

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-131

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 Marysville 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 11, 2023, the District requested an extension of time to respond to the complaint. OSPI granted the extension to October 19, 2023.

On October 19, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent on October 20, 2023. OSPI invited the Parent to reply by November 2, 2023.

On November 2, 2023, the Parent requested an extension and an interview. The same day, OSPI granted the Parent an extension to November 7, 2023, to provide any additional documents.

On November 6, 2023, the OSPI complaint investigator interviewed the Parent, and requested additional information.

On November 7, 2023, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District the same day.

On November 7, 2023, OSPI requested that the District provide additional information, and the District provided some of the requested information on November 15, 2023. OSPI forwarded the information to the Parent the same day.

On November 14, 2023, OSPI requested additional information from the Parent, and received the information on November 15, 2023. OSPI forwarded the additional information to the District the same day.

On November 16, 2023, the District provided additional information and OSPI forwarded it to the Parent the same day.

On November 16, 2023, the OSPI complaint investigator interviewed the District's executive director of special education (executive director), director for secondary special education (director), and a District education specialist.

On November 17, 2023, the District provided OSPI with additional information. OSPI forwarded it to the Parent on November 20, 2023.

On November 20, 2023, the District provided OSPI with additional information. OSPI forwarded it to the Parent the same day.

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 26, 2022. 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. Did the District develop an individualized education program (IEP) that addressed the Student's behavior needs according to WAC 392-172A-03110 and implemented the special education services in conformity with the IEP according to WAC 392-172A-03105?

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 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. "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).

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. Questions and Answers on Discipline Procedures (OSERS June 2009) (Question E-1 and E-2).

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.

IEP Must State Amount of Services: An IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the student, or on behalf of the student. An IEP must also include a statement of the program modifications or supports for school personnel that will be provided to enable the student: to advance appropriately toward attaining the annual IEP goals; to be involved and progress in the general curriculum in accordance with present levels of educational performance and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children in the above activities. 34 CFR §300.320(a)(4); WAC 392-172A-03090(1)(d). "The amount of services to be provided must be stated in the IEP, so that the level of [the district's] commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be (1) appropriate to the specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP." IDEA, 64 Fed. Reg. 12,475, 12,479 (March 12, 1999) (34 CFR Part 300, Question 35).

Disciplinary Removal that Results in a Change of Educational Placement: A change in placement occurs when a student is removed from his or her current placement because of discipline for more than ten consecutive days, or when the student is subjected to a series of removals that constitute a pattern because the removals total more than ten school days in a school year, because the student's behavior is substantially similar to the previous incidents that resulted in removals, and because of additional factors such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another. 34 CFR §300.536; WAC 392-172A-05155. After a student has been removed from his or her current placement for ten school days in the same school year, during any subsequent days of removal the school district must provide services to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP. If the removal is a change of placement under WAC 392-172A-05155, the student's IEP team determines appropriate educational services to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP. WAC 392-172A-05145.

Manifestation Determination: Within ten school days of the district's decision to change the student's placement through discipline, the district, parents and other relevant members of the IEP team (as determined by the parents and the district) must determine whether the behavior that led to the disciplinary action was a manifestation of the student's disability. In making the

manifestation determination, the district, parents and other relevant members of the IEP team must consider all relevant information in the student's file to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or if the conduct in question was the direct result of the school district's failure to properly implement the student's IEP or BIP. 34 CFR §300.530(e); WAC 392-172A-05146.

If the school district, parent(s), and other relevant members of the student's IEP team determine the conduct was a manifestation of the student's disability, the IEP team must either: conduct a FBA, unless the district had conducted a FBA before the behavior that resulted in the change of placement occurred, and implement a BIP for the student; or if a BIP already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and except for special circumstances, return the student to the placement from which the student was removed, unless the parent and the district agree to a change of placement as part of the modification of the BIP. 34 CFR §300.530(f); WAC 392-172A-05147.

