

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-144

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 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 October 16, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on October 18, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On November 10, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent on November 13, 2023. OSPI invited the Parent to reply.

On November 27, 2023, OSPI's investigator consulted with an OSPI team member with professional experience as a board-certified behavior analyst (BCBA).

On November 29, 2023, OSPI received additional information from the Parent. OSPI provided the District a copy of the same on December 11, 2023.

On November 30, 2023, OSPI requested that the District provide additional information, and the District provided the requested information on December 8 and 11, 2023. OSPI forwarded the information to the Parent on December 11, 2023.

On December 11, 2023, OSPI requested that the District provide additional information, and the District provided the requested information the same day. OSPI forwarded the information to the Parent on December 12, 2023.

On December 11, 2023, OSPI's investigator conducted a phone interview of the special education teacher.

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

ISSUES

1. Beginning with the 2023–24 school year, did the District follow proper IEP transfer procedures under WAC 392-172A-03105(4)?
2. Beginning with the 2023–24 school year, did the District follow proper isolation procedures?

LEGAL STANDARDS

Transfer Students Who Transfer from an In-State School District: If a student eligible for special education transfers from one Washington State school district to Washington State school district

and has an IEP that was in effect for the current school year from the previous district, the new school district, in consultation with the parents, must provide comparable services to those described in the student's IEP, until the new school district either: adopts the student's IEP from the previous school district; or develops, adopts, and implements a new IEP that meets the applicable requirements in WACs 392-172A-03090 through 392-172A-03110. 34 CFR §300.323(e); WAC 392-172A-03105(4). "Comparable services" means services that are similar or equivalent to those described in the IEP from the previous district, as determined by the student's new district. Individuals with Disabilities Education Act (IDEA), 71 Fed. Reg. 46681 (August 14, 2006) (comments to the final regulations). Districts must take steps to adopt the IEP or develop and implement a new IEP within a reasonable period of time to avoid any undue interruption in the provision of special education services. *Questions and Answers on IEPs, Evaluations, and Reevaluations* (OSERS June 2010) (Question A-4).

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. A school district must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 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).

Compensatory Education: A state educational agency is authorized to order compensatory education through the special education community complaint process. *Letter to Riffel* 34 IDELR 292 (OSEP 2000). Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 56 IDELR 31, (9th Cir. 2011). There is no requirement to provide day-for-day compensation for time missed. *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994). "There is no statutory or regulatory formula for calculating compensatory remedies. However, generally services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting." *In re: Mabton School District*, 2018-SE-0036.

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

Isolation Conditions: Isolation shall be used only when a student’s behavior poses an imminent likelihood of serious harm. The use of isolation as defined by RCW 28A.600.485 is subject to each of the following conditions: the isolation must be discontinued as soon as the likelihood of serious harm has dissipated; the isolation enclosure shall be ventilated, lighted, and temperature controlled from inside or outside for purposes of human occupancy; the isolation enclosure shall permit continuous visual monitoring of the student from outside the enclosure; an adult responsible for supervising the student shall remain in visual or auditory range of the student at all times; either the student shall be capable of releasing himself or herself from the enclosure, or the student shall continuously remain within view of an adult responsible for supervising the student, and any staff member or other adults using isolation must be trained and certified by a qualified provider in the use of isolation, or otherwise available in the case of an emergency when trained personnel are not immediately available due to the unforeseeable nature of the emergency. School districts must follow the documentation and reporting requirements for any use of isolation consistent with RCW 28A.600.485. WAC 392-172A-02110.

FINDINGS OF FACT

2022–23 School Year

1. During the 2022–23 school year, the Student was eligible for special education services and attended another Washington school district (prior district).
2. An April 2023 “Psychological Assessment Report”—part of an independent educational evaluation (IEE)—read, in part:

Applied Behavior Analysis (ABA) Support: The complexities noted above would likely be ameliorated by providing Student with push-in ABA support. Because Student demonstrates behaviors that are potentially harmful to him, and he needs frequent redirection in order to maintain educational and communication goals, Student benefit from continuous support of a 1:1 behavior technician (BT), with a classroom being able to flex up to 2:1 support if he escalates behaviors. In particular, he would make substantial gains from social, emotional, and behavioral supports that allowed him to interact more with peers in appropriate ways, while also providing him with consistent coping skills when he is dysregulated, or more ideally, prior to dysregulation. Beyond social, emotional, and behavioral supports, Student would also benefit from being provided with redirection in order to keep him on task. Supervision by a board certified behavior analysis should not only meet ethical guidelines, but should also be frequent enough to provide a safe and predicative environment for Student. Supervision time should support measurable competency for BT’s working with Student via fidelity checks.

...

