

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-143**

### **PROCEDURAL HISTORY**

On October 16, 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 **[REDACTED]** 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 16, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on October 17, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On October 17, 18, and 19, 2023, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on October 19, 2023.

On October 20, 2023, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on October 23, 2023.

On October 27, 2023, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on October 30, 2023.

On October 27, 2023, OSPI received additional information from the District. OSPI forwarded the additional information to the Parent on October 30, 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 2, 2023, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on November 3, 2023.

On November 6, 7, and 8 2023, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on November 7 and 9, 2023.

On November 8, 2023, the OSPI complaint investigator interviewed the Parent.

On November 15 and 17, 2023, the OSPI complaint investigator interviewed the Student's principal, special education director, teacher, and 1:1 paraeducator.

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

On November 15, 2023, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on November 16, 2023.

On November 16 and 17, 2023, OSPI received videos from the District that contained the images of many students. OSPI did not share these videos with the Parent because OSPI did not have a signed release of information from the parents of all the students.

On November 27, 2023, OSPI received additional information from the District. OSPI forwarded the additional information to the Parent on November 28, 2023.

On November 30, 2023, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on the same day.

On December 6, 2023, OSPI requested additional information from the District, and received the information on the same day. OSPI forwarded this information to the Parent on December 7, 2023.

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

### **ISSUE**

1. Per WAC 392-172A-01142, has the Student's behavioral intervention plan (BIP) been implemented properly during the 2023–24 school year?

### **LEGAL STANDARDS**

IEP Implementation: At the start 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. Each 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 district must ensure that the student's IEP is accessible to each general education and 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).

Behavioral Intervention Plan. A behavioral intervention plan (BIP) is a plan incorporated into a student's IEP if determined necessary by the IEP team for the student to receive FAPE. The behavioral intervention plan, at a minimum, describes: (1) The pattern of behavior(s) that impedes the student's learning or the learning of others; (2) The instructional and/or environmental conditions or circumstances that contribute to the pattern of behavior(s) being addressed by the IEP team; (3) The positive behavioral interventions and supports to: (a) Reduce the pattern of behavior(s) that impedes the student's learning or the learning of others and increases the desired prosocial behaviors; (b) Ensure the consistency of the implementation of the positive behavioral interventions across the student's school-sponsored instruction or activities; (4) 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.

Bullying and Harassment: Each school district shall adopt a policy and procedure that prohibits the harassment, intimidation, or bullying of any student. RCW 28A.300.285. Bullying is defined as aggression used within a relationship where the aggressor has more or real perceived power than the target, and the aggression is repeated or has the potential to be repeated. (Dear Colleague Letter, 61 IDELR 263.) In addition, under the IDEA, school districts have an obligation to ensure that students who are the targets of bullying continue to receive a free appropriate public education (FAPE) in accordance with the student's IEP. As part of an appropriate response to bullying under the IDEA, districts should consider convening an IEP team meeting to determine whether the effects of bullying have caused the student's needs to change such that their IEP is no longer providing educational benefit. *Dear Colleague Letter*, 61 IDELR 263.

Harassment or bullying that adversely affects that student's education, may result in a denial of FAPE. A denial of FAPE occurs when, taking into consideration the student's unique characteristics, it may be fairly said that a school district did not provide the student an opportunity to obtain some progress from the program it has offered. *Ojai Unified School District v. Jackson*, 4 F.3d 1467 (9<sup>th</sup> Cir. 1993), *cert. denied*, 115 S. Ct. 90 (1994). Harassment and bullying of a student eligible for special education that prevents the student from receiving meaningful educational benefit constitutes a denial of a FAPE that districts must remedy. As part of its response, the district should convene an IEP team meeting to determine whether additional or different services are necessary and must revise the student's IEP accordingly. A fundamental step in preventing disability-based harassment is developing and disseminating a policy that prohibits such harassment. *Dear Colleague Letter* (OSERS/OSEP Aug. 20, 2013).