Educational Services During Suspensions: A school district is only required to provide services during periods of removal to a student eligible for special education who has been removed from his or her current placement for ten school days or fewer in that school year, if it provides services to a student without disabilities who is similarly removed. 34 CFR §300.530(d)(3); WAC 392-172A-05145(2). A school district may not suspend the provision of educational services to a student in response to behavioral violations. During the suspension, expulsion, or emergency expulsion of a student, a school district must provide the student the opportunity to receive educational services. The educational services must enable the student to: (i) Continue to participate in the general education curriculum; (ii) Meet the educational standards established within the district; and (iii) Complete subject, grade-level, and graduation requirements. As soon as reasonably possible after administering a suspension or expulsion, a school district must provide written notice to the student and parents about the educational services the district will provide. The school district must provide the written notice in person, by mail, or by email. The notice must include: (a) A description of the educational services that will be provided; and (b) The name and contact information for the school personnel who can offer support to keep the student current with assignments and course work as required under this section. WAC 392-400-610 (1)–(4).

For students subject to suspension or emergency expulsion for six to ten consecutive school days, a school district must provide at least the following: (a) Course work, including any assigned homework, from all of the student's regular subjects or classes; Access to school personnel who can offer support to keep the student current with assignments and course work for all of the student's regular subjects or classes. School personnel must make a reasonable attempt to contact the student or parents within three school business days following the start of the suspension or emergency expulsion and periodically thereafter until the suspension or emergency expulsion ends to: (i) Coordinate the delivery and grading of course work between the student and the student's teacher(s) at a frequency that would allow the student to keep current with assignments and course work for all of the student's regular subjects or classes; and (ii) Communicate with the student, parents, and the student's teacher(s) about the student's academic progress. An opportunity for the student to make up any assignments and tests missed during the period of suspension or emergency expulsion. WAC 392-400-610 (1)–(4).

FINDINGS OF FACT

Background

1. The Student attended school in the District and was eligible for special education services under the eligibility category other health impairment (OHI).
2. According to the Parent, although there were some concerns during the prior school year, her complaint concerns the current, 2023–24 school year and the District’s repeated exclusion of the Student from his school program.
3. Prior to the 2023–24 school year, the Student’s IEP team met on March 23, 2023, to review the Student’s reevaluation and develop an annual IEP. As a result of the reevaluation, it was determined that the Student continued to meet special education eligibility criteria under OHI due to several diagnoses. The IEP team determined that the Student continued to need specially designed instruction (SDI) in social/emotional and behavior, along with several accommodations. The IEP team discussed the Student’s transition to middle school in the upcoming 2023–24 school year.

The March 22, 2023 IEP included annual goals in social/emotional and behavior services, with progress reporting at the semester. The IEP provided the Student with the following SDI for 270 minutes in a special education setting, during a 1,685-minute week:

- Social/Emotional: 30 minutes/4 times a week to be provided by a special education teacher
- Social/Emotional: 15 minutes/1 time a week to be provided by a case manager
- Behavior: 30 minutes/4 times a week and 15 minutes/1 time a week to be provided by a special education teacher

The Student’s IEP also included 18 accommodations, including access to noise buffer/headphones, access to resource room as needed, alternate response options, breaking material into chunks, breaks as needed, daily chart to track behaviors and regulation strategies, designated classroom break space, extended time to complete assignments, extra time to respond to classroom-based testing only, incorporate movement throughout the day, minimize visual distractions to support focus, noise buffer, physical activity, preferential seating to support focus, preferential seating (class/district assessments only) as needed, separate setting for testing as needed, shortened assignments (daily at teacher discretion), and visual schedule.

Under supports for school personnel, the IEP stated, “Share IEP with pertinent staff” with the frequency of “Annually and if/when amendments are made.”

The Student’s IEP did not include a behavioral intervention plan (BIP).

2023–24 School Year

4. The Student’s first day of the 2023–24 school year was August 31, 2023, and the Student began attending a District middle school for the sixth grade.

5. According to the Parent, when school started, the Student was not told where to go if he needed breaks, and he was not told where the resource room was located.
6. There are no records of the Student having any behavior incidents on the first seven days of school (August 31 and September 1, 5, 6, 7, 9, and 11, 2023).
7. On September 12, 2023, the Student was late to first period and missed second and third period as he was in the principal's office.
8. On September 13, 2023, the Student received a one-day suspension for property destruction and disrupting instruction. According to the Student's records, the Student was absent in periods one through six due to the out-of-school suspension.
9. On September 13, 2023, a re-entry meeting was held between the Parent and the middle school principal. Just prior to the meeting, the Student's schedule was rewritten to place him in classes with teachers he enjoyed.
10. The Parent said that during the September 13, 2023 meeting, she was not informed the Student was being suspended, only that he was being sent home for the day. The Parent said the Principal also told her that the Student's schedule had been revised per the Student's request to omit PE. The Parent said she told the Principal that the Student's IEP noted that he needs physical activity.
11. The Student returned to school the next day, September 14, 2023, and received a three-day suspension for "disruptive conduct" the same day.
12. According to the Student's attendance record, the Student was out of school for sixth period on September 14 and missed all six of his classes on September 15, 18, and 19, 2023, due to the out-of-school suspension.
13. On September 19, 2023, the IEP team held a re-entry meeting in conjunction with a previously scheduled IEP meeting with the Student's Parents, administrators, members of the Student's IEP team, and several of his general education teachers.

