

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-137

PROCEDURAL HISTORY

On October 6, 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 Puyallup 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 October 6, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on October 9, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On October 24, 2023, the District requested an extension of time to respond to the complaint. OSPI granted the extension to November 2, 2023.

On November 2, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent on the same day. OSPI invited the Parent to reply.

On November 10 and 15, 2023, the OSPI complaint investigator interviewed the Parent.

On November 10 and 13, 2023, OSPI requested additional information from the Parent. On November 13 and 14, 2023, OSPI received that additional information. OSPI forwarded the additional information to the District on November 14, 2023.

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

ISSUE

1. Per WAC 392-172A-03105, was the Student's individualized education program (IEP), including the Student's behavioral intervention plan (BIP) and safety plan, implemented properly on October 5, 2023, when the Student was suspended?

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

FINDINGS OF FACT

Background

1. Prior to the 2023–24 school year, the Student attended elementary school in a different Washington state school district and was eligible for special education services.
2. On May 17, 2023 the Student's IEP team from the previous district met. The Student's IEP provided specially designed instruction (SDI), provided by a special education teacher, from May 18, 2023 until March 8, 2024, as follows:
 - Social/Emotional: 15 minutes/1 times weekly
 - Written Language: 45 minutes/4 times weekly

The Student received 1,800 minutes per week of building instructional time, with 135 minutes served in the special education setting. The percent of time in a general education setting was 92.5%. The Student's LRE was 80–100%.

2023–24 School Year

3. A prior written notice (PWN), dated August 22, 2023, drafted by the District states:

We are proposing to honor your child's current evaluation from the previous school district.

...

We will honor the current evaluation and will create an IEP, with your input, based upon that evaluation. Your child will be assigned a case manager at their school, who will call you to set up this meeting. Your child's current IEP will be followed as closely as possible until the new...District IEP is implemented.
4. On September 5, 2023, the District held its first day of instruction. The Student was a second grader at a District elementary school, and the Student's May 17, 2023 IEP from the previous district was in effect.
5. On September 26, 2023, the Parent consented to the District conducting a functional behavioral assessment (FBA) of the Student.¹
6. On October 4 and 10, 2023, the IEP team met to draft an IEP and "positive behavior support plan" (PBSP) for the Student. There were two PWNs documenting the two IEP meetings.

¹ As of November 2, 2023, when the District's response was submitted to OSPI, the District had not completed the FBA and stated it would draft a behavioral intervention plan (BIP) once the FBA was complete.

The October 4 PWN, stated:

The IEP team (part 1)...met to discuss [Student's] IEP instructional progress.

...

1. The option to keep a goal focused on 'zones of regulation' was considered, this was rejected.

2. The option of pull-out social emotional minutes were considered and rejected.

...

1:1 conversation did not come to a clear decision: parent and teacher does not want [Student] to be reliant on a 1:1. General Education teacher wants a 1:1 in the classroom but not work with [the Student]. General Education teacher wants to make sure [the Student] has a good relationship with her and wants to be the one responding to her needs in class.

...

The action will be initiated on: 10/11/2023.

The October 10 PWN, states:

The IEP Team Meeting (part 2) was held...

The IEP team is clarifying the 1:1 support discussion, revisiting the social emotional instructional minutes and finalizing the positive behavior support plan (PBSP).

...

1. The IEP team considered having [the Student] join a Social-Emotional group in the resource room twice a week to focus on instruction around IEP goals, this was accepted.

2. The IEP team considered having 1:1 support for [the Student] in order to support her access to education, this was accepted to support access needed breaks, generalize skills, and give opportunities for targeted instruction.

...

If [Student] is escalation [sic] that causes a spiral, use escalation plan. Mom is providing a sensory box to use with guidelines at school. The goal is to have [Student] manage and maintain in the classroom.

Beardie Bucks (another intervention), will be tied to academic work. She will earn the bucks even if she finished at home.

A 1:1 was determined necessary in order to maintain safety and instructional progress.

Based on the October 4 and 10, 2023 IEP meetings, the Student's IEP provided SDI, provided by a special education teacher, from October 11, 2023 until October 9, 2024, as follows:

- Social/Emotional: 150 minutes/weekly (general education)
- Written Expression: 120 minutes/weekly (special education)
- Social/Emotional: 60 minutes/weekly (special education)

The Student also received the following related services:

- 1:1 Paraeducator Support: 1,515 minutes/weekly (general education)
- 1:1 Paraeducator Support: 180 minutes/weekly (special education)

The Student received 1,695 minutes per week of building instructional time, with 180 minutes served in the special education setting. The percent of time in a general education setting was 89.38%. The Student's LRE was 80–100%.

7. On October 5, 2023, teacher 1 sent the Parent the following email regarding the Student:

Struggling from the moment she got here. I need clarification, but I heard she bit her sister on the bus twice. So I think it may have started from there. She has been screaming the whole day here in class and even grabbed my mic and screaming into that. Luckily I have the main mic and was able to turn her mic off from mine. Right now she is in the hallway tearing things off the wall. She has been in class for maybe a total of 30 min.