### **FINDINGS OF FACT**

1. On September 6, 2023, the District held its first day of instruction for the 2023–24 school year and the Student was an eighth grader at a District secondary school. The Student was eligible for special education services under the eligibility category of autism.
2. Also, on September 6, 2023, the Student's IEP team met.<sup>1</sup> The Student's IEP provided specially designed instruction (SDI), provided by special education staff from September 6, 2023 until September 4, 2024, as follows:
  - Math: 36 minutes/5 times weekly (in a general education setting)
  - Reading: 20 minutes/5 times weekly (in a general education setting)
  - Writing: 20 minutes/5 times weekly (in a special education setting)
  - Social/Emotional: 114 minutes/5 times weekly (in a general education setting)
  - Social/Emotional: 112 minutes/5 times weekly (in a special education setting)
  - Math: 20 minutes/5 times weekly (in a special education setting)

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<sup>1</sup> In her November 8, 2023 interview with OSPI, the Parent expressed that the team reviewed the IEP, but did not review the BIP because time ran out. The Parent also expressed that she did not agree to the IEP because she wanted "behavioral process system" training for the new 1:1 paraeducator. The Parent also expressed that the BIP did not accurately mention the correct medications.

- Reading: 15 minutes/5 times weekly (in a special education setting)
- Communication: 20 minutes/5 times weekly (in a special education setting)
- Adaptive: 57 minutes/5 times weekly (in a special education setting)

The IEP stated, “[The Student] requires a one on one para for social/emotional/behavioral support throughout his academic and transition times during the school day...Staff who work with [the Student] in a 1:1 support and 1:1 teaching capacity, will receive training provided by a behavior services provider.”

The Student received 1,800 minutes per week of building instructional time, with 835 minutes per week served in the special education setting. The percent of time in a general education setting was 53.61%. The Student’s LRE was 40–79%.

One of the Student’s communication goals was as follows:

By 09/04/2024, when given the opportunity to interact in social settings with his peers [the Student] will identify an unkind remark directed at him and choose to ignore it, walk away, or notify an adult improving his communication skills from 0% (new goal) to 60% of the time as measured by behavior tracking forms.

The Student’s other communication goal was as follows:

By 09/04/2024, when given the opportunity to interact with peers [the Student] will interact with peers in an appropriate manner (using kind/respectful language, speaking about school/peer appropriate topics, with minimal adult support improving his ability to appropriately interact with his peers with minimal adult support from 2 out of 5 trials to 4 out of 5 trials as measured by teacher/para data.

For both of these goals, written progress reports were supposed to be provided on a semester basis.<sup>2</sup>

The Student’s BIP, dated September 6, 2023, provided two target behaviors. The first target behavior was aggression, and the second target behavior was vocal outbursts. These behaviors tend to occur in unstructured, chaotic environments, such as loud, disorganized classes. One of the antecedents for these behaviors is negative peer attention, such as teasing and bullying. The intervention strategies included the Student asking for a break to self-regulate. The antecedent intervention strategies included providing the Student with a consistent routine, and when possible, to place the Student in classes with structure. The teaching strategies included self-monitoring tracker, teach coping skills, and verbal reminders. Data collection procedures included a self-monitoring checklist, and a daily behavior frequency form completed by the 1:1 paraeducator.

3. On September 7, 2023, teacher 1’s daily notes<sup>3</sup> provided, in part:

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<sup>2</sup> OSPI notes that as of the filing and investigation of this complaint, the District’s semester had not ended yet. Therefore, there was no progress reporting available for the 2023–24 school year.

<sup>3</sup> These notes were provided to the Parent on a daily basis.

1st period - - PE struggled with following prompts from para. Was with a group of boys that are triggers for him. Para suggested to him try and stay away for a bit. [The Student] said 'No I will tell my mom' 'Who are you to tell me that?' Finished out the class with 6 reminders for blurting and language.

