resource room, the team will reflect this LRE change on his new IEP that is due this June." The PWN also documented that the team discussed that the Student's regular recesses with peers cannot be taken away for work refusal but that an extra recess incentive can be added for work completion, which would be added to his IEP "at the next annual IEP meeting." The PWN noted the Student's "BIP will also need to be updated to reflect current interventions."

The Student's resource room teacher provided evidence that from May 13 to June 10, 2021, she provided the special education services specified in the Student's IEP but in a resource room, not BI setting. And there was evidence that the Student was not denied any recesses. Rather, he was not given the opportunity to have, as an incentive, a third recess that other students did not receive. OSPI does not find that the IEP or BIP in place at that time called for a third recess; instead, it stated that the Student's time on preferred activities should be weaned as he had success.

The Student's IEP team met on June 3 and June 10, 2021, and review data, work samples, and discussed new reading, writing, and behavior goals. They also discussed creating a BIP, but the Parent wanted to hold off and conduct a new FBA and a BIP when the Student was in his new placement at the start of the next school year. Therefore, instead of creating a BIP, the IEP team discussed the behaviors staff had observed in the Student before and during his trial placement and developed "a Tier 2 Plan" at the June 10, 2021, meeting.

OSPI finds that from the period of May 13 to June 10, 2021, the Student was in what is often referred to as a "diagnostic placement." And OSPI finds that the diagnostic placement met the criteria set out in guidelines by Federal Department of Education guidance.<sup>1</sup> Specifically, the Parent was part of the IEP team that made that decision, understood the placement would be temporary, and received a PWN. Additionally, the Student was not denied any of the services specified in his existing IEP or BIP during that time; instead, the special education minutes were implemented in different location. On June 10, 2021 the IEP team considered the information gathered during the placement and developed both a new IEP and a "a Tier 2 Plan," which, while not called a BIP by the District, met all of the criterion of a BIP and was based on functional behavior information provided by the resource room teacher, the Parent, MTSS support specialist, and other members of the Student's IEP team. Overall, OSPI finds the IEP and BIP were implemented and finds no violation.

2021–2022 School Year: OSPI finds that at the start of the school year, the Student had an IEP in place and a "Tier 2 Plan," which functioned as a BIP, in place until a new FBA was conducted in October and November 2021, and a new BIP was developed on December 16, 2021.

OSPI finds that the evidence indicates that the Student's teachers and administrators were all aware of the Student's IEP and "Tier 2 Plan" at the start of the school year. The evidence also indicates that the Student's teachers, through the principal, were in regular communication with the Parent and that there were monthly meetings—and accommodation in the IEP—held with the Parent in September, October, and November to address issues as they arose. Beginning December 9, 2021, the Parent received a daily communication log with information from each teacher. A new BIP was developed on December 16, 2021.

The Parents speculated that because there were behavioral incidents in certain teachers' classrooms and because the Student was given alternate lunches or had issues at recess, the Student's IEP and BIP must not have been implemented. But even when a student has an IEP that provides for accommodations and modifications and a BIP that provides for interventions, and those are faithfully implemented by a district, there is no guarantee that a student will never act out or display undesirable behavior. In this case, the Parent provided specific instances when the Student had behavioral issues, which she asserted were evidence that the BIP and IEP were not implemented.

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<sup>1</sup> Appendix A to the IDEA Part B regulations, Question 14 (1999)

But the evidence in the investigation did not substantiate that the District failed to materially implement provisions of the Student's IEP and BIP in those instances. The teachers provided specific information and numerous examples during their individual interviews of how they implemented the Student's special education services, accommodations/modifications, and the provisions of the Student's "Tier 2 Plan" and the December 16, 2021 BIP. Moreover, the evidence does not indicate that the Student had any instances of exclusionary discipline or material deprivations of his education program. Therefore, OSPI concludes that the District materially implemented the provisions of the Student's IEP, "Tier 2 Plan" and BIP, and did not deny the Student a free appropriate public education (FAPE). OSPI finds no violation.

**Issue 2: Isolation Incidents** – The Parent's complaint alleged the Student was subjected to isolation on two dates: April 12 and 28, 2022.

Isolation is defined in Washington state law as "Restricting the student alone within a room or any other form of enclosure, from which the student may not leave." The law also states that temporary removal of a student from his or her regular instructional area to an unlocked area for purposes of carrying out an appropriate positive behavioral intervention plan is not "isolation" as that term is defined under state law.

As shown in the facts, on April 12, 2022, the teacher and other students left the music classroom and left the Student with the principal assistant (PA). The PA then left the music room, left the door open, and shortly thereafter, the Student left the music room too. The Student was not isolated in this instance.

On April 28, 2022, during recess and after wrestling a basketball away from a younger student and having the basketball knocked out of his hand by the principal, and being spoken to by the principal and other staff, the Student did not want to return to class. The Student was allowed to remain outside with other students and staff present until he decided to return to class. The Student was not isolated in this instance either.

OSPI does not find that the evacuation of the music classroom that occurred on April 12, 2022 or allowing the Student to remain on the playground as occurred on April 28, 2022 constituted the use of "isolation" as that term is defined under Washington law. Specifically, the Student was not left alone within a room or any other form of enclosure, from which the Student could not leave. OSPI finds that the actions taken were for the purposes of carrying out an appropriate positive behavioral intervention plan. OSPI finds no violation.

## **CORRECTIVE ACTION**

### **STUDENT SPECIFIC:**

None.

### **DISTRICT SPECIFIC:**

None.

## RECOMMENDATION

During the course of the investigation, OSPI reviewed information about the Student's school refusal behavior—e.g., the Student refuses to attend school at times or refuses to attend certain classes. The documentation indicated the District made attempts to address these behaviors, although the behaviors continued.

OSPI recommends that if the Student's school refusal behavior continues in the 2022–2023 school year, the District and the Student's IEP team consider both conducting a functional behavioral assessment (FBA) and providing any necessary supplementary aids and services, including but not limited to parent training, to address those refusals. OSPI recommends the District consider using the "School Refusal Assessment Scale-Revised."

Dated this \_\_\_\_ day of June, 2022

Dr. Tania May  
Assistant Superintendent of Special Education  
PO BOX 47200  
Olympia, WA 98504-7200

### **THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT**

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