During the meeting, the team discussed the possibility of a change in placement, but rejected this option. The IEP team also discussed "in a few weeks to start a Daily Point Sheet to earn rewards for his on-task behaviors." The team detailed the interventions that had taken place the prior couple weeks, including schedule changes, resetting in classrooms, and breaks in "the nest" and the office, noting that some had been successful and others not. The team determined that a functional behavioral assessment (FBA) should take place, as the one developed in 2019 was no longer up to date.

14. According to the Parent, at this meeting, some of the Student's teachers indicated that they were unaware the Student had an IEP and had never seen the Student's IEP, nor his list of needed accommodations. The prior written notice (PWN), dated September 19, 2023,

indicated that the IEP team "Also discussed ... the accommodations in his IEP being addressed and followed." Additionally, the PWN stated:

One of the issues that was brought up that may have led to [the Student] acting out was that the writing process is difficult for him and he becomes overwhelmed and agitated which leads to his escalated behaviors [and] extensive note taking in class can be a major trigger especially if a lot is done in previous classes as it just snowballs.

15. On September 20, 2023, the Student's first day back after his prior three-day suspension, he was sent home early and received a two-day suspension. The Student and was out of school due to suspension on Thursday and Friday, September 21 and 22, 2023.
16. On September 22, 2023, the Student's IEP team met again. The PWN reiterated much of the information as in the September 19, 2023 PWN and noted that they had sent FBA information "to get that process started." And it also had new information, that "the IEP team has assigned a temporary 1:1 para to assist [the Student] in his classes for the next four weeks and then two weeks of gradual release to see if this will positively impact his behaviors and choices."
17. On the Student's third school day back after his prior two-day suspension, September 27, 2023, the Student left the classroom to reset after he created disruption and incited a fight between two students in class. This resulted in a classroom exclusion from periods four, five, and six, but the Student remained at school.
18. That evening, the principal emailed the Parent and explained that the 1:1 aide "could be temporary, not permanent, as the plan of 4 weeks and then easing back for 2 weeks just because of what we put in place right now may not be sustainable due to ap[p]lications and interviews and such." The Principal also stated she discussed the Student's schedule with him, and explained that four core courses (science, language arts, math, and social studies) are required by law, and his social skills class is an elective required per his IEP. As he is only allowed two electives, he can either take PE or another class he likes, but not both.
19. That evening, the Parent emailed the Principal and asked that school move the Student from social studies back into PE.
20. The one-on-one paraeducator was not provided to the Student until September 25, 2023.
21. The District provided information that while the paraeducator accompanied the Student, the paraeducator documented the Student's behavior each day in each class between September 25 and November 17, 2023, except for a few days when there was a substitute paraeducator.
22. On September 28, 2023, the Student was suspended for five days after he hit and kicked a student and staff member. The Student missed all six of his classes on September 28 and 29, and October 2, 3, and 4, 2023.
23. The District met on October 3, 2023, to conduct a manifestation determination meeting related to the September 28, 2023 behavioral violation.

24. The PWN, dated October 3, 2023, stated that the IEP team:

Determined that the incidents were a manifestation of [the Student]'s disability. In regards to if the behavior was a direct result of the school district's failure to implement the IEP, prior to [the Student] having the support of a 1:1 paraprofessional, [the Student's] IEP was not being properly implemented as he did not know how to access his supports and accommodations. The last incident that resulted in a suspension, his IEP was being implemented.

The notice also stated, "A [FBA] will be completed as a result of this meeting." It continued, "Team continues to make modifications to support [the Student]. Next steps will be a [FBA] and consider a [BIP]." It also stated that the team considered and rejected "a shortened day until [the Student]'s schedule and supports could be put into place," because "an additional transition may incite more behaviors and would not be in his best interest."