Student would benefit from preventative sensory breaks guided by an occupational therapist.
3. The prior district developed a new IEP for the Student on June 1, 2023, via a facilitated IEP meeting. A related prior written notice read, in part:

[Team] reviewed [and agreed with] the proposed services matrix, with the addition of...BCBA minutes and RBT minutes to include [a private doctor’s] recommendation of BCBA support starting at 20% of the time the RBT is providing services, then reduce to 10% of

the time the RBT is providing services. The RBT services would be a full school day and include the bus ride to and from school...[The] full day RBT [will assist the Student on the] bus ride to and from school. The team will review the level of support needed by the BCBA before decreasing from 20% of the time to 10% of the time.

...

Discussed [and agreed with] the need for scheduled sensory breaks throughout the school day, [at intervals of] every 60 minutes, [to be] provided [via] the use of a visual timer to track the longevity of the break.

The June 1, 2023 IEP included, in part, provisions related to the following:

- Special Factors and Accommodations: Assistive Technology Devices and Services: The district has provided Student with a speech-generating device while at school to communicate when his home device is not available.
- Special Factors and Accommodations: Allow frequent breaks; provide consistent structure; give advance notice of changes; provide a daily written schedule; pre-teach significant vocabulary; and, "scheduled 10 minute sensory breaks (use visual timer) (jumping on trampoline, swinging, rolling, hug machine, heavy work)"
- Supports for School Personnel: "Student's team receives right response training yearly to continue to work on positive behavior intervention and de-escalation. Student and his team continue to receive support and training from the SLP for his speech-generated device. The team also receives training and coaching from the [occupational therapist (OT)/OT assistant] OT/COTA on his fine motor and sensory needs. These supports happen within the school setting throughout the school year. Staff will also receive training in trauma-informed practices."
- Educational Services: to be provided by an RBT in a *special education setting*: reading (290 weekly minutes); written language (290 weekly minutes); math (290 weekly minutes); adaptive (300 weekly minutes); and, social, emotional, and/or behavioral (470 weekly minutes).
- Educational Services: to be provided by an RBT in a *general education setting*: social, emotional, and/or behavioral (30 weekly minutes).
- Educational Services: to be provided by a speech language pathologist (SLP) in a *special education setting*: speech language (60 weekly minutes).
- Supplementary Aids and Services: to be provided by a RBT from June 19, 2023 through November 6, 2023: a total of 2,360 weekly minutes, with 600 of these minutes to be devoted to "bus support."
- Supplementary Aids and Services: to be provided by a board certified behavior analyst (BCBA) from June 19, 2023 through October 4, 2023: 352 weekly minutes.¹
- Supplementary Aids and Services: to be provided by a SLP from June 19, 2023 through November 6, 2023: 60 monthly minutes.
- Transportation: "Special transportation is required to and from schools and/or between schools [and] in and around school buildings [and] specialized equipment is required. Student requires a harness along with a max 2-mount strap to keep him safe while riding the bus. If the max 2-mount is not used, Student will unbuckle himself and will not stay seated. Student is requiring an RBT on the bus at this time to insure he rides safely."

Progress on the June 2023 IEP goals was to be reported every trimester.

The June 1, 2023 behavioral intervention plan (BIP) read, in part:

¹ From October 5 through November 6, 2023, this figure was to be reduced to 176 weekly minutes.

When given behavioral feedback from staff, and academic demand or request, an interruption in routine, failure to achieve a task goal, refusal to engage in activities/expectations...may begin to roam classroom in attempt to elope...or engag[e]...in activities known to cause concern and heightened adult response.

...

Student will be taught and prompted to use his [augmentative and alternative communication] AAC or low-tech in order to appropriately protest or request an activity or task, appropriately ask for a break or desired object or reinforcer by his teacher and/or 1:1 aide. Staff, including 1:1 aide working with Student, will be trained on how to use and model the AAC device.

...

Frequent verbal reinforcement after appropriate choices and/or behavior [or] after task completion...Provide non-contingent praises for calm body.

...

Set and communicate clear start and end times for both preferred and nonpreferred activities...Review Student's visual schedule with him when he arrives at school. Provide frequent reminders...Frontload pending changes in expectations before transitions and before starting activities...Remind Student of sequential activities....Remind Student how much time remains before a transition [and] prompt [transitions] with a verbal/visual cue. Allow Student to select a preferred item to take with him during any transition. Ensure Student has enough time to complete this routine (e.g., put crayons away) before transition occurs.

...

State clear behavioral expectations and next steps before entering activities...Provide valid examples and prompts for replacement behaviors for undesired behavior....State behavior expectations in consistent and positive language...Social stories with expected behaviors.