4. On September 8, 2023, teacher 1's daily notes provided, in part:  
1st – [The Student] played a pickleball game. He used a lot of foul language, but was able to participate with his peers.  
2nd – [The Student] had a lot of small comments, but redirected well in class. He had some back and forth banter with friends.  
...  
We are working on some strategies and solutions for Math as this seems to be the most difficult group of students for him to be with.
5. On September 12, 2023, teacher 1 sent the following internal email to District staff:  
Can you all help me brainstorm options for rewards for [the Student]? He does crave social interaction with his peers and missing lunch may be a good motivator. I would like to find positive reinforcements that we can maintain. Is there a student...that might be able to spend time throwing the football with him when he has done well for a day or a week?
6. The District's response included descriptions of replacement and reinforcement strategies and in their interviews, the staff mentioned that at the start of the school year, they determined strategies used the previous year were no longer as effective as they had been the previous year.
7. On September 13, 2023, the Parent emailed teacher 1, in part, "...It seems the one on one is doing a poor job of regulating and controlling [the Student's] Behaviour [sic] with her strategies. It is only irritating [the Student] more. I would like [the Student's] one on one to get the same training as [behavior group] used for [the Student]."
8. On September 14, 2023, teacher 2 sent the following email to the principal, dean of students, and teacher 1:  
[Student's 1:1 paraeducator] said that some students, including [the Student] are using foul language during first period P.E. Is it possible for one of you to check in on some days?  
[Student's 1:1 paraeducator] said that [PE teacher] doesn't hear it because they are spread out, but [Student's 1:1 paraeducator] hears it since she is shadowing [the Student].  
  
The dean of students responded he would visit the PE class the next day.
9. Also, on September 14, 2023, teacher 1's daily notes provided, in part:  
1st period – [The Student] had a good time, but struggled with foul language. [1:1 paraeducator] let [dean of students] know that other student were using foul language as well and it has caused frustration for [the Student] as he is corrected for it and other students aren't always. [Dean of students] will be in the class tomorrow to ensure fair treatment and expectations for all.
10. On September 18, 2023, teacher 1's daily notes provided, in part, "1<sup>st</sup> period- [The Student] struggled with his foul language in PE. He is drawn into negative language by the other

students. [The Student] is working on making his own choices, not following along when others make poor choices.”

11. On September 19, 2023, teacher 1’s daily notes provided, in part, “1<sup>st</sup> period - [The Student] was doing well in class, several boys were making rude comments and at the end of class he punched one in the face.”

A video of the incident on September 19, 2023 showed:

- The students were playing capture the flag. About twenty students are divided into two teams. About 15 students were on the far side of the gym and about 5 students were on the closer side of the gym. Some of the students were wearing belts like those worn in flag football, which have streamers hanging from them that can be easily pulled off by the opposing team to demonstrate that they have touched a player. The Student was wearing such a belt.
- Five players on the opposing team were standing near a box marked off with cones and their team’s flag sits in the middle. These students were protecting the space in the game.
- The Student was standing within ten feet of the PE teacher about 40 feet from the opposing team’s five players. No one was talking to him at that moment. Suddenly, the Student sprinted toward the opposing team’s side, and as he neared the space where the opposing team’s flag is, the opposing team players react. Two opposing players grabbed at the streamers on the Student’s belt. He pushed one of the students away, and when that student once again tried to grab the streamer, the Student threw four punches at this player and then stepped back from the confrontation. Another player pushed the Student, and the Student began to walk away. The PE teacher moved toward the students to break up the situation.

12. A September 20, 2023 Parent email to the District stated, in part:

I wanted to share [my Student’s] worries today (regarding the fight). He was crying when telling me what the kids were allowed to bully him all through class before the physical violence happened. Which I believe could’ve been prevented the boys that were harassing him should’ve been removed immediately before it got out of hand. He doesn’t want to go to school he said they are going to jump him? They will never treat him as a normal kid. I advised [my Student] this morning. If the kids are bullying him saying mean things to him an (sic) he feels the school is not addressing it to call me and I will come and get him before any physical violence happens.