The PWN indicated that the next steps would include changing the Student's schedule to give him a preferred class (PE), which will also give him a movement break. It also stated, "[The Student] will have access to a quiet space for a break...Point sheet will be put in place with a debrief at the end of the day with school staff (not a teacher)."

25. On October 4, 2023, the IEP team met again and reviewed the manifestation determination documentation, and developed an FBA and a safety plan for the Student's re-entry. The document for the manifestation determination stated that the Student has missed five previous days that school year. However, right below that, it listed five incidents, including the one on September 28, 2023:

- a five-day out-of-school suspension for a "violent incident" without a major injury
- a half-day classroom exclusion for "inciting a fight"
- a two-day out-of-school suspension for a "violent incident" without a major injury
- a three-day out-of-school suspension for "disruptive conduct"
- a one-day out-of-school suspension for "disruptive conduct"

Those suspensions and exclusions were on September 13, 15, 18, 19, 21, 22, 27, 28, and 29, and October 2, 3, and 4, 2023, a total of eleven and a half school days.

The manifestation determination documentation also noted that no FBA had been conducted and the Student did not have a BIP in place. It also documented that the conduct in question "was" a manifestation of the Student's disability.

26. At the October 4, 2023 IEP meeting, the team completed an FBA for the Student. The summary of data collection indicated that observations were conducted by the Student's paraeducator who was providing 1:1 support as an intervention. The FBA indicated "a target behavior of frustration response with physical aggression and property destruction in response to insecurity or perceived peer teasing." It also discussed prior interventions, described the settings where behavior occurs, antecedent events, maintaining consequences, and had a hypothesis. A recommendation was made to develop a BIP.

The FBA identified six replacement behaviors, seven setting event strategies, seven antecedent strategies, ten teaching strategies, and consequence strategies. The consequence strategies included six consequences for target behaviors (physical aggression and property destructions) and four consequences for replacement (positive) behaviors.

27. Although the District provided a copy of the FBA during this complaint investigation, it did not provide a copy of any BIP that was to be implemented by the Student's teachers or other school staff after the FBA meeting on October 4, 2023.
28. The Student's suspension was recorded as a five-day suspension, and he returned to school on October 5, 2023. The Student's schedule was also changed so that he has science, math, language arts, social skills, a PE class, and a preferred elective.
29. The District admitted that the Student's IEP was not fully implemented between August 31 and September 25, 2023, and proposed the following corrective actions:
 - "The District proposes to conduct a training with the District staff and administrators from the Student's current IEP team...regarding the requirements of WAC 392-172A-03105 for appropriate implementation of IEP services. Such training would occur prior to the end of the current calendar year, with documentation of the training and participants sent to OSPI for review and approval."
 - "Further, the District proposes to provide Student compensatory education for the six days that Student served an out-of-school suspension prior to the October 4, 2023, manifestation determination. Such compensatory education services would be provided by District special education staff at a schedule mutually agreed upon between Parent and the District prior to the start of the 2024-25 school year."
30. According to the Parent, the FBA that was developed on October 4, 2023, was not effective as the Student has been sent to the principal's office twice, on October 20 and 23, 2023. And, as discussed further below, the Student was given another five-day suspension on November 3, 2023.
31. The Parent provided OSPI with a meeting notice that indicated a manifestation determination meeting was held at 8 am on November 2, 2023. The District provided another meeting notice about a BIP meeting held the same day, November 2, 2023, at 9:05 am.
32. The District provided OSPI a copy of a document related to the BIP meeting held on November 2, 2023. It indicated that a special education teacher, general education teacher, District representative, and the Parent participated in the meeting.

The BIP identified some Student strengths and summarized the data collected during the observations of the Student on September 20, 27, and 28, 2023, which were discussed in the October 4, 2023 FBA. The document also identified the same contributing factors and noted the same number of referrals, but inaccurately stated the Student had been suspended for nine and a half days.¹ It identified the same target behavior as the FBA, which was "physical

¹ At the time of the November 2, 2023 BIP, the Student had five suspensions or disciplinary exclusions from the classroom for eleven and a half days.