The June 1, 2023 emergency response protocol (ERP) read, in part, "[Staff should execute] annual Right Response training [regarding execution of restraints and isolations]...Physical restraint: 20 minutes maximum...Isolation: 30 minutes with constant 1:1 supervision...Escort: maximum of 5 minutes."

Summer 2023

4. According to the Parent, the Student's family moved into the District's boundaries in summer 2023.
5. According to the Parent, on August 9, 2023, she spoke with the District's director of special education (director) and the director "confirmed she would arrange transportation, a bus aide, and [a] behavior technician."
6. According to the Parent, she provided the Student's new special education teacher with a copy of his BIP and ERP on August 29, 2023.

2023–24 School Year

7. At the start of the 2023–24 school year, the Student was eligible for special education services under the category of intellectual disability, was in the fifth grade, attended a District elementary school, and the Student's June 2023 IEP was in effect.

8. The District's 2023–24 school year began on August 31, 2023.

According to the Parent, on August 31, 2023:

I was told there would be no RBT for the bus for Student so I had to transport him myself. I found out that the school did not have a BCBA or RBT for Student at all. The transition for Student was difficult right away, as the school was communicating with me about his behavior outbursts. I found out the staff working with him did not know how to use his AAC device and did not know how to communicate with him. I tried to talk to them about strategies in his BIP for children with autism that work for Student, especially creating social stories. I was told that the staff did not know what social stories were.

...

At some point an aide called a 'behavior technician' was supporting Student at school but not an RBT. I was told an RBT could not be found. There were [paraeducators] assigned to his class but they were not RBTs. I disagreed and told staff that his IEP calls for an RBT because it was previously decided that he needs a behavior technician that has specialized training and qualifications, that is supervised by a BCBA...On days when the aide called in sick, I was told Student could not come to school.

9. According to the District, during the 2023–24 school year, the Student was in a self-contained classroom and received his social emotional specially designed instruction (SDI) "daily...during [the] 1 PM small group time." According to the District, the Student's schedule was as follows:

9:25 am, arrive at school, and breakfast is offered to all students in the classroom. The student has his own, provided foods.

9:40 Circle Time Center (Day, Date, Weather, Clothing choice, Letter of the Day, Shape, Color, Counting).

10:15 Specialist (PE, STEAM, Music, PE, Library).

11 Toileting.

11:10 Brain Break – music, exercises, drawing, etc.

11:20 Small Groups – CVC words, Sight Words, letter of the day book.

11:50 Brain Break - music, exercises, drawing, etc.

12 Lunch & Recess.

12:45 Toileting.

1 Small Groups - Social Emotional Learning.

1:30 Brain Break - music, exercises, drawing, etc.

1:40 Small Groups - Individual work books, Art, Social Studies, Reading.

2:10 Recess.

2:25 Toileting.

2:35 Snack (Home provided snacks or other acceptable or pre-arranged gluten-free, dairy-free snacks).

2:50 Free Time – Individual work, computers, story time online, video, etc.

3:30 Clean up.

3:40 leave for buses.

10. The District's response included examples of visuals used in relation to the Student's scheduling. These visuals included a "first, then" display, and then numerous pictures of various school activities.
11. According to the Parent, the Student was "not allowed to come [to school]" on September 13 and 21, 2023, because a BT was not present.
12. According to the Parent, during fall 2023, the Parent made two round trips to the Student's school—e.g., transporting the Student in both the morning and afternoon, on approximately 22 occasions, and the Parent made one round trip to the Student's school—e.g., transporting the Student in either the morning or the afternoon on approximately four occasions.
13. During this investigation, the Parent provided, in part, the following written statement:
SLP consultation and training of staff in AAC is...important for Student's IEP [and] the District just having an SLP work with Student is not comparable to what the prior school district decided was necessary...[The] District's response [to this community complaint] that it allowed me to review AAC with the staff...is not the same thing as training and consultation on the IEP.

In support of the foregoing statement, the Parent cited an SLP-related IEE. It read, in part, "Recommendation...Consistent consultation and collaboration between the teachers and the school SLP to support ongoing implementation and troubleshooting of AAC."

14. According to emails, in September 2023:
 - The Parent expressed concern a BT—and not an RBT—was working with the Student.
 - The Parent expressed concern that the District did not have the "correct [bus] harness" for Student.
 - As of mid-September 2023, the BT was "not...Right Response trained."
 - The Parent expressed concern that the Student knew how to use his AAC device but appeared to not be using it with regularity.
 - The Parent discussed observing the Student in the classroom.
15. The District's response included a communication log—handwritten, semi-daily notes exchanged between the Parent and District staff. According to the communication log, in September 2023, the Student utilized the sensory room on no less than nine separate school days, and frequently on days wherein the Student utilized the sensory room, the Student used the sensory room on more than one occasion. The September 2023 communication log also noted the following:
 - September 14: "Did not respond to AAC inquires."
 - September 20: "We tried firm direction, redirection, [and] ignore."
 - September 22: "Used AAC to identify colors."
 - September 25: There was no AAC device this day.
 - September 26: An AAC device provided by the District was utilized this day.