13. A September 27, 2023 Parent email to the District stated, in part:

...I am also very concerned on where the one on one was when this incident happened (September 19 fight). And how the ‘one on one’ an (sic) the district follow through with [my Student’s] behavioral plan. I am also very concerned why [my Student] was allowed to be bullied all through class by several boys before the incident even happened.

14. On September 28, 2023, teacher 1’s daily notes provided, in part, “1<sup>st</sup> period – [The Student] struggled with a lot of foul language in PE, 7 instances. He was able to continue on in class with reminders and discussion about not responding to peers with swearing.”

15. On September 29, 2023, teacher 1’s daily notes provided, in part:

Lunch – [Student] struggled at lunch today and was rapping inappropriately very loud in the lunch room. [1:1 paraeducator] told him it was not acceptable and refused to stop. He was rude and disrespectful to [1:1 paraeducator]. She then had him leave the lunch room to return to [teacher 2’s] room to finish lunch.

4th period – [The Student] was able to talk over why he had to leave the lunch room and went on to get several assignments finished.

16. On October 2, 2023, teacher 1's daily notes provided, in part:

[Student] did well during lunch time until he went outside to play football. [Dean of students] has the full description of events and will email you those. The positive in the situation is that [the Student] got upset and walked away rather than using physical aggression. [The Student] called [the Parent] after the incident and was picked up.

17. Also, on October 2, 2023, the Parent emailed the District three times as follows, "[My Student] came home because he was being bullied and none of the staff including his one on one was there to help de-escalate the situation and to make him feel safe in school!"

In a second email, the Parent stated, "Again, I asked [sic] the question what is the one on one doing other than sitting there?"

And, in a final email, the Parent wrote, "[My Student] also came into school in not a good mood because he did not want to attend school due to his one on one that he felt assaulted him!"<sup>4</sup>

18. On October 12, 2023, teacher 1's daily notes provided, in part, "1<sup>st</sup> Period - [The Student] was playing and an incident with the other students occurred. [The Student] went to the office, met with the Nurse and the Nurse called [the Parent]. [The Student] left school shortly after."

A video of the October 12, 2023 incident showed:

- 13 students were in the gym (three playing volleyball and ten playing football).
- The Student was playing football and his 1:1 paraeducator was sitting on the bleachers about 40 feet from the from the football players.
- The Student was the running back for his team.
- It was a rough game of football and it included the Student getting knocked to the ground on the first play seen in the video. Despite this, all the players remained calm.
- On the fourth play, the football was handed off to the Student and he ran to his left. He encountered opposing player 1 in the center of the court and the Student appeared to bring his right elbow up and that elbow appeared to make contact with opposing player 1's jaw and face. The Student continued to run with the ball down the center of the court. Two other opposing players try to stop the Student's forward progress. Opposing player 2 ends up behind the Student and grabbed the back of the Student's shirt near the bottom and began to pull on it to prevent the Student's forward progress. By this time, opposing player 1 caught up to the play and appeared to throw two punches at the back of the Student's head and then came around the Student's left side. At this point, the 1:1 paraeducator got up and started to walk toward the Students. There are three opposing players around the Student trying to prevent

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<sup>4</sup> On November 8, 2023, the Parent emailed OSPI a screenshot of texts the Parent exchanged with another student's parent. A screenshot from the other parent stated, "[Other student] said that he saw [Student's] one on one kind of slap his arm." The screenshots were of texts from October 1 and 2, 2023, and were referring to the incident occurring on Friday, September 29, 2023.

The 1:1 paraeducator denied the slap and no other evidence was introduced that the incident occurred.

his forward motion, including opposing player 1. As the Student and three opposing players moved forward together, opposing player 1, who is now standing in front of the Student, punched at the Student. The Student dropped the ball, which rolled behind the Student and opposing player 2 let go of the Student's shirt to follow the ball. The Student went back at opposing player 1 and the two of them each threw two punches to the face and head of the other person. The Student then turned to his left and began to move away from opposing player 1. Opposing player 1 moved beside the Student's right side and hit him with a punch to the face. The other players in the game separate the Student and opposing player 1. The 1:1 was now within the group of the students who were playing football.