aggression and property destruction in response to insecurity or perceived peer teasing.” It included a hypothesis, discussed five prior interventions, and described the settings where behavior occurs. It also included four antecedent strategies (proactive communication, a safety plan, behavioral contracts, and emotional recognition and regulation), and five teaching strategies (emotional regulation, communication skills, conflict resolution, social skills, and self-advocacy). The BIP identified five consequences for what will happen if target behavior occurs, including:

- Immediate de-escalation and safety
- Loss of privileges
- Taking a break
- Restitution if property damage occurs
- Behavior reflection

The BIP also included a “Reinforcement Plan” that described what staff will use to increase the positive alternative/replacement behavior. Specifically, a “Daily Point Sheet for data collection from 1:1 para to track frustration issues and related behaviors that are associated with [the Student’s] frustrations. Allow breaks or resets when appropriate and at appropriate times.”

It also included a “Response Plan” for what staff will do if the target behavior occurs. Specifically, “Monitoring the data and responding to assist [Student] with making appropriate, positive responses to his frustration levels. Giving [the Student] ‘breaks’ when things are escalating or opportunities to reset either in the classroom or the ‘Nest’ or a place deemed necessary in the moment by school staff.” It indicated that data will be collected daily by period and reported daily to school staff and Parents. It also indicated that the people responsible were “the school staff and IEP case manager.”

However, the BIP did not include a “De-escalation Plan” to identify the signs staff will observe that indicate escalation and steps to follow should the Student’s behavior escalate. Nor did it include a “Crisis and Recovery Plan” with steps to follow in the event of a crisis and steps to help the Student return to baseline.

33. The Parent was provided with a PWN that indicated the District was proposing to implement the BIP to address the Student’s behavior issues. The PWN indicated the BIP would be implemented on November 3, 2023. The Student did not attend sixth period on November 2, and on Friday, November 3, 2023, the Student was issued another five-day suspension.
34. According to the Parent, the Student’s teachers did not provide the Student with schoolwork during the Student’s periods of disciplinary exclusion and he is falling behind in school. The Parent said she raised this as an issue at the manifestation determination about this suspension on November 7, 2023. She said she also asserted at this meeting that another five-day suspension was not legal. The Parent said that, at the manifestation determination meeting, it was determined that the Student’s behavior was a manifestation of his disability, and the Student could come back to school the next day (November 8, 2023), but with a modified schedule and the Student now goes to school for four periods instead of six.
35. The Parent provided OSPI with the documentation she received regarding a manifestation determination meeting held on Tuesday, November 7, 2023. It indicated that the Parent, the

paraeducator, a school administrator, a school psychologist, and a special education teacher attended the meeting.

The November 7, 2023 document stated that an incident occurred on November 3, 2023, and the Student was issued a five-day out-of-school suspension. The written manifestation determination noted that the Student had been previously suspended for 14 days.²

The manifestation determination documentation also indicated that the Student had an FBA completed and that there is a BIP. The determination was that the Student's conduct was related to the Student's disability, and was not a direct result of the District's failure to implement the IEP. It also noted, "Parent is concerned with the suspensions and how much school [Student] is missing and the missing work accumulating. [Student] is associating school with discipline and Parent is concerned that he won't be able to participate as a student with how things are currently going."

36. The Parent also provided OSPI with a PWN, dated November 7, 2023. It noted that the Student was to return to school the next day. It indicated that the IEP team determined that the Student needed:

An additional intervention in place, that being a shortened schedule and he will go home after 4th period. Parent will transport home until bussing is scheduled. Student's current 1:1 support will continue for a further two weeks – at that point team will determine if student needs a designated 1:1 or if other supports would benefit his learning.

The November 7, 2023 PWN made no reference to any reevaluation for the Student but also stated that the IEP team considered removing the 1:1 support but rejected that option because "A 1:1 is not supporting [the Student] to the degree that is needed. Until team decides on the next plan, supports will not be removed and additional interventions will be implemented." The PWN also stated, "Team will consider a change in educational placement to the behavior intervention program at [middle school]. Parent and student will tour the classroom and meet with the other school's team to determine if that would be a beneficial change for [the Student]."

37. The District did not provide OSPI with any documentation regarding the imposition of discipline for the November 3, 2023 incident, such as a suspension notice that indicated how many days the Student was suspended. But his attendance record and behavioral notes indicated he was out of school due to suspension on four days, November 6 and 7, attended periods one to four on November 8, and all but one period on November 9, 2023. Friday, November 10, 2023, was a holiday. It also indicated that beginning on November 13, 2023, the Student was excused from his fifth and sixth period classes.
38. The Student attended school from periods one to four on November 13, 14, and 17, 2023. The Student did not attend school on November 15 and 16, 2023.