- September 27: An SLP worked with the Student and a District-provided AAC device was utilized.
 - September 29: "Did some free choice before doing work."
16. The sensory room had a "boat." The District described this as follows, "a unique product designed to provide comfort and support for children with sensory needs. It's like a giant hug that applies gentle pressure all over the body, helping your child stay calm and relaxed." The District described the sensory room as follows:
- The sensory room is located between the 2 DLP classrooms. The sensory room doors does have a locking mechanism from the outside of both classrooms but can be opened from the inside at any time. There are windows that are partially covered from both classrooms. The protocol is for a staff member to accompany the student to the sensory room. Students are never alone in the sensory room. There is no knowledge of a staff member sitting outside the sensory room.
17. The District's response included a behavior tracking chart. For any particular incident, it noted the following: setting; antecedent; behavior; and consequence. It included approximately 70 entries between September 7 and October 18, 2023.
- The behavior tracking chart noted, in part, the following behaviors: command refusal; disrobing; "throwing things into toilet"; "hit [a] friend"; elopement; "climbed on" furniture; and placing non-food items in mouth.
- The behavior tracking chart noted, in part, the following interventions: use of a "break area"; "transition to bathroom"; "minimal attention given to [the] attention-seeking behavior"; verbal and visual prompting; "block[ing]" access to a particular area; "transition to sensory room"; request for "gentle hands"; use of a "transition toy"; and "items removed" from Student's vicinity.
18. According to the District, on September 12, 2023, "the Parent was called to pick up the Student due to illness."
19. The District's response included a SLP provider log. According to this log, between September 14 and December 1, 2023, the SLP provided the Student with six hours and 15 minutes of services. On several occasions, the SLP did not provide services, either because the Student was absent, the provider was absent, or there was "no school."
20. According to a "Remind Message History," on or about September 19, 2023, "the Student escalated...and injured the BT. The special education teacher had to do a room clear."
21. According to the District, "On September 21, 2023, Parent was notified that [the] BT was not available."
22. A September 22, 2023 "behavioral referral form" noted that around noon that day, the Student disrobed. In response, the Student was "moved to [an] internal classroom" and the "Parent [was] called."

Regarding the September 22, 2023 incident, the District stated, "The Student was not restrained on this date. He was guided into the restroom by the BT. The nurse was called to come to the classroom to check on the student. While waiting for the nurse, the BT was shoved into the doorknob."

23. Regarding the Student's AAC device, the District's response read, in part:

The student brought his personal AAC device (they refer to it as a 'Talker') to school to use. On Sept 22 he repeatedly smashed it against hard surfaces (his desk, the wall, thrown, etc) and broke the case. The device continued to work and it was sent home.

Parent chose to no longer send it to school with him. The District SLP was consulted and a District AAC was provided. This device has a protective case. Student has done the same thing to it, smashing it and breaking the screen. It still works and is used in the class daily.

24. According to a "Remind Message History," on or about September 25, 2023, the Student laid in the sensory room "under a weighted blanket" for a significant portion of the school day.

25. A September 25, 2023 prior written notice read, in part:

Student...transferred into the [District] from the [previous district]. Student was receiving special education services under the eligibility of Intellectual Disability...The IEP team talked about getting a [BCBA] to help support the RBT and Student in the classroom. The school staff that works with Student will meet to review the Behavior Support Plan. His mother and advocate indicated that all the staff needs to be trained with Right Response and be familiar with the BIP. The team also discussed what rewards/activities he will work for and to help with transitions. A Max 2 Mount strap will be ordered for the bus.

26. The Parent stated, on or about September 27, 2023, she was told the Student was taken to the sensory room "to remove him from...class for behavior [challenges]."

A September 27, 2023 "behavior referral forms" noted, "while in the sensory room" that day, the Student disrobed and engaged in self-harm, and in (at least partial) response, District staff "transitioned Student to [the] bathroom."

The District stated a restraint was not administered on September 27, 2023, "The student was not removed from the classroom environment. In this classroom, it consists of a restroom and a sensory room that is shared between two DLP classrooms."

27. The Student's IEP team met on September 28, 2023, to discuss the Student's needs resulting from the Student's disability.

A September 28, 2023 prior written notice read, in part:

The team is proposing to continue the current IEP/BIP/ERP provided by [previous district]. The reason we are proposing or refusing to take action is: Student's annual IEP is due 11/6/23. The team determined that they would use this next month to gather data in order to write a new IEP/BIP/ERP. The current IEP will stay in effect until that time...Parent shared a lot of useful information about supports for Student and his typical responses...[The team

is] hoping to get to know him better and find solutions to help him regulate. Parent agreed to the continuance of the IEP/BIP/ERP.