- All the players are milling around calmly and within a few seconds, the Student and opposing player 1 walk calmly past each other.
- A few seconds later, it appeared the 1:1 directed the football players to leave the gym and she remained in the gym with the Student for a few more seconds. The Student has his hand to his left ear and appeared calm. The Student suddenly ran out of the gym towards where the football players exited. The 1:1 paraeducator also ran in that direction, and the students playing volleyball also ran out of the gym in that direction.
- The video no longer showed what is happening.

According to the 1:1 paraeducator, one of the players yelled something to the Student from off camera. The Student ran toward that person, but there was another teacher at the location that was able to prevent the students from engaging in more fighting.

19. The principal provided OSPI notes from investigations into the September 19 and October 12, 2023 incidents. According to the notes, the Student felt he was being bullied.

Regarding the September 19, 2023 incident, the notes showed:

- Five classmates were interviewed.
- Two classmates had no comment because they were not involved in this incident.
- The remaining three classmates said that there were no discussions, threats, or foul language prior to class in the hallway, locker room, or in the gym.
- When asked about what happened immediately leading up to the fight, one classmate said, "Maybe ... rough play. He [Student] wasn't playing by the rules. Then he got mad and punched me." Another classmate said, "I saw nothing other than he's competitive and he got angry and punched." The third classmate said, "Comments back and forth. [The Student] said something. [Other student] came back. Talk led to aggression. [The Student] was swinging first. Out of nowhere, [the Student] cussing."
- One classmate commented that the Student makes homophobic, sexist, and ableist derogatory statements to him, and this classmate admitted he responds with similar language. This student said, "My classmates insult each other. Amongst us, we are tough. We stand up for each other."
- Another classmate said, "He's competitive [the Student]. Maybe a smile or a look. He picks people out of a crowd and gets angry with them. We go back and forth playing games. It starts fun and changes. He gets mad."
- The third classmate said, "Random at lunch saying bad stuff and when they try and shut it down, he says they're prejudiced...He says crazy things then it turns sexual and racial. You say that and people don't want to be around."

Regarding the October 12, 2023 incident, the notes showed:

- Five classmates were interviewed.



- The five classmates said that there were no discussions, threats, or foul language prior to class in the hallway, locker room, or in the gym. One student said, "I try to stay away from him. Telling him to get away was because I don't want him around me."
- When asked about what happened immediately leading up to the fight, one classmate said, "It happened really fast. The referees were making bogus calls. [The Student] was slamming into people. Not playing by the rules. People were pissed. Not much talk."
- Another classmate said, "They were losing, so they kept giving the ball to [the Student]. ... playing aggressive and the fight happened."

At the end of the document, it stated:

Recommendation: We need to intentionally and aggressively work on problem solving and provide techniques for students to de-escalate when angry. We also need to work as a staff to monitor behavior and selectively group students. Inappropriate language needs to earn a consequence. (Progressive with parent involvement) classmate and [the Student] need to be separated from each other via a safe haven contract. I also will work with the school guidance counselor to develop groups to develop coping and de-escalation techniques. There will be no more aggressive, two hand touch football in PE.

20. An October 12, 2023 email from the Parent to teacher 1 stated:

I feel like this daily report is pretty nonchalant and not accurate of [Student's] day...you have nothing in there that states [my Student] was assaulted and punch several times in the head in the Jaw and his earring was ripped out of his ear where his ear was bleeding. nor of the nurse had called me concern [my Student] had a concussion and that I needed to take [my Student] to the ER, which he was diagnosed with a concussion. like I have said many times before, please be truthful in these daily reports if you don't understand the word, honesty, look it up in the dictionary. I don't appreciate you minimizing the assault on my son today which the consequence was an ER visit that cost thousands of dollars and my son is hurt. I have made many complaints to you regarding bullying at the school.

21. On October 16, 2023, the Parent filed a complaint with OSPI that alleged, in part, "School not following [Student's] behavior plan" and "inaccurate daily reports."