² OSPI notes it is unclear how this number was reached as the Student had previously had eleven and a half days of suspension, and at the time of the meeting, he had served two additional days of suspension.

39. On November 17, 2023, the District provided OSPI with an email exchange from that day between the District's secondary special education coordinator and the Parent. The email noted that at the November 7, 2023 meeting, there was a conversation regarding things that are related to IEP team decisions. The email noted, "that was not a formal IEP meeting with proper documentation" and stated that the District would like to propose "an IEP amendment without a meeting to address the following items" and would send the IEP home for input prior to finalizing the following areas: (1) the need for paraeducator support; and (2) the change in schedule to reduce the Student's school day because of the Student's daily stamina.

The email noted that the IEP team agreed that the change in placement was supported by data and that transportation would be provided. The email also noted that the team had discussed a smaller, more structured learning environment for the Student. The email noted that they would have another meeting to discuss that further and would not be incorporated into an amendment until a further meeting was held. The email also informed the Parent that if the email did not accurately capture the discussion or the Parent felt further discussion was warranted, the District could hold another meeting as soon as the team is able to reconvene.

40. The Parent replied to the District's email the same afternoon, November 17, 2023, "That all is fine. Thank you."

CONCLUSIONS

The Parent alleged that the District failed to develop and implement an IEP that addressed the Student's behavioral needs. And the Parent alleged, because of that failure, the Student engaged in behaviors that resulted in several successive disciplinary exclusions that prevented him from attending much of the first two months of middle school.

Issue 1a: Development and Implementation of an IEP that Addressed the Student's Behavioral Needs – A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP.

OSPI finds that, at the start of the 2023–24 school year, the Student had an IEP in place that addressed behavior, although it did not include a BIP, and the Student's most recent FBA was in 2019. The Student's IEP team, on September 19, 2023, acknowledged that the FBA was out of date and need to be updated. Additionally, it was not until that IEP meeting on September 19, 2023, after the Student had missed four of twelve school days (September 13, 15, 18, and 19, 2023), that the Student was told how or where he could take breaks in accordance with his IEP. Additionally, based on information in a PWN and provided by the Parent, OSPI finds that prior to that date, some of the Student's teachers were unaware of the Student's IEP accommodations. The District acknowledged that the Student's IEP was not fully implemented between August 31 and September 25, 2023.

OSPI finds a violation based on the District's failure to follow proper procedures and ensure that, at the start of the school year, the Student and all of the Student's teachers were aware of the IEP

and how to implement it. The District acknowledged that the Student's IEP was not fully implemented and proposed the Student receive six days of compensatory education—which equates to 27 hours of SDI in social/emotional and behavior—and that the Student's team be provided training. OSPI accepts the District's proposed corrective action.

Issue 1b: Addressing Behavior that Resulted in Discipline – The Parent alleged that, even after the September 19, 2023 IEP meeting, the District failed to adequately address the Student's behavioral needs and instead removed him from school for disability-related reasons on several more instances.

At the September 19, 2023 IEP meeting, the team determined that the Student needed an FBA. On September 20, 2023, the Student's first day back after a prior three-day suspension, he was sent home early and received another two-day suspension, which resulted in him missing two more school days, September 21 and 22, 2023.

Prior to September 28, 2023, the Student had already been suspended for six full school days (September 13, 15, 18, 19, 21, and 22, 2023); had a one-to-one paraeducator assigned to him³; and had been excluded from class for half a day on September 27, 2023. On September 28, 2023, the District imposed another five-day suspension (September 28 and 29, and October 2, 3, and 4, 2023), which resulted in the Student being excluded from school for disciplinary reasons for eleven and a half school days. OSPI finds that the September 28, 2023, five-day suspension was the Student's fourth out-of-school suspension in two and a half weeks. And it was the result of the Student engaging in behavior similar to other behaviors that had resulted in the recent disciplinary exclusions. Thus, OSPI finds that this constituted a pattern of removals that constituted a change of educational placement.