According to the Parent:

In the [September 28, 2023] meeting, I finally got the chance to share more information with the team on how to work with Student. I told the school team that I was concerned about Student being taken to the sensory room out of the classroom for long periods of time. One day it was reported in his home-school notebook that he was placed in the sensory room from 9:27 am to 12:30 pm, and then taken there again in the afternoon. I said it looked like it was triggering him further.

I was told the District was accepting Student's June 2023 IEP, ERP and BIP [from the prior district], but would meet again to update his IEP by the annual date on November 6, 2023.

According to the District's response and the PWN from the meeting, at the September 28, 2023 IEP meeting, "The IEP team shared that Student was not responding positively to attempts to help him regulate, but that the move also appeared to be traumatic for the Student."

The copy of the Student's IEP that appeared on District letterhead, dated September 28, 2023, stated progress on IEP goals was to be reported every semester.

28. According to emails, in October 2023:

- The Student was emotionally dysregulated for a significant portion of the day on October 18, 2023.
- The Parent expressed frustration with having to provide transportation for the Student, as the District was unable to provide an aide for the bus.
- The District ordered the bus harness for the Student on or about October 18, 2023.
- A BCBA was "scheduled to observe" the Student for some portion of the week of October 16, 2023.

29. According to the communication log, in October 2023, the Student utilized the sensory room on no less than six separate school days. The October 2023 communication log also noted the following:

- October 4: "Helped 1:1 set up Student's visual schedule."
- October 5: "Demands reduced for the day based off this morning's [events]."
- October 9: "Student set AAC aside."
- October 10: "We practiced constructing responses on AAC."
- October 11: The AAC device was used this day; and, "BCBA came in to observe and work with BT."
- October 17: Student communicated with AAC.
- October 19 and 23-25: BT absent.

30. The Parent stated, "The District did not make contact with a BCBA [regarding] Student's [needs] until October 3, 2023."

31. According to the Parent, "I was told a BCBA would be observing Student on October 10, 2023 [but] other than that, I do not think a BCBA [or] RBT have been provided specifically for Student."
32. On October 18, 2023, the principal informed the Parent—via voicemail—that the recently hired BT had quit and that the District still did not have a bus aide for the Student.
33. The Parent stated she served as the Student's 1:1 on October 19, 2023.
34. According to the District, the Parent transported the Student both ways (e.g., in the morning and afternoon), between October 23 and December 1, 2023.
35. According to the Parent, between October 30 and November 28, 2023, the Student missed five days of school because transportation was not provided.
36. According to the Parent, "a [substitute] BT was present on October 31, 2023, [but] after October 31, 2023, Student has not had [a BT]."
37. According to emails, on November 1, 2023, the Student demonstrated elopement, command refusal, and pica.²
38. The District's response was submitted to OSPI on November 10, 2023. In part, it noted, "District staff have not reported on any IEP goal progress for this school year, [as] the grading period ends [on] January 26, 2023."
39. According to the District, it "contracted with another agency for BT services and they have provided services as of December 4, 2023."
40. During this investigation, OSPI asked the District for information related to "Right Response Training" for staff. The District stated, "[Right Response Training] sessions have been offered" and at least some staff had received "Right Response Training" prior to the start of the 2023-2024 school year.
41. In its response, the District presented its findings regarding whether it provided comparable services to those found in the June 2023 IEP:

² In part, an email from the special education teacher read, "Someone was near Student, working directly with him at a desk. When she said it was time to clean up to get ready to go home, he grabbed the car and put it in his mouth and ran away from her. He refused to open his mouth to see about getting it out. At some point in time, he had to have removed it...The para was concerned that he had swallowed it because neither of us saw him get rid of it. He refused to walk at the end of the day and when we called the office to have Gramma meet him, she was not yet here. We used a wagon to go to the office, to meet gramma. He grabbed a sheet of stickers and put some on his pants. We were taking them off him when...got to the school. When Gramma met us in the hallway near the office, he pulled the stickers off his pants and started putting them in his ears. Until that point, they had been on his pants."

[BT]: The District followed Student's IEP regarding BT services...While these services were not provided by an RBT, the services provided were comparable to those in Student's June 2023 IEP.

...

[BCBA]: The District admits that it did not provide comparable BCBA services to Student during this school year...The BCBA's identified role was to provide additional supports for the BT and staff on a weekly basis. A BCBA began observing Student on or about October 9, 2023. The District is diligently working to implement this service.

...