22. On October 17, 2023, the Student drafted a written statement regarding the October 12, 2023 incident. It stated:

[Peer 1] told me I needed to get out of here. Warning me. We started to play football ... [other players] Where making racist comments to me my one on one was on the side lines visiting with [another person]. I did a football play called stiff arm to [a player] an he started to punch me in the head. [Another player] tried to Break it up Then my one on one came. I went to the school Nurse because I was hurt. She called my mom to take me to the E.R.

23. Also, October 17, 2023, the teacher wrote an email to a private behavior provider who had previously worked with the District and the Student. The email provided, "He has had struggles in Math and PE this and wanting to see if we need to make changes to his schedule or if he is where he should be and need to adjust how those classes are set up for him."

24. Teacher 1's notes from October 18, 2023 provided, in part:

2nd period - [Student] chose to go work in teacher 2's room after the first 5 minutes of class. He said he didn't want to be with some of the other student that are in that class and it brought up

memories of the fight last week. He was able to remain calm and tell 1:1 paraeducator why he wanted to leave and talk through friend choices.

...

[The Student] went to talk with 1:1 paraeducator about the mean comments that some of the other students were making. They had a good conversation about people that treat you poorly are not your friends. [The Student] was able to listen to her advice and have a productive conversation about choosing friends that treat him with respect.

25. On October 19, 2023, the Parent sent OSPI the following email:

I just had to pick up my son from school. He was very upset and frustrated. He went to the doctor yesterday and still has not recovered from his concussion. The doctor ordered for him to have extra breaks at school. My son requested a break from his one on one, she gave him five minutes. My son said he needed more time to rest. The one on one told him no my son started to get very frustrated and said he was gonna lose it, [teacher] in the resource room, threaten to call the police on my son. If he lost his temper, my son went to the nurses office and I came and got him. My son stated the one on one was very rude and mean to him. His one on one was having a conversation with somebody else and my son ask a question. She told him be quiet nobody asked you.

Regarding this incident, in her November 15, 2023 interview, the Student's 1:1 paraeducator said there was an earthquake drill and Student was taking a break during that time and did not want to get under the table and participate in the drill.

26. The Student has not been in school since October 19, 2023. On October 25, 2023, the Student began receiving instruction via "Home/Hospital Instruction" on Mondays and Wednesdays for two hours each day.<sup>5</sup>

27. The District's records show that the teacher produced daily behavior data<sup>6</sup> for each class period on the following dates during 2023–24 school year: September 6–8, 11–15, 18–22, 25, 28, 29, October 2–6, 9–12, and 16–18, 2023.

28. On November 2, 2023, the District responded to this complaint. The District's response stated in part:

District followed the BIP prior to the complaint filed. During the 23-24 school year to-date. The BIP was reviewed on 9/6/23 with the IEP team including the parent, with no changes made from the previous year. The BIP was developed from a Functional Behavior Assessment by [private provider] on 12/16/2022 at the request of the parent and their attorney.

29. On November 15 and 17, 2023, the OSPI complaint investigator interviewed the principal, teacher 1, 1:1 paraeducator, and special education director. The main points from these interviews were:

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<sup>5</sup> According to the Parent, the Student has refused to attend school as he says he is being bullied.

<sup>6</sup> The data provided a brief summary of the Student's behavior during each period, and a count of how many times the Student blurted in class, became physically aggressive, and the Student's self-rating.

