

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-130

PROCEDURAL HISTORY

On September 25, 2023, the Office of Superintendent of Public Instruction (OSPI) received and opened a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Vancouver 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 25, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on September 26, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On October 6, 2023, the Parent provided OSPI with additional information. On October 24, 2023, OSPI provided the District a copy of this information.

On October 13, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent on October 17, 2023. OSPI invited the Parent to reply.

On October 25, 2023, OSPI's investigator consulted with OSPI's director of student health and school safety.

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

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which related exclusively to events taking place on September 6, 2023 per the allegations in the complaint. 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. On or about September 6, 2023:
 - a. Did the District follow proper procedures to implement the following portion of the Student's individualized education program (IEP): provision of a 1:1 registered behavior technician during transportation?
 - b. Did the District follow proper restraint procedures during transportation?

LEGAL STANDARDS

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special

education services. A school district 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 [student with a disability] and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

Restraint: Restraint as defined in RCW 28A.600.485 means: Physical intervention or force used to control a student, including the use of a restraint device to restrict a student's freedom of movement. It does not include appropriate use of a prescribed medical, orthopedic, or therapeutic device when used as intended, such as to achieve proper body position, balance, or alignment, or to permit a student to participate in activities safely. WAC 392-172A-01162.

FINDINGS OF FACT

1. At the start of the 2023–24 school year, the Student was eligible for special education services under the category of autism, was in the seventh grade, attended a District middle school, and the Student's January 2023 IEP was in effect. A January 2023 behavioral implementation plan (BIP) was also in effect at the start of the 2023–24 school year.
2. The Student's January 2023 IEP was informed, in part, by a January 2022 evaluation. The Student's January 2022 evaluation noted, in part:
 - The Student was first found eligible for special education in 2014, and, for a significant portion of that time, the Student was provided with a 1:1 paraeducator – in part, to help address behavioral needs.
 - "Student had an Emergency Response Plan put in place in November 2018 due to concerns around bus safety and behaviors."
 - As a result of the Student's disability, the Student would, on occasion, demonstrate, "meltdowns," "refusal to comply with a directive", "attempting to run away", and "elopement within and outside the classroom."
3. The January 2023 IEP included many of the observations found in the January 2022 evaluation, noted above. In part, the January 2023 IEP provided the Student with specially designed instruction in adaptive and social emotional. The January 2023 IEP provided the Student with the related services of occupational therapy and speech language pathology. The January 2023 IEP stated the Student required special transportation and included, in part, the following "Supplementary Aid and Service: Additional Adult Support – to be provided by a paraeducator (60 minutes 5 times a week)."
4. The District's response included relevant background information on the Student:

The Student also has a behavior intervention plan that targets 'noncompliance,' including specified high frequency behaviors (vocal protesting, laying on the floor, and verbal scripting) and low frequency behaviors (physical aggression and elopement).

...

The Student's IEP provides a 1:1 aide throughout the school day and during transportation to and from school. The Student's aide is a registered behavior technician, as indicated in the IEP.

5. In relation to the incident on September 6, 2023, the Parent expressed concern to OSPI that a physical restraint was used on the Student to prevent the Student from leaving the bus via the emergency exit at the back of the vehicle.

6. In relation to the incident on September 6, 2023, the District's response read, in part:

[Issue 1]: The Student's [January 2023] IEP provides a 1:1 aide throughout the school day and while riding the bus. On September 6, 2023, the Student's regular aide was not available for the afternoon bus ride. There were, however, two other aides assisting the five total students riding the bus.¹ This minor discrepancy between the services provided to the Student and those required by his IEP was not a material failure to implement the IEP, nor did it result in any harm to the Student.

[Issue 2]: Video recordings of the September 6, 2023 bus ride show that the Student did not attempt to elope from the bus and that the Student was not restrained at any time during the bus ride.

7. The District's response included a video of the Student's afternoon bus ride on September 6, 2023.

The video showed, in part: the Student crawled down the center aisle and sat in the last row of seats; the bus driver pulled over; the aide walked to the back of the bus and guided the Student back to his seat; and the aide buckled the Student back in his seat. At no point in the video did the Student reach for the emergency exit door.

8. According to the Parent, as of September 19, 2023, she had not been provided with any documentation regarding the incident on September 6, 2023.