Speech and Language Consultation Services: The District provided comparable Speech and Language Services for Student, as [the District's] SLP worked to implement the Student's SLP minutes, as provided in the June 2023 IEP...The home/school communication log also shows that [the District's] SLP worked with Student using his AAC device.

Support to School Personnel: The District did not fail to provide comparable services related to support to school personnel services...The IEP does not specify that the training is required to take place prior to Student beginning the school year, prior to the transfer meeting or prior to the start of the school year. Accordingly, the District will be able to provide staff training, as necessary, throughout the remainder of the 2023-24 school year in compliance with Student's IEP.

[ERP]: The District complied with...the Student's ERP. The District did not use physical restraint, escort or isolation of Student during the 2023-2024 school year, because the time that Student spent in the sensory room was a sensory break, as provided for by his BIP.

Transportation-Related Services: The District admits that it failed to provide comparable transportation services for Student following his transfer into the District. The District acknowledges that Parent provided transportation while the District was setting up Student's route and due the unavailability of a 1:1 BT on the bus. Additionally, the District ordered the proper harness for Student to use while being transported to and from school on the bus, which took additional time to arrive.

BIP Services: The District states that it provided comparable services and supports to those identified in Student's BIP following his transfer into the District. The adoption and implementation of a BIP does not guarantee that a student will not experience a behavioral escalation.

In relation to isolation procedures, the District's response read, in part:

The District did not isolate Student in the school, because the District implemented Student's BIP, which provides for 'planned and frequent sensory breaks in his day.' Indeed, Student's BIP offers numerous opportunities for Student to take sensory breaks, both of his own accord and when he is escalating and staff makes the decision for him to take a sensory break. The District consistently communicated these sensory breaks with Parent through the daily communication logs. The District has no documentation that Student was left alone in the sensory room and unable to leave of his own accord.

In its response, the District proposed the following corrective actions:

[Proposal 1:] The District proposes to conduct a training with the District staff and administrators from Student's current IEP team...regarding the requirements of WAC 392-

172A-03105 to develop and implement comparable IEP services for a student following their transfer into the District.

[Proposal 2:] The District proposes to provide Parent with reimbursement for transportation costs for the days that Parent transported Student to and from school during the fall of 2023 on any dates due to lack of District transportation or the lack of 1:1 staff available to ride the bus with Student.

CONCLUSIONS

Issue 1: Transfer Procedures – The Parent alleged the District did not follow proper intra-state procedures beginning with the Student’s enrollment in the District.

If a student eligible for special education transfers from one Washington state school district to another Washington state school district and has an IEP that was in effect for the current school year from the previous district, the new school district, in consultation with the parents, must provide comparable services to those described in the student’s IEP, until the new school district either: adopts the student’s IEP from the previous school district; or develops, adopts, and implements a new IEP that meets the applicable requirements in WACs 392-172A-03090 through 392-172A-03110. “Comparable services” means services that are similar or equivalent to those described in the IEP from the previous district, as determined by the student’s new district.

A school district must ensure it provides all services in a student’s IEP, consistent with the student’s needs as described in that IEP. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child’s IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a student with a disability and those required by the IEP.

Here, the previous school district developed an IEP for the Student in June 2023. With the Student’s transfer into the District at the start of the 2023–24 school year, the District adopted the June 2023 IEP. The September 28, 2023 prior written notice read, in part, “The team is proposing to continue the current IEP...provided by [the previous Washington State school district]”; in its response, the District explained, “The September 28, 2023 IEP is Student’s IEP [from the previous Washington State school district, and it was] copied and pasted onto District IEP paperwork”; and, at various points in its response, the District cited the June 2023 IEP—including in the Parent’s complaint request—as the IEP that was to be implemented in fall 2023.

Speech Services: The June 2023 IEP provided the Student with 60 minutes a week of direct speech services. August 31 through December 1, 2023 represents approximately 12.5 weeks of school. During this time, the Student should have received approximately 12.5 hours of speech.

According to the SLP provider log, though, the Student only received approximately six hours and 15 minutes of SLP services. In part, this was because, according to the SLP provider log, the provider was absent on one occasion and the Student was absent or unavailable on seven

occasions.³ The foregoing discrepancy between what should have been provided to the Student and what was actually provided to the Student represents a material failure to implement the IEP. Accordingly, some compensatory education is warranted.

Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. There is no requirement to provide day-for-day compensation for time missed.

Here, the District will provide the Student with four hours of compensatory SLP education, representing the SLP sessions either the Student or SLP was absent. (According to the SLP provider log, each session with the Student last approximately 30 minutes.) The SLP compensatory education will be in a 1:1 setting, meaning just the Student and the SLP.

In relation to the AAC device, the communication log showed the AAC device was generally available to the Student, and that District staff worked with the Student on using the AAC device. OSPI does not find a material IEP violation on this score.