- 1:1 paraeducator is usually standing very close to the Student and his peers and can hear the conversations they are having.
- The Student and his peers often talk very rudely and disrespectfully towards each other, but the language being used by the peers is not the language of "bullying". The 1:1 paraeducator stated that whenever she hears the inappropriate language, she informs the peers or the Student to stop using such language. (Daily behavior notes include data on the Student's vocal outbursts as described in the interview.)
- The District staff interviewed believes that the Student characterizes the rude language targeted at him by his peers as "bullying".
- The Student called his Parent to come pick him on a number of occasions when inappropriate language was exchanged between the Student and his classmates.
- The District had arranged an IEP meeting to discuss these pickups, but the Parent canceled the meeting because of the October 12, 2023 incident.
- A private behavior provider provided training to the District's staff on October 27 and November 14, 2023. The training is not complete, but future dates have yet to be scheduled.
- When the Student is in his special education class, 1:1 paraeducator is working with the Student on social-emotional skills by using cards that have scenarios and they talk through these scenarios. The 1:1 paraeducator also makes up scenarios based on what she sees the Student experience at school. This instruction occurs daily during third and fourth periods.
- The school also organized a small group of students that included the Student in which the group was going to review the "Character Strong" curriculum. The Student did not get an opportunity to participate in this group because it became available in about mid-October when the Student was no longer attending school in person.
- Music has been offered as a way to calm the Student, per his BIP, but he struggles to use it appropriately. He wants to use it during instruction, which is not appropriate.

30. On November 22, 2023, the parties had an IEP meeting. A prior written notice (PWN) from that meeting stated:

1. [District] will continue Home Hospital instruction with increased rigor incrementally through timer system while the tutor is onsite. [sic] 2.The district will increase home hospital tutoring instruction by 2 hours per week.

...

1. [Student] continues to require [specially designed instruction] and tutoring through home hospital.

2. [Student] will benefit from a longer amount of tutoring support as parent reports he is unable to work independently at home.

...

District proposed Emergency Response Plan development to occur during this meeting via email invitation last week 11/17/23.

...

Parent refusal to develop Emergency Response Protocol in collaboration with the district via email 11/20/23.

## **CONCLUSIONS**

In the present case, the Parent filed this complaint, alleging that the school was not following the Student's behavior plan and not providing accurate daily reports to the Parent. The District responded that it had followed the Student's BIP.

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.

In the present case, on the first day of the school year, the Student's IEP in effect provided for "a one on one para for social/emotional/behavioral support throughout his academic and transition times during the school day." The Student's BIP, dated September 6, 2023, provided two target behaviors. The first target behavior is aggression, and the second target behavior is vocal outbursts. These behaviors tend to occur in unstructured, chaotic environments, such as loud, disorganized classes. One of the antecedents for these behaviors is negative peer attention, such as teasing and bullying. The intervention strategies included the Student asking for a break to self-regulate. The antecedent intervention strategies included providing the Student with a consistent routine, and when possible, place the Student in classes with structure. The teaching strategies included self-monitoring tracker, teach coping skills, and verbal reminders. Data collection procedures included a self-monitoring checklist, and a daily behavior frequency form completed by the 1:1 paraeducator.

From the beginning of the school year until October 19, 2023, when the Student stopped attending school in-person, the Student had a 1:1 paraeducator who shadowed the Student throughout his school day. This paraeducator also worked with the Student for two periods per day on his social/emotional IEP services. These services included reviewing scenarios with the Student of challenging situations and imagining ways the Student can handle the situations in a manner that does not involve aggression. Additionally, the paraeducator stated they were undergoing training as is mentioned in the Student's IEP, and as the Parent has expressed that she would like to see happen.

Despite the 1:1 paraeducator accompanying the Student throughout his school day and the District providing social emotional/behavioral and communication instruction, the Student and his classmates often spoke to each other inappropriately using crude, homophobic, and racist language that the paraeducator heard. The paraeducator encouraged the Student to make good decisions when the Student exchanged inappropriate language with his classmates with whom he played sports and socialized with on a daily basis. Despite this, according to the paraeducator and the principal's investigation into incidents, although these interactions involving crude language often left the Student feeling bad, the Student was not being bullied. A review of the videos for the September 19 and October 12, 2023 incidents do not show that the Student's classmates were bullying or engaging in inappropriate conduct toward the Student prior to the punches being thrown in those incidents. The videos show that the District's staff was present during these incidents and responded as quickly as they could considering how fast events were happening in the PE class.