9. The Student's IEP team met on September 25, 2023. According to the District:

Among other topics, the team discussed the September 6 bus ride. The Parent expressed concerns that the school did not contact her about the aid's absence, that she believed the Student attempted to elope from the bus, and that she was uncertain whether staff restrained the Student. The Student's team recognized that staff could have done a better job communicating with the Parent about the bus ride. To address the Parent's concerns, the team agreed on a communication plan in the event that the Student's aide is absent (or has to leave early) in the future. The team also developed a daily communication form

¹ The District's response further explained, "The Student's aide supported him on the morning bus ride of September 6 and during the school day. The aide had to leave early for a personal appointment and did not accompany the Student on the afternoon bus ride. The District did not provide a substitute aide for the bus ride. However, two other aides ride the afternoon bus. The Student's special education case manager, in consultation with the Student's aide, determined that the two other aides on the bus could support the Student during the bus ride, if needed."

to share with the Parent, to facilitate improved information sharing about the Student's school day.

...

[And] following the September 25 meeting, the principal of [the middle school] met with the Student's case manager. They reviewed the expectation that the Student's IEP is implemented as written, including having a 1:1 aide support the Student during school transportation and providing a substitute if the regular aide is absent.

10. The Student's January 2023 BIP was amended on September 25, 2023.
11. A September 25, 2023 prior written notice read, in part, "The District proposes to update Student's BIP and [to] add a response plan to his BIP."

September 25, 2023 meeting notes referenced a conversation regarding the Parent's transportation concerns, as well as creation of a "home communication system." The September 25, 2023 meeting notes read, in part, "[The Parent] will review the BIP changes that were made today...In the future when there will be an absence, another paraeducator will ride and Parent will be called to notify Parent...Parent approved a daily communication google form."

12. The District's response included a September 28, 2023 "Student Response Plan."

13. According to the District:

The District had one of its board certified behavior analysts provide a training on elopement to the Student's school team. This training was delivered on October 9, 2023, and addressed strategies for creating a school environment that discourages elopement and how to respond in the event the Student attempts to elope from his classroom, the building, or during transportation.

The District's response included a PowerPoint presentation on "Elopement Training" dated October 9, 2023.

CONCLUSIONS

Issue 1(a): Implementation of 1:1 Bus Paraeducator – The Parent alleged the District did not follow proper procedures for implementing the Student's 1:1 paraeducator services on the afternoon bus ride of September 6, 2023.

A school district must also 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.

On September 6, 2023, the Student's regularly assigned 1:1 paraeducator was not present on the afternoon bus. This resulted, in part, in the Student leaving his seat during the ride and an aide for a different student having to guide the Student back to his seat. See Issue 1(b), below. The

District argued this does not represent a material violation, in part because other aides were present on the bus.

Despite the fact that the incident on the bus on the afternoon of September 6, 2023 represents a single occurrence, OSPI does find this to represent a material violation of the IDEA. The reasons for this finding are as follows: both the January 2022 evaluation and the January 2023 IEP noted the Student had needs in the areas of elopement, meltdowns, and refusing to comply with directives; the January 2023 IEP provided the Student, in part, with a 1:1 paraeducator on the bus; the other aides on the bus were assigned to other students; and the setting—a moving bus—represents one where safety is paramount. This fact is demonstrated by the fact that when the Student left his seat, the bus driver pulled over to the side of the road before the other aide was able to leave her seat to guide the Student back to his assigned seat. For the foregoing reasons, OSPI finds the September 6, 2023 afternoon bus incident to represent a material failure to implement the IEP.

In response to this incident, though, the District undertook several actions, including, in part: holding an IEP meeting with the Parent on September 25, 2023; amended the Student's BIP; adding a "response plan" to the Student's BIP; creating a "home communication system"; developing a plan to execute in the event the Student's 1:1 bus paraeducator is absent in the future; and a board certified behavior analysts provided a training on elopement to the Student's school team on October 9, 2023. OSPI finds no other actions are needed to address the material IEP implementation failure that took place on the afternoon of September 6, 2023.

Issue 1(b): Restraint – The Parent alleged the District did not follow proper restraint procedures on September 6, 2023.

Restraint is defined as physical intervention or force used to control a student.

Here, the District's response included a video of the Student's afternoon bus ride on September 6, 2023. The video shows the Student was not restrained. The video showed, in part: the Student crawled down the center aisle and sat in the last row of seats; the bus driver pulled over; the aide walked to the back of the bus and guided the Student back to his seat; and the aide buckled the Student back in his seat. At no point in the video did the Student reach for the emergency exit door.

The aide's interaction with the Student cannot be characterized as administration of a restraint. For example, the aide did not restrict the Student's freedom of movement; the aide did not lock the Student's arms or legs. Rather, the aide assisted the Student back to his seat; the aide guided the Student utilizing body proximity and light, occasional touch. The Student did not resist the aide's assistance. In sum, OSPI finds the Student was not restrained on the afternoon bus ride on September 6, 2023. OSPI does not find a violation.

CORRECTIVE ACTIONS

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this 16th day of November, 2023

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

THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

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