Transportation: The June 2023 IEP provided the Student with a RBT on the bus. This portion of the June 2023 IEP was not materially implemented. This represents a violation of the IDEA. As a result, according to the Parent, she had to provide transportation for the Student—both to and from school—on approximately 24 school days. According to the District, the Parent provided transportation for the Student—both to and from school—on approximately 21 school days. To address this violation of the IDEA, the District will be required to reimburse the Parent for 24 round trips at the District's privately-owned vehicle rate.

Additionally, the District will be required to obtain a "max 2-mount strap" for the Student in the immediate future.

Instruction to be Provided by Behavioral Staff: The June 2023 IEP provided the Student with the supplementary aid and service of weekly BCBA consultation with staff.⁴ Specifically, the BCBA was to supervise and assist an RBT in providing services. Under the June 2023 IEP, the RBT was to provide extensive educational services: (1) *Special Education Setting*: reading (290 weekly minutes); written language (290 weekly minutes); math (290 weekly minutes); adaptive (300 weekly minutes); and, social, emotional, and/or behavioral (470 weekly minutes); and (2) *General Education Setting*: social, emotional, and/or behavioral (30 weekly minutes).

Here, an RBT did not implement the educational services in the Student's IEP. Rather, a BT implemented the educational services in the Student's IEP. In and of itself, this fact does not

³ This investigation showed on several occasions, the Student was absent because the District did not provide the Student with an RBT on the bus, as per the June 2023 IEP—in other words—but for the failure to implement the transportation provisions of the June 2023 IEP, the Student likely would have been present for more sessions with the SLP.

⁴ 352 weekly minutes through October 4, 2023; and 176 weekly minutes from October 6 through November 6, 2023.

represent a material violation of the IDEA. For example, WAC 392-172A-02090(1)(i) reads, in part, “[S]taff [other than special education teachers], including general education teachers and paraeducators, may assist in the provision of special education and related services.” Additionally, when the Student’s IEP team formally adopted the June 2023 IEP, the service provider for the “related service [of] 1:1 individual student support” was identified as a “1:1 behavior technician”, not an RBT. For the foregoing two reasons, the fact that a BT implemented the educational services in the Student’s IEP does not represent a material failure to implement the IEP.

The District acknowledged, though, and this investigation demonstrated, a BCBA did not provide weekly consultation to the Student’s BT.⁵ A BCBA observed the Student on a single day in mid-October, but this does not represent weekly consultation with the BT. To provide proper behavioral support, a BT must work under the supervision of a BCBA. See the latter part of WAC 392-172A-02090(1)(i): staff other than special education teachers may deliver instruction, “provided that the instruction is designed and supervised by special education certificated staff.” The fact that a BCBA did not design and supervise the instruction delivered by the BT represents a material failure to implement the IEP.

Additionally, on or about October 18, 2023, the Student’s BT quit; between October 18 and December 4, 2023, the Student was not provided with a BT. This also represents a material failure to implement the IEP. According to the special education teacher, the Student had significant behavioral needs resulting from his disability, and without the support of a 1:1 support person, it was “almost impossible to have Student engage” with specially designed instruction between October 18, 2023 and December 4, 2023.

In sum, throughout fall 2023, the specially designed instruction that was to be provided by behavioral staff was not materially implemented. Accordingly, compensatory education is warranted.

Under the June 2023 IEP, an RBT was to provide the following educational services each week: reading (290 weekly minutes); written language (290 weekly minutes); math (290 weekly minutes); adaptive (300 weekly minutes); and, social, emotional, and/or behavioral (500 weekly minutes).

August 31 through December 15, 2023 represents approximately 14.5 weeks of school. Over this time period, then, and BT should have provided the following education services to the Student, approximately: 70 hours of SDI in reading; 70 hours of SDI in written language; 70 hours of SDI in math; 73 hours of SDI in adaptive; and 121 hours of SDI in social-emotional-behavioral.

As compensatory education, the District will provide the Student with figures representing approximately 75% of these totals: 53 hours of SDI in reading; 53 hours of SDI in written language; 53 hours of SDI in math; 55 hours of SDI in adaptive; and, 91 hours of SDI in social-emotional-behavioral.

⁵ The September 2023 adopted IEP continued to include BCBA supervision: the September 2023 adopted IEP included the supplementary aid and service of BCBA support, for 352 minutes each week.

As per WAC 392-172A-02090, the foregoing compensatory education must be provided by qualified staff, and the District will be required to provide documentation showing a BCBA is designing and supervising the provision of the compensatory education.

Additionally, the District will be required to submit documentation to OSPI showing a BCBA begins to design and supervise the qualified staff person's provision of regularly scheduled IEP services, moving forward.