OSPI finds that on October 4, 2023, within ten school days of making that determination as required by special education regulations, the District appropriately held a manifestation determination meeting to determine whether the behavior that led to the disciplinary action was a manifestation of the Student's disability. The IEP team determined that the Student's behavior was a manifestation of his disability. The IEP team also conducted an FBA. However, the team did not develop a BIP until almost a month later on November 2, 2023, and it was not implemented before the Student was again suspended on November 3, 2023, for five more days.

The manifestation determination regulations state that a team, if it determines the conduct was a manifestation of the student's disability, must implement a BIP for the student; or if a BIP already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior. OSPI does not find that the District timely developed an appropriate BIP with strategies and instruction that could be implemented in a systematic manner by the Student's teachers and other staff as required.

³ The Student's IEP team determined that they would assign "a temporary 1:1 para to assist [the Student] in his classes for the next four weeks and then two weeks of gradual release to see if this will positively impact his behaviors and choices." The paraeducator began accompanying the Student throughout his school day on September 25, 2023.

OSPI also finds that, after October 4, 2023, the Student had two classroom exclusions, and on November 3, 2023, the District suspended the Student from school again. The suspension contemplated was for five days and he was excluded from school for at least two, but most likely four additional school days. The District appropriately held a manifestation determination meeting on November 7, 2023, and determined that the Student's behavior was related to his disability. But the District failed to take other several necessary actions.

When a student's behavior is a manifestation of the student's disability, the IEP team is required to review the student's FBA and BIP, and modify it, as necessary, to address the behavior. Further, except for special circumstances, because the student's behavior was related to his disability, the student was to be returned to the placement from which the student was removed, unless the parent and the district agree to a change of placement as part of the modification of the BIP. Here, OSPI does not find that the BIP developed on November 2, 2023, was in place, incorporated into the Student's IEP, or shared with the Student's teachers. The District did not consider whether changes to the unimplemented BIP were needed. Nonetheless, on November 7, 2023, and in response to the November 3, 2023 behavioral incident, the IEP team changed the Student's placement by putting him on a shortened school day. The District issued a PWN about this shortened school day and later, with Parent agreement, moved to amend the Student's IEP without another IEP meeting.

Overall, OSPI finds that the District has denied the Student a FAPE since October 4, 2023, because it failed to adhere to IDEA requirements that require that a BIP be developed and implemented for the Student who has had a change in placement due to disciplinary exclusion, and reconsidered the BIP when there are subsequent disability-related behaviors that are resulting in further disciplinary exclusions. OSPI finds a violation and the District will be required to conduct training on manifestation determination requirements related to FBAs and BIPs. The District will also be required to hold an IEP meeting to discuss whether the BIP needs to be amended, implementation of the BIP, and whether any additional compensatory education is required to address the delay in developing a BIP.

Issue 1c: IEP Implementation and Educational Services During a Suspension – The Parent alleged the Student was not provided with schoolwork during any of his periods of suspension. As of October 4, 2023, the Student's IEP team should have been aware that the September 28, 2023, five-day suspension subjected to a pattern of exclusion that changed his placement as he had been suspended for over ten days in the prior month. The Student was again suspended for five days on November 3, 2023.

A school district is required to provide services during periods of removal to a student eligible for special education who has been removed from his or her current placement for ten school days or fewer in that school year, as it provides services to a student without disabilities who is similarly removed. Additionally, after a student has been removed from his or her current placement for ten school days in the same school year, during any subsequent days of removal, the school district must provide services to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP. For students with disabilities subject to suspension for six to ten

consecutive school days, a school district must provide at least the following: course work, including any assigned homework, from all of the student's regular subjects or classes; and access to school personnel.

For suspensions of ten or more school days or that result in a pattern of exclusion that changes a student's placement, a school district must provide the student with the opportunity to receive educational services. The educational services must enable the student to: (i) continue to participate in the general education curriculum; (ii) meet the educational standards established within the district; and (iii) complete subject, grade level, and graduation requirements.

Prior to September 28, 2023, the Student had been given a one-day suspension, a three-day suspension, and a two-day suspension for a total of six days. OSPI found no evidence that the District provided the Student and Parent with schoolwork to ensure the Student did not fall behind in his coursework during the five-day suspension that was imposed on September 28, 2023. And OSPI finds that the District failed to provide the Student with alternative education services when the Student was suspended for five days on November 3, 2023. (Although the Student was eligible to come back on November 8, the Student's attendance records indicate he remained suspended on November 8 and 9, 2023.) Thus, OSPI finds a violation.