The Student's actions resulted in a four-day suspension. Typed notes of the incident provided, in part, as follows:

9:15– 10:15	S (Student) – Says “frick you” took balloon from class and went to fill it with water. Opened utility box and flipped switches. Tried to pull of (sic) psych’s cardigan; S says “I want to see your muscles”	Redirected to break space Threw Velcro balls	Under “strategies and interventions” sub section “possible strategies” Replacement behavior for throwing -throwing balls in break space instead of throwing items in break space
10:30	T (teacher) called office for support, S throwing items towards T, admin and psych responded, S was lifting table a couple inches and dropping it. She grabbed 6 pairs of big scissors and put the handle of one pair in her mouth. T and psych asked if she needed a break. T said “those don’t taste good. Do you need a snack?” S agreed to snack (grabbed 3 granola bars) break with psych, went to read books	Offered a break and a snack	Under “how to respond” on the Escalation: -remain positive -redirect after meeting basic needs -gave break -avoided instruction -co-regulate
11	S went with psych to counseling office to see where lunch bunch would, had short break, talked about feelings/strengths, and used therapeutty (had choice of putty).		Under “how to respond” on the Escalation -Give choices -reconnected in a positive way
11:15	Agreed to got (sic) to class to earn break with counselor (break is playing Connect 4)		emotion chart on her desk
Approx 11:20	Ran around room making noises, grabbed T’s mic, screamed in room, screamed into mic, ran out of classroom, tore things off the walls, ripping things, dumped water, threw mic in hallway, mic broke, pulled lanyard off principal, flipped off	T Moved towards student T did not open the door for the student, because S was escalated	Under “how to respond” on the Escalation Hierarchy Wait it out Reduce demands

	class in window, flipped off staff, pushed staff.		
11:35	Ripped T's pictures	Reminded to make safe choices	
11:45	Threatening gestures, tried to throw the fire extinguisher at Resource Para tried to spray staff with extinguisher	Directed Resource Para to step away. Took extinguisher from S, offered food.	Under "how to respond" on the Escalation Hierarchy Move dangerous items away Neutral body language/facial expressions
11:58	Started ripping paper. Pushed Resource Para, ripped school Second Step Poster took walkie, hanging it over the railing	SpEd T talks to her about the walkie, talked to her about students who need to help and they need the radio to help the students.	Under "how to respond" on the Escalation Hierarchy Avoiding a power struggle
12:07	Walks with SpEd T to SpEd classroom	Walked with S	

At approximately 12:30 pm on October 5, 2023, the Student was sent home.

8. On October 6, 2023, the Parent filed a complaint with OSPI that alleged, in part, "[Student's] behavior is a direct result of her delay and she should not be suspended because her IEP/PBS plan was not followed."
9. On November 2, 2023, the District submitted its response to the Parent's complaint. Regarding the issue under investigation, the District responded that it appropriately implemented the Student's IEP and stated, in part, as follows:

The District staff implemented Student's IEP in all material respects when Student was suspended on October 5, 2023, because it followed her relevant May 17, 2023 IEP accommodations, including redirection, replacement behavior, offering a break and snack, waiting out the behavior, reducing demands, moving away dangerous items, neutral body language/facial expressions and taking a walk with Student.
10. On November 10, 2023, OSPI interviewed the Parent. The Parent expressed that the District handled the October 5, 2023 incident inappropriately. The Parent stated that the parties had agreed to a plan for how to de-escalate the Student when the Student became agitated that included the zones curriculum referenced in the May 17, 2023 IEP and the District had not followed that plan.
11. On November 13, 2023, the Parent sent OSPI copies of many emails with a message that states in part, "I have attached some correspondence with regard to my complaint in that I truly believe [Student's] IEP, PBS, and Escalation Plan was in place at the time of her suspension on 10/05/2023."

12. On November 14, 2023, the Parent sent OSPI a Microsoft Word file, titled "[Student] Positive Behavior Support Plan 9.27.23". One of the pages is a diagram that describes the seven phases of escalation and how to respond to each phase.

CONCLUSIONS

The Parent's complaint alleged, "[Student's] behavior is a direct result of her delay and she should not be suspended (on October 5, 2023) because her IEP/PBS plan was not followed." The District has responded, "[we] implemented Student's IEP in all material respects when Student was suspended on October 5, 2023" and our actions were appropriate in handling the Student during the incident.

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 child with a disability and those required by the IEP.

In the present case, OSPI does not find a violation for three reasons. First, Washington Administrative Code 392-172A-05145(2)(a) states, "School personnel may remove a student eligible for special education services who violates a code of student conduct...[by] suspension." This regulation establishes that students with IEPs can be suspended even if the conduct that led to the suspension is related to the reason the student is eligible for special education services.²

Second, the District's notes from the October 5, 2023 incident detail that District personnel tried to de-escalate the situation on multiple occasions from 9:15 am until about noon, by redirecting the Student to a break space to play with Velcro balls, offering breaks and snacks, and reminding the Student to make safe choices. These responses by the District to the Student's actions are consistent with safe and reasonable methods to de-escalate a student who is escalated.

Third, the Parent's main argument is that the Student's IEP/behavior plan was not followed. In her November 10, 2023 interview, the Parent specifically mentioned that the District on October 5, 2023, did not go through the recommendations for how to respond to the seven phases of escalation referenced in the September 27, 2023 positive behavior support plan.

It was not a material failure by the District to not implement the recommendations for how to respond to the seven phases of escalation exactly how they are referenced in the September 27, 2023 positive behavior support plan during one instance when the Student was escalated. Additionally, as stated above, the District's response on October 5 to the Student's actions were consistent with safe and reasonable methods to de-escalate a student who is escalated.

For the reasons provided above, OSPI does not find a violation in the present case.

² Special education regulations do provide additional protections in the area of discipline for students eligible for special education; however, those regulations are not at issue here as the Student was only suspended for one day and her placement was not changed via discipline.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this 4th day of December, 2023

Dr. Tania May
Assistant Superintendent of Special Education
PO BOX 47200
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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.)