Support for School Personnel: The June 2023 IEP read, in part, "Supports for School Personnel: Student's team [to] receive Right response training yearly to continue work on positive behavior intervention and de-escalation."

During the instant investigation, OSPI asked the District for information related to "Right Response Training" for staff. The District stated "[Right Response Training] sessions have been offered" and at least some staff had received "Right Response Training" prior to the start of the 2023–24 school year.

Because the District could adhere to this portion of the IEP by scheduling such a training in spring 2024, OSPI does not find an implementation failure on this score. Regardless, as OSPI is ordering corrective actions for other findings in this decision, OSPI will require the District to provide it with documentation showing when the Right Response Training is scheduled for, and that the Student's IEP team members will be in attendance.

Issue 2: Isolation Procedures – The Parent alleged the District did not follow proper isolation procedures during the 2023–24 school year.

Isolation as defined in RCW 28A.600.485 means: restricting the student alone within a room or any other form of enclosure, from which the student may not leave. It does not include a student's voluntary use of a quiet space for self-calming, or temporary removal of a student from his or her regular instructional area to an unlocked area for purposes of carrying out an appropriate positive behavioral intervention plan. Isolation shall be used only when a student's behavior poses an imminent likelihood of serious harm.

Here, the investigation did not reveal the Student was subjected to isolation, as that term is defined under the special education regulations. For example, the District stated it had a policy whereby any time the Student used the sensory room, a staff member was present with the Student inside the room. This assertion is supported, in part, by the September 27, 2023 "behavior referral form," which noted a staff person worked with the Student while he was in the sensory room; according to the September 27, 2023 "behavior referral form," "while in the sensory room" that day, the Student disrobed and engaged in self-harm, and in (at least partial) response, District staff "transitioned Student to [the] bathroom." And, during her interview with OSPI's investigator, the special education teacher stated a staff person was always present with the Student when the Student was in the sensory room. Additionally, the contemporaneous documentation provided to OSPI during this investigation (the emails, prior written notices, communication log, etc.) do not mention the Student as having ever been in the sensory room alone. Similarly, the

contemporaneous documentation does not mention the Student was locked in the sensory room, or otherwise prevented from leaving the sensory room. OSPI does not find a violation of isolation procedures.

Still, the Parent expressed a concern the sensory room was being overused. And, given a BCBA was not designing and supervising the BT's provision of IEP services to the Student, it makes sense the sensory room was possibly utilized more frequently than otherwise might have been the case. If the Parent still has concerns in this area, OSPI recommends the IEP team meet to discuss the behavioral support of the Student's use of the sensory room; for example, when it may be used, how long it may be used on any given occasion, etc.

CORRECTIVE ACTIONS

By or before **January 5, 2024, January 12, 2024, March 1, 2024, June 14, 2024, and September 6, 2024**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Reimbursement

By or before **January 5, 2024**, the District will be required to reimburse the Parent for 24 round trips at the District's privately-owned vehicle rate. By or before **January 5, 2024**, the District will provide OSPI with documentation of the same.

Documentation Submissions

By or before **January 12, 2024**, the District will obtain a "max 2-mount strap" for the Student for transportation. By or before **January 12, 2024**, the District will provide OSPI with documentation of the same.

By or before **January 5, 2024** and **March 1, 2024**, the District will provide OSPI with documentation showing a BCBA is actively designing and supervising the IEP services being provided by the qualified staff person.

Compensatory Education

By or before **January 12, 2024**, the District and Parent will develop a schedule for the following compensatory education: 53 hours of SDI in reading; 53 hours of SDI in written language; 53 hours of SDI in math; 55 hours of SDI in adaptive; and 91 hours of SDI in social-emotional-behavioral.

As per WAC 392-172A-02090, the foregoing compensatory education must be provided by qualified staff, but the District will be required to provide documentation showing a BCBA is designing and supervising the provision of the compensatory education. The compensatory education services, though, must be designed and supervised by a BCBA, and the District's corrective action submissions to OSPI must reflect this fact.

The IEP team may determine the appropriate setting for the provision of the compensatory education services—e.g., a 1:1 setting—meaning just the Student and the service provider, with other students with IEPs, and/or with students in a general education setting.

Services will be provided outside the District's school day and can be schedule on weekends, over District breaks, or before or after school. The compensatory services can be provided through a District summer program, if that program will provide specially designed instruction in the Student's areas of service.

The District will provide OSPI with documentation of the schedule for services by or before **January 12, 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 **September 6, 2024**.

The District must provide OSPI with an update on the amount of compensatory services provided to the Student by providing documentation on **March 1, 2024** and **June 14, 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**.

DISTRICT SPECIFIC:

None.

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.

Dated this 15th day of December, 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.)