OSPI notes that under the IDEA, school districts have an obligation to ensure that students who are the targets of bullying continue to receive a free appropriate public education (FAPE) in accordance with the student's IEP and the district has an obligation to address allegations of bullying. OSPI's investigation shows that the District has taken steps to address the bullying

allegations and incidents via investigation, has made recommendations about steps needed for all students involved, and has engaged in and continues to engage in additional training for staff. Federal guidance notes that as part of an appropriate response to bullying under the IDEA, districts should consider convening an IEP team meeting to determine whether the effects of bullying have caused the student's needs to change, such that their IEP is no longer providing educational benefit. Here, the Student's IEP team met at the beginning of September 2023, a meeting was scheduled in October 2023 and canceled by the Parent, and a meeting occurred on November 22, 2023, to continue discussing the Student's IEP. While the incidents that occurred are unfortunate and OSPI understands the Parent's concern, especially given the Student was injured, the District has taken steps to investigate and address the incidents. At the same time, given the Student has been out of school due to his belief he is being bullied, OSPI strongly recommends the Student's IEP team meet to discuss what is needed for the Student to return to school and consider including the Student in the meeting so that he can share his concerns.

Overall, out of 28 days of data taken on the Student's behavior, the Student was involved in a physical altercation on two days. Although it is unfortunate the two incidents occurred, this does not mean the District failed to materially implement the Student's BIP. These two incidents occurred during PE sports activities. Based on this case's record, it is apparent that sports are important to the Student, but sports also create the type of chaotic environments that can be difficult for the Student as shown by the incidents that occurred in PE. Despite the two PE incidents, other incidents provide examples of the BIP being implemented and the impact of the behavior skills being taught to the Student. For example, on October 2, 2023, there was an incident during a lunch time football game in which the Student handled a difficult situation well. Teacher 1's daily notes from the incident stated, "The positive in the situation is that [the Student] got upset and walked away rather than using physical aggression."

The Parent also alleged that the daily reports were not detailed enough. A close review of those reports show that the District provided daily reports that usually detailed the Student's behavior for each class of his schedule. These reports also provided information on how many vocal outbursts and physical acts of aggression the Student engaged in daily. While OSPI acknowledges that these reports may at times have left out specific details, such as the Student getting detention or the October 12 altercation that took place in first period PE, it cannot be said that these daily reports were overall inadequate. The present case's record does not show that the District materially failed to implement the Student's BIP, and thus, OSPI does not find a violation related to the implementation of the BIP.

### **CORRECTIVE ACTION**

#### **STUDENT SPECIFIC:**

None.

#### **DISTRICT SPECIFIC:**

None.

## RECOMMENDATIONS

Given the Student has been out of school due to his belief he is being bullied, OSPI strongly recommends the Student's IEP team meet to discuss what is needed for the Student to return to school and consider including the Student in the meeting so that he can share his concerns.

Additionally, while the District was not found to have failed to materially implement the Student's BIP, it is not entirely clear that the BIP was sufficient this school year to support student progress and implementation across environments. Staff noted that previous interventions that worked the previous school year no longer worked as well. Thus, OSPI recommends the IEP team meet and discuss amending the BIP to ensure it is effective and meeting the needs of the Student. This discussion should include:

- Whether new or different positive behavior supports and strategies are needed and whether it would be helpful to conduct a functional behavioral assessment (FBA).
- What practices are needed for enhanced communication with the Parent, given the Parent's concerns that the daily reports were not detailed enough.
- Enhanced practices for behavior data collection.
- Discuss the Student's paraeducator support and include how the paraeducator support is working with the Student and whether a plan for fading paraeducator support should be developed. The District is strongly encouraged to review [Appendix A: Best Practices for Planning Paraeducator Support](#) and implement steps to:
  - More clearly define the scope and function of paraeducator support for students in IEPs and BIPs.
  - Ensure that when paraeducator support is assigned, that there is an established process for special education certificated teachers and/or ESA staff to closely monitor student progress data to determine when to systematically fade paraeducator supports.

Dated this 11th 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.)