As discussed above, the District acknowledged and offered compensatory education to address the September 2023 time period. However, based on this violation related to the November 2023 time period, the Student is entitled to compensatory education for an additional five school days. At the time of the violation, per the Student's March 22, 2023 IEP, which was in effect, the Student was to receive about 270 minutes per week of SDI in social/emotional and behavioral services and thus the District will provide an additional 22 hours of compensatory education. The District will also provide training in this area.

CORRECTIVE ACTIONS

By or before **December 15, 2023, January 30, 2024, March 29, 2024, April 5, 2024, June 28, 2024,** and **September 6, 2024,** the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Compensatory Education

By or before **January 30, 2024,** the District and Parent will develop a schedule for the Student to receive 49 hours of compensatory education in social/emotional and behavioral.

Unless otherwise agreed to by the District and Parent, services will be provided by a certified special education teacher or a certified related service provider. Services may be provided in a 1:1 setting or a group setting, if appropriate. Services will be provided outside the District's school day and can be scheduled on weekends, over District breaks, or before or after school. The compensatory education could be provided through some sort of social skills or other summer

camp that provides social/emotional and behavioral skill building. The District will provide OSPI with documentation of the schedule for services by or before **January 30, 2024**.

If the District's provider is unable to attend a scheduled session, the session must be rescheduled. If the Student is absent, or otherwise does not attend a session without providing the District or provider with at least 24 hours' notice of the absence, the session does not need to be rescheduled. The services must be completed no later than **August 30, 2024**.

The District must provide OSPI with an update on the amount of compensatory services provided to the Student by providing documentation on **March 29, 2024** and **June 28, 2024**, of the compensatory services provided to the Student at that point. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled or missed by the Student. By or before **September 6, 2024**, the District must provide OSPI with documentation that it has completed compensatory services for the Student.

The District either must provide the transportation necessary for the Student to access these services or reimburse the Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must provide reimbursement for round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **September 6, 2024**.

IEP Meeting

By or before **December 13, 2023**, the Student's IEP team will meet. At the meeting, the IEP team must address the following topics:

- Whether the BIP needs to be further amended to address the Student's needs.
- All team members should have a shared understanding of how to implement the Student's BIP.
- Whether any additional or different services or supports are needed to meet the Student's needs, including continuing discussion of the 1:1 paraeducator.
- Whether additional compensatory education is needed to address the delay in developing and implementing the BIP.

By **December 15, 2023**, the District will provide OSPI with i) a prior written notice, summarizing the group's discussion and decisions concerning the above matters; ii) a copy of the Student's IEP; iii) any relevant meeting invitations and prior written notices; iv) the compensatory education plan, if additional compensatory education is warranted; and v) any other relevant documentation.

DISTRICT SPECIFIC:

Training

The District, in cooperation and collaboration with a non-District employee (e.g., the ESD or other trainer), will co-develop and jointly conduct a training on the below topics. The District will provide the trainer with a copy of this decision, SECC 23-131.

The following District staff will receive training: District special education administrators, and the Student's current IEP team and staff currently working with the Student. The training will cover the following topics:

- Implementation of IEPs, including requirements to provide staff with a copy of the IEP.
- Manifestation determination requirements related to developing and reviewing FBAs and BIPs.
- Requirements around provision of services during disciplinary exclusions.

The training will include examples.

By or before **December 15, 2023**, the District will notify OSPI of the name of the trainer and provide documentation that the District has provided the trainer with a copy of this decision for use in preparing the training materials.

By or before **January 30, 2024**, the District will submit a draft of the training materials for OSPI to review. OSPI will approve the materials or provide comments by February 16, 2023.

By **March 29, 2024**, the District will conduct the training regarding the topics raised in this complaint decision.

By **April 5, 2024**, the District will submit documentation that required staff participated in the training. This will include 1) a sign-in sheet from the training, and 2) a separate official human resources roster of all staff required to attend the training, so OSPI can verify that all required staff participated in the training.

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.

RECOMMENDATIONS

In investigating this complaint, OSPI notes the Parent raised concerns about some of the Student's behavior being the result of bullying by others and there were notes in IEP meetings about the principal discussing the outcome of bullying investigations with the Student. Therefore, OSPI recommends that the District provide guidance to the principal and other school staff about how to assess bullying of students with disabilities and its implications for FAPE.

Dated this 22nd 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.)